

PLANNING AND ENVIRONMENT COURT OF QUEENSLAND

CITATION: *Bundaberg Regional Council v Muller* [2019] QPEC 31

PARTIES: **BUNDABERG REGIONAL COUNCIL**
(applicant)

v

**DEBBIE LORRAINE MULLER AS TRUSTEE UNDER
INSTRUMENT 71566903**
(respondent)

FILE NO/S: 4525 of 2018

DIVISION: Planning and Environment

PROCEEDING: Application

ORIGINATING
COURT: Planning and Environment Court, Brisbane

DELIVERED ON: 18 June 2019 (*ex tempore*)

DELIVERED AT: Brisbane

HEARING DATE: 18 June 2019

JUDGE: Kefford DCJ

ORDER: **1. The Respondent is fined \$5 000 and the fine is to be paid by 30 August 2019.**

2. The Respondent by herself, her servants or agents remove from land described as Lot 65 on RP22109 and situated at 22 Kolan Street, Bundaberg (“the Land”), and do not replace, all things in connection with the building that has been placed on the Land, by 30 August 2019.

3. The Respondent pay the Applicant’s costs of and incidental to the proceeding, fixed at \$20 000, to be paid by 30 August 2019.

CATCHWORDS: COURTS AND JUDGES – CONTEMPT – PARTICULAR CONTEMPTS – DISOBEDIENCE OF ORDERS OF COURT – where an enforcement order was made by his Honour Judge Rackemann in the Planning & Environment Court on 16 March 2018 – where the order was made by consent – where the enforcement order was not complied with – whether the respondent is in contempt of the enforcement order

LEGISLATION: *District Court of Queensland Act 1967*, s 129
Penalties and Sentences Act 1992, s 9

Planning and Environment Court Act 2016, s 36

Uniform Civil Procedure Rules 1999, r 930, r 932

CASES:

Bundaberg Regional Council v Bailey [2017] QPEC 31; [2017] QPELR 782, considered

Bundaberg Regional Council v Lammi & Anor [2014] QPEC 52, [2015] QPLR 111, considered

Dubois v Rockhampton Regional Council [2014] QCA 215, cited

Logan City Council v Whelan [2015] QPEC 23; [2015] QPELR 659, considered

Whitsunday Regional Council v Branbid Pty Ltd & Anor [2017] QPEC 66; [2018] QPELR 224, considered

SOLICITORS:

Connor O’Meara for the appellants

The respondent represented herself

Introduction

- [1] Ms Muller owns land at 22 Kolan Street, Bundaberg. In 2014, pursuant to a building approval, she caused a relocated house to be placed on her land. The building approval subsequently lapsed because Ms Muller neglected to undertake various works to complete and secure the house.
- [2] For almost three years, the Bundaberg Regional Council (“*the Council*”) has been endeavouring to variously encourage, demand, require and eventually coerce Ms Muller to either remove the house or obtain a new building development approval and undertake the works necessary to complete and secure the house.
- [3] The Court has made enforcement orders requiring steps be taken to rectify the unlawful building works. Ms Muller accepts that she has not complied with the enforcement orders.
- [4] The Council seeks to have Ms Muller punished for contempt.

The enforcement order

- [1] On 20 December 2017, the Council commenced proceedings for enforcement orders with respect to an incomplete building relocated from other land (“*the relocated dwelling*”) that was placed on land described as Lot 65 on RP22109 situated at 22 Kolan Street, Bundaberg.
- [2] On 16 March 2018, this court was satisfied that a development offence had been committed by Ms Muller, namely the carrying out of assessable development without all necessary development permits being in effect. His Honour Judge Rackemann made an enforcement order pursuant to s 180 of the *Planning Act 2016* (Qld).

[3] The order of His Honour Judge Rackemann was:

“IT IS ORDERED PURSUANT TO SECTION 180(3) OF THE PLANNING ACT 2016 THAT:

1. The Respondent by herself, her servants or agents remove from the Land, and do not replace, all things in connection with the building that has been placed on the Land (the “Resite Dwelling”), unless the Respondent complies with paragraph 3 of this order.
2. Provided that paragraph 3 of this order is complied with, the operation of paragraph 1 of this order shall be suspended. Where paragraph 3 of this order is not complied with, the requirement in paragraph 1 of this order shall be complied with, within 2 months of the date of the non-compliance with paragraph 3.
3. The Respondent is to:
 - (a) maintain temporary security fencing on the Land to restrict public access to the Land until such time as the building works for the Resite Dwelling are completed in accordance with this order;
 - (b) by 30 June 2018, lodge a properly made building development application to a building certifier for a building development approval to authorise the completion of the building works for the Resite Dwelling, including making an amenity and aesthetics referral to the Bundaberg Regional Council (“Council”) for a concurrency agency response;
 - (c) by 14 August 2018, obtain an effective building development approval to authorise the completion of the building works for the Resite Dwelling;
 - (d) by 21 September 2018:
 - (i) complete all works necessary so that a Form 16 Inspection Certificate for the foundation (footings) stage of the building work can be given by a building certifier; and
 - (ii) provide to the Council a Form 16 Inspection Certificate for the foundation (footings) stage of the building work;
 - (e) by 21 September 2018:
 - (i) complete all works necessary so that a Form 16 Inspection Certificate for the frame stage of building work can be given by a building certifier; and
 - (ii) provide to the Council a Form 16 Inspection Certificate for the frame stage of the building work;
 - (f) by 30 October 2018:
 - (i) complete all exterior building work in accordance with the requirements of the building development approval and any concurrence agency response; and
 - (ii) provide to the Council a statement from building certifier that the external works have been completed in accordance with paragraph 3(f)(i) of this order; and

- (g) by 30 October 2018:
 - (i) complete all necessary works under the building development approval to enable a Form 21 Final Inspection Certificate to be given by a building certifier; and
 - (ii) provide to the Council a Form 21 Final Inspection Certificate from a building certifier.

4. There be liberty to apply on the giving of three (3) business days written notice to the other parties.”

[4] The order was endorsed with the following warning:

“If you, DEBBIE LORRAINE MULLER AS TRUSTEE UNDER INSTRUMENT 715669303, do not obey this order within the time specified, you will be liable to Court proceedings to compel you to obey it and punishment for contempt.”

The contempt

- [5] Section 36 of the *Planning and Environment Court Act 2016* provides that a P&E Court judge has the same power to punish a person for contempt as a District Court judge. It also provides that s 129 of the *District Court of Queensland Act 1967* applies to the Planning and Environment Court in the same way as it applies to the District Court.
- [6] Section 129(1) relevantly provides that a person is in contempt of the District Court if the person, without lawful excuse, fails to comply with an order of the court other than an order mentioned in s 129(1)(e). That subsection does not apply in this case. Under s 129(2), a District Court judge has the same power to punish for a contempt mentioned in subsection (1) as a Supreme Court judge would have if the contempt were a contempt of the Supreme Court.
- [7] The enforcement orders required Ms Muller to either take particular steps to facilitate the completion of the partially completed building works or remove the relocated dwelling from the land.
- [8] The Council alleges that, other than erecting temporary fencing around the relocated dwelling, none of steps required under paragraph 3 of the enforcement order have been complied with and the relocated dwelling remains on the land. The Council has filed extensive affidavit material and statutory certificates in support of its allegations.
- [9] The evidence of Ms McGinley, a Council officer, establishes that she inspected the land on 13 July 2017, 18 September 2017, 10 December 2018 and 10 June 2019.
- [10] On the 10 December 2018 inspection, the building works remained on the land, were in an incomplete state and Ms McGinley did not observe that any building works had been undertaken since her previous inspections in 2017. The photographs exhibited in AGM 17 to the first affidavit of Ms McGinley demonstrates the incomplete nature of the building works as at 10 December 2018.
- [11] On the 10 June 2019 inspection, Ms McGinley could not detect any difference in the state of the building works compared to the building works she observed during her previous inspection on 10 December 2018. The photographs exhibited to her third

affidavit demonstrates the incomplete nature of the building works as at 10 of June 2019.

- [12] Temporary security fencing was observed on both 10 December 2018 and 10 June 2019, albeit Ms McGinley noted that a portion of the fence had been pulled back, leaving a gap where access could be obtained. That was noted during the inspection on 10 June 2019.
- [13] The Certificate pursuant to section 251 of the *Local Government Act 2009* (“*Certificate*”) establishes that as at 14 June 2019:
- (a) the Council has no record of a private certifier having been engaged in respect of the Land since a Notice of Discontinuance of the previous private certifier was lodged on 26 February 2015;
 - (b) the Council has no record of a further building development approval having been given in respect of the Land, since the building development approval granted on 21 October 2014 (which lapsed on 26 February 2015)¹⁶;
 - (c) the Council has no record of having received a Form 16 Inspection Certificate for the foundation (footings) stage of the building works on the Land;
 - (d) the Council has no record of having received a form 16 Inspection Certificate for the frame stage of the building works on the Land;
 - (e) the Council has no record of having received a statement from a building certifier that the external works for building works on the Land have been completed in accordance with the requirements of a building development approval and any concurrence agency response; and
 - (f) the Council has no record of having received a Form 21 Final Inspection Certificate from a building certifier with respect to the building works on the Land.
- [14] Ms Muller has filed material, but that material does not seek to rebut or contradict the evidence of Ms McGinley or that established by the Certificate.
- [15] During the hearing, Ms Muller accepted that the Court made an enforcement order on 16 March 2018. She also accepted that she was personally served with the enforcement order on 23 March 2018; and that the Council’s allegations regarding non-compliance are true.
- [16] Ms Muller sought to excuse her failure to comply with the orders on the basis that the builder whom she had engaged to move the house to the land, Mackay & Sons (Qld) Pty Ltd, had not complied with its obligations and that the Queensland Building and Construction Commission was responsible for the cost of rectification under an insurance policy. At the time the enforcement order was made, the Queensland Building and Construction Commission had notified Ms Muller, by letter dated 13 May 2016, that the items listed in a direction to the builder had been satisfactorily rectified and that her complaint file would be closed. Ms Muller says, however, that her complaint is still the subject of proceedings in the Queensland Civil and Administrative Tribunal.

- [17] The Council submits that the relief that Ms Muller seeks in the QCAT proceedings does not impact upon how or when the building works should have been completed or her ability to comply with the enforcement orders. The Council also submits that, to the extent that Ms Muller is seeking to extend the time by which she can seek an external review of the Queensland Building and Construction Commission decision with respect to her complaint about the builder's work, it is of relevance that the Queensland Building and Construction Commission decision was made on 13 May 2016 and the QCAT proceedings were commenced on 14 February 2019. The respondent consented to enforcement orders some two years after the Queensland Building and Construction Commission decision.
- [18] The Council submits that even if it is accepted that Ms Muller has some remaining avenue of challenge in respect of the Queensland Building and Construction Commission decision, she could have taken that challenge before the determination of the Planning and Environment Court enforcement proceedings which resulted in the enforcement orders that she has breached. The Council submits the QCAT proceedings do not amount to a lawful excuse.
- [19] The matters sought to be relied on by Ms Muller do not provide a lawful excuse for the failure to comply with the enforcement order.
- [20] Having regard to the material relied on by the Council, I am satisfied beyond reasonable doubt that Ms Muller has contravened the enforcement order made on 16 March 2018, in particular paragraphs 1 and 3(b) to (g). Ms Muller's concessions also support that finding.
- [21] The Council submits that Ms Muller's failure to comply with the Enforcement Orders was flagrant and contumacious given the following circumstances:
- (a) The relocated dwelling has been on the land since at least 19 September 2016 and the Council has been endeavouring since September 2016 to secure compliance with the law.
 - (b) Efforts by the Council to secure compliance between September 2016 and December 2017 were unsuccessful, resulting in the commencement of Originating Application No. 4927 of 2017 in December 2017.
 - (c) Ms Muller, through her then solicitor, consented to the Enforcement Orders in Originating Application No. 4927 of 2017 on 16 March 2018.
 - (d) Other than erecting temporary fencing (which has been in place since October 2016 in response to an enforcement notice), Ms Muller has taken no steps to comply with the enforcement orders. In that respect, the Council notes that:
 - (i) Ms Muller has ignored the requirement to make a building development application and obtain a new effective building development approval, which were required to occur by 30 June 2018 and 14 August 2018 respectively;
 - (ii) Ms Muller has ignored the requirement to remove the relocated dwelling from the land, which arose as and from 1 July 2018 and was required to be completed by 1 September 2018;

- (iii) Ms Muller has ignored the balance of the requirements of paragraph 3 of the enforcement orders, which were required to be completed by 30 October 2018 (had she not otherwise failed to comply with paragraph 3(b) of the enforcement orders);
- (e) Ms Muller was given an opportunity to purge her contempt. In that respect the Council notes that:
 - (i) The Council, through its solicitors, wrote to Ms Muller on 5 October 2018 urging her to apply to the Court as soon as possible to seek amendments to the Enforcement Orders.
 - (ii) In the same letter, the Council advised that upon the making of an application to vary the enforcement orders, the Council would agree to amended timeframes to facilitate the completion of the building works.
 - (iii) Rather than take up the Council’s recommendations and apply to the Court to vary the Enforcement Orders, the letter from Connor O’Meara of 5 October 2018 seems to have prompted Ms Muller to engage in a series of communications with Queensland Building and Construction Commission which ultimately resulted in the commencement of the QCAT Proceedings.

[22] I am satisfied that the Council has also demonstrated, beyond reasonable doubt, that the non-compliances involved deliberate disobedience of the court’s orders. Contempt of the enforcement orders has been established.

The appropriate remedy for contempt

[23] In *Bundaberg Regional Council v Bailey* [2017] QPEC 31; [2017] QPELR 782 the Court observed, at 788, that:

“...contempt of the court is a serious matter. It goes significantly to the heart of the justice system. The community will have no faith in orders that the Court makes in circumstances where people treat those orders with total disregard without any risk of penalty. Deterrence, of course, works in two ways. One is the general deterrence, to deter other people from carrying out conduct such as this, but also, at a personal level, to deter you from further breaches of court orders.”

[24] The court has the same powers to punish for contempt as has the District Court for a contempt of that court.

[25] Those powers are the subject of Chapter 20, Division 3 of the *Uniform Civil Procedure Rules 1999*. Pursuant to r 930(2) of the *Uniform Civil Procedure Rules*, the Court may punish an individual by making an order that may be made under the *Penalties and Sentences Act 1992*.

[26] As was noted by his Honour Judge Horneman-Wren in *Bundaberg Regional Council v Lammi & Anor* [2014] QPEC 52; [2015] QPELR 111 at 114-5, paragraph 10, citing *Dubois v Rockhampton Regional Council* [2014] QCA 215 at 73-4 :

“...in punishing for contempt the court is exercising its inherent powers. The reference to the *Penalties and Sentences Act 1992* (Qld) in r 930 of the UCPR

does not confine the court's powers to make only those orders contained in the Act."

- [27] The maximum penalty that the District Court can impose on Ms Muller, as an individual, is 4175 penalty units, which is \$545,046.25 at the moment.
- [28] In determining an appropriate sentence, regard ought be had to s 9 of the *Penalties and Sentences Act* and a sentence of imprisonment should only be imposed as a last resort.
- [29] As was observed by his Honour Judge Horneman-Wren in *Bundaberg v Lammi & Anor* [2014] QPEC 52; [2015] QPELR 111 at paragraph 19:
- "The purpose of a court imposing a sanction upon persons in contempt of its orders is two-fold. It is both to punish for the past failure to comply, and to coerce future compliance."
- [30] The Council submits that the Court should exercise its discretion to impose a fine on Ms Muller rather than imprisonment.
- [31] The Council makes reference to a number of comparable cases.
- [32] In *Bundaberg Regional Council v Lammi & Anor* [2014] QPEC 52; [2015] QPELR 111, the Court ordered that respondents were jointly fined \$5000. In that case, there was evidence of regret from the respondents for their failure to comply and evidence of a willingness to take steps to achieve compliance. Until today, there was no such indication from Ms Muller.
- [33] In *Bundaberg Regional Council v Bailey* [2017] QPEC 31; [2017] QPELR 782, the respondent was released on her entering into a recognisance in the amount of \$1000. In that case, there was evidence before the Court that there were a number of financial and health issues that would have materially impacted upon the respondent's ability to comply with the enforcement orders. There is no evidence of those type of circumstances in this case.
- [34] The Council submission also make reference to *Logan City Council v Whelan* [2015] QPEC 23; [2015] QPELR 659 where a fine of \$12,000 was imposed on a corporate entity and \$2500 on an individual respondent for a failure to comply with an enforcement order requiring that approvals be obtained or unlawful use cease. In that case, the Court was mindful that the respondents accepted a finding of contempt without a need for a hearing and that some steps had been taken toward compliance under the enforcement order and that further steps had been taken since the contempt proceedings had been on foot. That is not the case here.
- [35] In *Whitsunday Regional Council v Branbid Pty Ltd & Anor* [2017] QPEC 66; [2018] QPELR 224, the Planning and Environment Court found that the flagrant refusal to cease carrying on the unlawful use of the land can only be described as contumacious. The Court imposed a \$15,000 fine on the corporate entity and \$5000 on the individual respondent. In that case, the Court also ordered each respondent to pay 30 per cent of the applicant's costs of and incidental to the proceeding on an indemnity basis.
- [36] The Council submits that the present circumstances demonstrate greater defiance than encountered in both *Bailey* and *Lammi* because there is no evidence of any acceptance of any wrongdoing or remorse. It submits that the reliance on the QCAT proceedings

is an effort to deflect wrongdoing, which is not an excuse let alone a reasonable or a lawful excuse. It says there is no evidence of mitigating circumstances of the nature before the Planning and Environment Court in *Bailey* and no evidence of remorse or a willingness or even attempts to comply.

- [37] It seems, just today, Ms Muller accepts that there is a need to comply with the orders of this Court, regardless of the existence of the QCAT proceedings. She has not otherwise referred to evidence of mitigating circumstances, that is, other than her complaints that the builder had not complied with its obligations in her arrangements with it when it located the house on the property.
- [38] Important principles in determining the appropriate sentence in this case include specific deterrence and general deterrence.
- [39] In terms of specific deterrence, there needs to be a penalty that is sufficient to compel compliance given the disobedience of the enforcement orders was ongoing and wilful. In that regard I am mindful of the correspondence from Connor O'Meara to Ms Muller on 5 October 2018 and the complete absence of any efforts made by Ms Muller to bring the matter back before the Court, despite having been invited in that letter to apply to the Court because she was already in contempt of the Court orders.
- [40] General deterrence is also a relevant consideration. The disobedience of Court orders lessens the community's faith in enforcement orders. The community's faith in orders of the Court needs to be maintained.
- [41] The Court's powers in contempt proceedings also extend to making an order of costs under r 932 of the *Uniform Civil Procedure Rules*. The costs of a proceeding for punishment for contempt are within the Court's discretion, whether a specific punishment is imposed or not.
- [42] In my view, appropriate punishment for the contempt would be an order that the respondent is fined \$5000. I will also order that the respondent, Ms Muller, by herself, her servants or agents remove from the land described as Lot 65 on RP22109 and situated at 22 Kolan St Bundaberg, and do not replace all things in connection with the relocated building that has been placed on the land by the 30th of August 2019, and order that the respondent, Ms Muller pay the applicant's costs of and incidental to the proceeding fixed at \$20,000.
- [43] In terms of the fine, I will order that the fine is to be paid by 30 August 2019. With respect to costs, I will also order that they are to be paid by 30 August 2019.