IN THE PLANNING AND ENVIRONMENT COURT
AT BRISBANE No. BD 4658 of 2004

BETWEEN: **CAROL JEANETTE BOOTH**

Applicant

AND: **FRIPPERY PTY LTD (ACN 010 890 007)**

First Respondent

MERVYN MEYER THOMAS

Second Respondent

PAMELA ANN THOMAS

Third Respondent

APPLICANT'S OUTLINE OF ARGUMENT FOR CONTEMPT PROCEEDINGS

Material to be read

1. The applicant reads the following material in support of the application for contempt filed on 14 October 2008 (eCourt document No. 94):

   (a) Affidavit of Larissa Joy Waters affirmed on 1 October 2008 and filed on 14 October 2008 (eCourt document No. 95); and

   (b) Affidavit of Daniel David Mead sworn 18 August 2008 and filed on 14 October 2008 (eCourt document No. 96).

Introduction

2. The applicant seeks[1] an order that the respondents be punished for contempt of the Court by contravening an order of the Court to dismantle the electric grid system constructed on their land to electrocute flying-foxes.

3. The issues in dispute are:

   (a) Whether the respondents have committed the alleged contempt; and

   (b) If so, what penalty (if any) ought be imposed on the respondents.

4. The applicant no longer seeks costs on an indemnity basis, in the light of the recent decision of Wilson SC DCJ in *Booth v Yardley* [2008] QPEC 100 at [22]-[23].

[1] Pursuant to s 4.1.5 of the *Integrated Planning Act* 1997 (Qld); and r 926 of the *Uniform Civil Procedure Rules 1999*.

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Particulars

5. As a further introductory matter, the applicant particularizes the contempt as having occurred from 16 January 2008 until 5 December 2008, the date of the hearing of the contempt hearing. The reason for particularizing the contempt as lying being these dates is to avoid the possibility of a claim of *res judicata* if the respondents continue to disobey the Court's orders in the future and further contempt proceedings become necessary. The applicant seeks only the minimum orders from the Court necessary to ensure that the respondents dismantle the electric grids and she will apply to the Court again if the respondents continue to disobey the Court's orders. The Court can thereby sentence the respondents for their contempt at this stage conscious that further defiance of the Court's orders in the future will result in further contempt proceedings. If no further contempt proceedings could be brought against continuing defiance of the Court's orders in the future then the Court would need to impose a heavier sentence at this stage to punish the respondents and avoid them making a commercial profit or windfall gain from their contempt.

History of the proceedings

6. The principal proceedings concern an application for enforcement orders under s 173D of the *Nature Conservation Act* 1992 (Qld) for contravening s88 of the Act by unlawful taking of a protected animal. The unlawful taking was alleged to have occurred due to the use of an electric grid killing, injuring or harming flying foxes to protect a lychee fruit crop on the respondents' farm in North Queensland. The "electric grids" were defined in grounds 7 and 8 of the Originating Application (Version 3) as follows:[2]

> 7. Since approximately 1987, aerial electric grids have been constructed on the land for the purpose of electrocuting, or delivering a non-lethal electric shock to, flying foxes that approach, fly between or depart from the lychee fruit trees on the land. There are currently 6 electric grids constructed on the land for this purpose ("**the electric grids**").
>
> 8. The electric grids are constructed of approximately 15 wires, spaced approximately 24 centimeters apart. The wires are positioned above the height of lychee fruit trees on the land, commencing approximately 5 meters above the ground to a height of approximately 10 meters above the ground. The wires are strung horizontally between metal poles of approximately 10 meters in height, spaced approximately 20 meters apart. The wires are electrified by supply of an electrical current. The total length of the electric grids is 2,000 meters.

7. The first trial was heard by Pack DCJ on 5-7 September 2005. His Honour dismissed the application.[3]

8. The applicant, Dr Booth, successfully appealed Pack DCJ's decision and the Court of Appeal ordered the proceedings be reheard before a different member of the Court.[4]

9. At the re-trial of the application Robin QC DCJ granted the application and ordered on 16 November 2007:[5]

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[2] Strike-out of words deleted and underlining of new words from version 2 omitted. This document was filed by leave of Pack DCJ on the start of the first trial. There appears to be no eCourt document number for it.
[3] *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095 (Pack DCJ).
[4] *Booth v Frippery Pty Ltd & Ors* [2006] 2 Qd R 210; [2006] QCA 74 at [37].
[5] *Booth v Frippery Pty Ltd & Ors* [2007] QPEC 099 (Robin QC DCJ).

> 1. That the First Respondent, Second Respondent and Third Respondent be restrained from the commission of an offence against section 88 of the Nature Conservation Act 1992 by electrocuting, delivering a non-lethal electric shock to, and/or shooting Black Flying Foxes (Pteropus alecto) at 376 Volk Road, Mutarnee, being land described as Lot 85 on CWL 1576, County of Cardwell, Parish of Waterview, in the State of Queensland, unless authorised in accordance with section 88 of the Nature Conservation Act 1992.
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> 2. That within 2 months of the date of this order, the First Respondent, Second Respondent and Third Respondent, 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 (Pteropus alecto) at 376 Volk Road, Mutarnee, being land described as Lot 85 on CWL 1576, County of Cardwell, Parish of Waterview, in the State of Queensland unless the taking of Black Flying Foxes by electrocution or delivering a non-lethal electric shock using such an electric grid is specifically authorised under section 88 of the Nature Conservation Act 1992.

10. On 28 November 2007 the applicant's instructing solicitor served a copy of the final orders made by Robin QC DCJ and in a cover letter to the respondents' solicitors attached to the final orders stated:[6]

> We refer you to the decision of Judge Robin QC on the Re-hearing of the above matter in November 2007.
>
> We attach by way of service of copy of the final order by Judge Robin QC in this matter dated 16th November 2007.
>
> Your clients must comply with the order and dismantle the entire electric grid system within 2 months of the date of the order i.e. on or before the 16th January 2007. Non-compliance with final order by your clients will be regarded as a contempt of court and may result in serious penalties or fines for your clients.
>
> The plain meaning of "dismantle" is "to pull down and take apart"[7] the entire electric grid system constructed by your clients for the purpose of electrocuting or delivering a non-lethal electric shock to Black Flying Foxes.

11. The respondents did not respond to this correspondence or dispute that Order 2 required them to pull down and take apart the entire electric grid system, not merely disconnect the power supply.

12. An appeal against the decision of Robin QC DCJ by the respondents was dismissed by the Court of Appeal due to non-compliance with the Court's directions.[8]

13. A separate application brought by the respondents in the Federal Court against the applicant and her solicitors was discontinued but indemnity costs were awarded against the respondents.[9]

14. The applicant applied for the respondents to be punished for contempt of the orders made by Robin QC DCJ on 14 October 2008 (eCourt document No. 94).

Evidence of contempt

15. The affidavit of Daniel David Mead sworn 18 August 2008 and filed on 14 October 2008 (eCourt document No. 96) establishes that, as at 15 May 2008, the wires and poles comprising the electric grids were still erected on the respondents' land.

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[6] See the affidavit of Larissa Joy Waters affirmed on 1 October 2008 and filed on 14 October 2008 (eDoc No. 95), p 7.
[7] Australian Macquarie Dictionary (Revised 3rd ed, 2001), p 546.
[8] *Frippery Pty Ltd v Booth* (unreported, Queensland Court of Appeal 123/08, 15 and 25 February 2008).
[9] *Frippery Pty Ltd v Booth* [2008] FCA 514 (Collier J).

16. At paragraphs [4]-[7] of the affidavit of the second respondent sworn on 17 November 2008 and filed on 18 November 2008 (eCourt document No. 101), the respondents admit that the electric grid system remains in place on their land but say that the electric control units have been disconnected from the wires and poles.

17. The second respondent has not stated in his affidavit that the respondents understood the orders to only require the electric control units to be disconnected from the wires and poles, without requiring the wires and poles to be dismantled. There is, therefore, no evidence regarding how the respondents understood the orders. Despite this lack of evidence, it may be that the respondents will submit that, as a matter of law, the orders only required the wires and poles to be disconnected from the electrical control units. These submissions will, therefore, address that point.

Legal principles for contempt

18. Failing to comply with an order of the Court is a contempt of court.[10]

19. While noting that the distinction between civil and criminal contempt has been held to be illusory and that both kinds of contempt are essentially criminal in nature,[11] in terms of the traditional dichotomy, the contempt alleged against the respondents is a civil contempt rather than a criminal contempt. Breach of a court order is normally a civil contempt rather than a criminal contempt; however, it is a criminal contempt if it involves deliberate defiance or is contumacious.[12] In the context of the history of these proceedings it is open to the Court to conclude that the respondents' actions constitute deliberate defiance or were contumacious but it is not necessary to reach this conclusion to find that the respondents have committed a contempt.

20. Proceedings for contempt, whether civil or criminal contempt is alleged, are criminal in nature and contempt charges must be proved beyond reasonable doubt.[13]

21. In *Lade & Co P/L and Ors v Black* [2006] 2 Qd R 531, Jerrard JA, Keane JA, and Jones J differed slightly in what constitutes contempt. It is submitted that the differences in their judgments do not lead to different results in the facts of this case.

22. Jerrard JA held in *Lade v Black* at 541-543 [24], [26] and [27]:

> … while establishing breach of an order or undertaking is simply a matter of fact, establishing contempt of it is a matter of attitude or state of mind, and always has been. … Contempt is established by proof of a deliberate act or omission which breaches an order or undertaking. It is no defence that the party deliberately doing the act honestly believes, or was wrongly advised, that it would not be in breach of the order, if the act was deliberately done. It is no defence if a party wrongly believes the party's inadequate steps are reasonable ones, if there is a deliberate choice made not to do more. The proposition that no particular intent is necessary to establish contempt is not the same as the statement

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[10] Section 129(1)(a) *District Court of Queensland Act 1967* (noting the reference to this section in s 4.1.5 of the *Integrated Planning Act 1997*); and r 925(1)(a) of the *Uniform Civil Procedure Rules 1999*. The history of contempt and practice of contempt proceedings under the UCPR were discussed by Atkinson J in *Bakir v Doueihi & Ors* [2001] QSC 414 and *Bakir v Doueihi & Ors* [2002] QSC 019.

[11] *Witham v Holloway* (1987) 183 CLR 525 (Brennan, Deane, Toohey, Gaudron and McHugh JJ). An example of contempt proceedings in the Planning and Environment Court is *Beaudesert Shire Council v Brecevic & Anor* [2003] QPEC 052 (McLauchlan QC DCJ).

[12] *Witham v Holloway* (1987) 183 CLR 525 at 530 per Brennan, Deane, Toohey and Gaudron JJ; and 538-539 per McHugh J.

[13] *Witham v Holloway* (1987) 183 CLR 525 at 534 per Brennan, Deane, Toohey and Gaudron JJ; *Lade & Co P/L and Ors v Black* [2006] 2 Qd R 531 at [65](d) per Keane JA; *Crowther v State of Queensland* [2006] QCA 308 at [14] per de Jersey CJ and [29] per McMurdo P.

> that there can be contempt without a deliberate act or omission. For that reason I agree with the observation by Atkinson J in *Bakir v. Doueihi & Ors* [2002] QSC 19 that:
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> > "The breach of an order will not constitute contempt unless it is willful and not casual, accidental or unintentional."
>
> … I consider it follows that a deliberate act or omission which is in fact in breach of an order will constitute contempt, and to prove contempt it is necessary and sufficient to prove that much. There will be no contempt proved if the act or omission is "casual, accidental or unintentional".
>
> … The Lades had to prove that beyond a reasonable doubt that Mr Black was in contempt of his undertaking. That required proof that he deliberately omitted to comply with it, not just that his cattle were on the Lade's land. The evidence established that Mr Black genuinely tried to comply, but had not taken all reasonable steps open, and had simply refused to consider, for example, an electric fence. That was sufficient to prove contempt.

23. Keane JA distinguished in *Lade v Black* between contempt under the general law and under statute. His Honour held at 551 [65](c) that, at common law punishment by way of a fine or imprisonment as a remedy for contempt may be imposed where the disobedience of a court order is more than "casual, accidental or unintentional."

24. Keane JA set out the principles for contempt under the UCPR, stating at 552-553 [67] and [75]:

> Because of the provisions of r 930 of the UCPR, there is in Queensland a statutory basis for the imposition of a fine which does not require that it be established that the breach of the order was willful or worse than "casual, accidental or unintentional".
>
> Under r. 930 of the UCPR, it was not necessary … to determine whether the appellant's breach of his undertaking was wilful.

25. While Jones J stated he agreed generally with Keane JA in *Lade v Black* at 560 [108], his Honour's reasoning appears consistent with the reasoning of Jerrard JA on the point that there will be no contempt if disobedience is casual, accidental or unintentional. Jones J stated at 558 [104]-[105] and 560 [109]:

> [104] In [*AMIEU v Mudginberri Station Pty Ltd* (1986) 161 CLR 98], in the reasons of the majority, the test is expressed as follows (at 113):
>
> > "In our view the reasons supporting the recent decisions are compelling and they should be accepted by this Court. It follows that a deliberate commission or omission which is in breach of an injunctive order or an undertaking will constitute such wilful disobedience unless it be casual, accidental or unintentional."
>
> [105] The test to establish contempt thus stated does not require proof of any specific mental element for the act or omission. Nor, in my view, is there any basis for importing notions of "reasonableness" into the question of whether a breach of the order or undertaking in fact occurred. Neither in the reasons of the High Court nor in the authorities there relied upon was there any reference to an inquiry into the reasonableness of the alleged contemnor's conduct constituting the disobedience.
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> …
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> [106] The proof of breach of an undertaking does not require any specific mental element. Any relief from this *quasi*-criminal liability on the part of a contemnor is found in the exculpatory provisions of "casual, accident or unintentional". There is not in my view any warrant for introducing into the test, now authoritatively stated in *Mudginberri*, concepts of specific intent or of reasonableness.

26. Keane JA was in the minority in *Lade v Black* in holding that establishing contempt under the UCPR does not require that it be established that the breach of the order was willful or worse than "casual, accidental or unintentional". However, the reasoning of

Jerrard JA in *Lade v Black* at 541 [24] indicates that there is no material difference to the facts of this case because:

> Contempt is established by proof of a deliberate act or omission which breaches an order or undertaking. It is no defence that the party deliberately doing the act honestly believes, or was wrongly advised, that it would not be in breach of the order, if the act was deliberately done. It is no defence if a party wrongly believes the party's inadequate steps are reasonable ones, if there is a deliberate choice made not to do more.

27. In this case there is no dispute that the respondents have deliberately failed to dismantle the wires and poles. It is no defence that the respondents, in deliberately failing to dismantle the wires and poles, honestly believed, or were wrongly advised, that it would not be in breach of the order, as the act was deliberately done.

28. Despite the lack of evidence about the respondents' understanding of the meaning of the orders, there may be a dispute is over whether their failure to dismantle the wires and poles is a breach of the order of the Court. The respondents may allege that merely disconnecting and removing the electric control units is sufficient to achieve compliance with the orders.

29. The meaning of an order must be clear if it is to be enforced by contempt proceedings.[14] The meaning of an order is to be ascertainable by applying ordinary principles of construction and the matrix of facts in which it was given.[15] The "matrix of facts" includes the objective framework of facts from which an order arose and the meaning given to particular words by the parties.[16]

30. Atkinson J stated in *Bakir v Doueihi & Ors* [2002] QSC 019 at [18] (footnotes omitted):

> An order of the court should be read, so far as is reasonably possible, to give it the effect which was apparently intended, so as to achieve the court's purpose. As Brooking J held in *Festival Records Pty Ltd v Tenth Raymond Management Pty Ltd* (1987) 11 IPR 61 at 73, in the Full Court of the Supreme Court of Victoria:
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> > "The court will always discourage subtle attempts to tease some ambiguity out of an injunction which, fairly viewed, bears a plain meaning."

31. In this case the applicant submits that it is clear from the history of the proceedings and the "matrix of facts" of the case that the reference to "any electric grid" in the order is to the wires and poles erected on the respondents' property for the purpose of electrocuting flying-foxes. Consequently, merely disconnecting the power supply to the electric grids does not constituted dismantling them. The plain meaning of "dismantle" is "to pull down; take apart."[17]

32. In relation to the "matrix of facts" of the case it is significant to note in relation to the history of the proceedings for the contempt application the following points:

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[14] *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2001] 2 Qd R 118 at 133 [48] (Williams J with whom McMurdo P and Pincus JA agreed); *Bakir v Doueihi & Ors* [2002] QSC 019 at [16] (Atkinson J).

[15] *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2001] 2 Qd R 118 at 136 [60] (Williams J with whom McMurdo P and Pincus JA agreed); *Bakir v Doueihi & Ors* [2002] QSC 019 at [16]-[24] (Atkinson J); *Booth v Yardley* [2008] QPEC 5 at [5] (Wilson SC DCJ).

[16] *Bakir v Doueihi & Ors* [2002] QSC 019 at [24] (Atkinson J).

[17] *Macquarie Dictionary* (Revised 3rd ed, 2001), p 546. See also *Booth v Yardley* [2008] QPEC 5 at [7] (Wilson SC DCJ).

(a) The parties conducted the hearing of the Originating Application before Robin QC DCJ on 12-14 September 2007 on the common basis that "the electric grids" consisted of the wires and poles specified in grounds 7 and 8 of the Originating Application.

(b) In making Order 2 on 16 November 2007 in the principal proceedings, that the respondents "dismantle any electric grid system" on their land within 2 months, Robin QC DCJ understood the "electric grids" as meaning the wires and poles used for electrifying or delivering a non-lethal electric shock to flying-foxes on the respondents' land, together with the circuitry used to power and control them, as is evident from his Honour's reasons in *Booth v Frippery Pty Ltd & Ors* [2007] QPEC 099 at [1], [9], [10], [15], [16], [69] and [70].

(c) As is clear from his Honour's reasons in *Booth v Frippery Pty Ltd & Ors* [2007] QPEC 099 at [70], the reason Robin QC DCJ made Order 2 requiring the respondents to "dismantle any electric grid system" on their land was that "if the grids remain in place it will be impossible for the applicant to monitor compliance with the Court's orders without trespassing on the land".

(d) Order 2 required the electric grids to be "dismantled" by pulling down and taking apart the wires and poles, not merely disconnecting the power supply to the grids, to allow effective monitoring of the respondents compliance with Order 1 restraining the respondents from operating the electric grids.

(e) Robin QC DCJ indicated in *Booth v Frippery Pty Ltd & Ors* [2007] QPEC 099 at [69] that "liberty to apply ought to be provided for, against the possibility that circumstances change in a way making it appropriate that the court revisit Order 2, whose ramifications are considerable." The respondents did not apply to the Court for clarification of the meaning of Order 2, or to vary it due to changed circumstances.

(f) On 28 November 2007 the applicant's instructing solicitor served a copy of the final orders made by Robin QC DCJ and in a cover letter to the respondents' solicitors attached to the final orders stated:[18]

> The plain meaning of "dismantle" is "to pull down and take apart"[19] the entire electric grid system constructed by your clients for the purpose of electrocuting or delivering a non-lethal electric shock to Black Flying Foxes.

(g) The respondents did not respond to this correspondence or dispute that Order 2 required them to pull down and take apart the entire electric grid system, not merely disconnect the power supply.

33. As a consequence, merely disconnecting the power supply to the electric grids, or removing their electric control units, does not constitute dismantling them and does not comply with Order 2 made by Robin QC DCJ. By failing to pull down and take apart the wires and poles comprising the electric grids, the respondents have committed contempt.[20] The more difficult issue is what penalty should be imposed upon them.

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[18] See the affidavit of Larissa Joy Waters affirmed on 1 October 2008 and filed on 14 October 2008 (eDoc No. 95), p 7.
[19] Australian Macquarie Dictionary (Revised 3rd ed, 2001), p 546.
[20] Wilson SC DCJ reached this conclusion on almost identical facts in *Booth v Yardley* [2008] QPEC 5.

Penalty

34. Rule 930 of the *Uniform Civil Procedure Rules 1999* (UCPR) permits the Court to punish contempt by making any order that may be made under the *Penalties and Sentences Act 1992*.

35. The general principles for sentencing of offences under the *Penalties and Sentences Act 1992* should be applied to sentencing for contempt.[21] The purposes of sentencing stated in subs 9(1) of the Act include punishment, general deterrence, and personal deterrence. Subs 9(2) states the considerations a court must have regard to in sentencing an offender, including:

    (a) that a sentence of imprisonment should only be imposed as a last resort;
    (b) the maximum penalty prescribed for the offence;
    (c) the nature of the offence and how serious it was; and
    (d) the extent to which the offender is to blame for the offence.

36. The sentencing of contempt in proceedings such as these has a dual character. As between the parties there is an element of civil execution and as between the party in default and the State there is a penal or disciplinary jurisdiction exercised by the Court in the public interest.[22] Proceedings for breach of an order have the effect of vindicating judicial authority as well as a remedial or coercive effect.[23]

37. In *Formal Wear Express Franchising Pty Ltd v Roach* [2004] QCA 339 at p 6 Williams JA (with whom McPherson JA and White J agreed) stated the seriousness of the contempt will be the determining feature when considering the nature of the penalty to be imposed.

38. The maximum penalty that may be imposed for the contempt is somewhat unclear. There are two possible alternatives:

    (a) Section 4.1.5(4) of the *Integrated Planning Act 1997* (IPA) states a maximum penalty for contempt of 3,000 penalty units ($225,000) and 2 years imprisonment but cross-references to a now repealed version of s 129(4) of the *District Court of Queensland Act 1967*.

    (b) As no maximum sentences are stated in either the current version of s 129 of the *District Court of Queensland Act* or r 930 of the UCPR, the maximum fine that the Court may impose for the contempt is 4175 penalty units ($313,125) and the maximum term of imprisonment is 2 years due to ss 5, 46(1)(b) and 153A of the *Penalties and Sentences Act 1992*.

39. In the recent decision on almost identical facts in *Booth v Yardley* [2008] QPEC 100 at [16]-[17], Wilson SC DCJ held that the Court should consider the maximum penalty to be 3,000 penalty units ($225,000) as referred to in the IPA.

40. Given the enormous variety of possible contempts of court to occur there is limited benefit in looking at comparative sentences. Penalties for contempt range from no

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[21] See *BCC v Stapleton* [2006] QPEC 073 (Rackmann DCJ).
[22] *Bakir v Doueihi & Ors* [2001] QSC 414 at [7]-[9] (Atkinson J); *ASIC v 1st State Home Loans Pty Ltd & Ors* [2002] QSC 095 at p 3 (Wilson J); *Formal Wear Express Franchising Pty Ltd v Roach* [2004] QCA 339 at p 5 (Williams JA with whom McPherson JA and White J agreed); *City Hall Albury Wodonga Pty Ltd v Chicago Investments Pty Ltd* [2006] QSC 031 at [4]-[6] (Atkinson J).
[23] *Witham v Holloway* (1995) 183 CLR 525 at 533.

penalty for technical and minor breaches of court orders,[24] to substantial fines[25] and sentences of imprisonment where the contempt is of a serious nature.[26]

41. However, in a recent case with almost identical facts, *Booth v Yardley* [2008] QPEC 100, Wilson SC DCJ imposed a fine of $5,000 in circumstances where:

    (a) The proceedings were the second contempt application against the respondents.

    (b) There had been a long delay by the respondents in complying with the Court's orders.

    (c) The respondents showed little sign of any remorse or regret and their agent continued to dispute the validity of the legislation applied throughout the proceedings and sought remedies that were unavailable, ostensibly supported by arguments which are untenable and had previously been strongly and clearly rejected.

    (d) The Court was concerned that the respondents were not properly advised and may not have understood the consequences of their actions.

    (e) The respondents encountered some difficulty finding the time and resources to cut down the poles and wires.

    (f) The respondents had belatedly, but actually, complied with the order.

42. The applicant submits that in the present case it is not yet apparent that it would be futile to impose a fine. Consequently, the applicant submits that a fine is appropriate at this stage. A custodial sentence may be appropriate if further contempt proceedings become necessary because the respondents continue to disobey the Court's orders and refuse to dismantle the electric grids. As noted earlier, the Court may proceed with sentencing of the respondents on the basis that further contempt proceedings will be instigated if they continue to disobey the Court's orders.

43. An aggravating factor in this case, as in the *Yardley* case, is that the respondents show no remorse for their disobedience of the Court's orders.

44. While the respondents have chosen not to provide any evidence to the Court of their financial circumstances,[27] it is apparent from the fact that the lychee farm is 70 acres and 3,500 trees[28] that they conduct a significant commercial operation.

45. The Court should be conscious of ensuring that any fine exceeds the commercial benefit that the respondents gain by disobeying the Court's order but this is difficult to determine due to the lack of evidence regarding it.

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[24] E.g. *Battle Pty Ltd v Hoy* [2000] QDC 043 (McGill DCJ). In *BCC v Stapleton* [2006] QPEC 073 Rackmann DCJ ordered 100 hours community service for contempt.
[25] E.g. *Purtill v Landfix Pty Ltd* [2004] QPEC 067 (Wilson SC DCJ).
[26] E.g. *Formal Wear Express Franchising Pty Ltd v Roach* [2004] QCA 339 at p 6 (Williams JA with whom McPherson JA and White J agreed); *City Hall Albury Wodonga Pty Ltd v Chicago Investments Pty Ltd* [2006] QSC 031 (Atkinson J).
[27] Section 48(1) of the *Penalty and Sentences Act* requires the Court to consider the financial circumstances of the respondents in determining the amount of any fine.
[28] *Booth v Frippery* [2007] QPEC 99 at [9] (Robin QC DCJ).

46. The cost of compliance with the Court's orders was not a matter that was raised before Robin QC DCJ prior to the orders being made but the respondents appear to raise it now in mitigation of their contempt. The respondents allege that the cost of dismantling of the grids would be over $55,000.00.[29] However, it is apparent from the itemized list that allowance for storage and destruction of the fence materials is not required to comply with the Court's orders and, hence, the alleged cost of compliance is $34,000.

47. The applicant submits that taking all of these matters into account, the seriousness of the contempt indicates that the range of the fine that the Court could impose for the contempt is $5,000 – $50,000. Fines beneath $5,000 or above $50,000 would be, respectively, manifestly inadequate and manifestly excessive. The circumstances of this case are more serious than in *Booth v Yardley* [2008] QPEC 100, where Wilson SC DCJ imposed a fine of $5,000. Unlike that case, the respondents here have been legally represented throughout the proceedings and have not belatedly complied with the Court's orders.

48. Having regard to all of these matters, the applicant submits that a fine of $25,000 would be appropriate together with an indication that if the contempt continues and another application is made for the respondents to be punished for their further contempt, a sentence of imprisonment is likely to be imposed.

Dr Chris McGrath
Counsel for the applicant
28 November 2008

[29] See the affidavit of Mervyn Meyer Thomas sworn 17 November 2008 and filed 18 November 2008 (eCourt document No. 101) at [9].