IN THE PLANNING AND ENVIRONMENT COURT
AT BRISBANE No. BD 2845 of 2006

BETWEEN: **CAROL JEANETTE BOOTH**

Applicant

AND: **RICHARD GEORGE YARDLEY**

First Respondent

ANTJE GESINA YARDLEY

Second Respondent

APPLICANT'S OUTLINE OF ARGUMENT FOR CONTEMPT PROCEEDINGS

1. The applicant seeks[1] an order that the first respondent and the second respondent be punished for contempt of the Court by contravening an order of the Court by failing to dismantle the electric grid system constructed for the purpose of electrocuting flying-foxes on their property.

2. The respondents admit the wires and poles used in the electric grid system remain in place on their property but say they have complied with the Court's orders by disconnecting the power supply of the grids.[2]

3. The history of this matter and the matrix of facts of the case explain why the respondents' actions do not comply with the order made by the Court. It is clear from this history that the reference to the "any electric grid" in the order is to the electric grid erected on the respondents property comprising three electric grids of approximately 600-800 meters in length, constructed of approximately 15 wires, spaced approximately 20 centimeters apart and strung horizontally between metal poles. 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."[3]

---

[1] Pursuant to s 4.1.5 of the *Integrated Planning Act* 1997 (Qld); and r 926 of the *Uniform Civil Procedure Rules 1999*.
[2] See "Reply to Application in a Pending Proceeding – Application for Proceeding to be Struck Out" dated 14 November 2007 (filed 19 November 2007, eCourt document No. 57).
[3] *Macquarie Dictionary* (Revised 3rd ed, 2001), p 546.

Environmental Defenders Office (Qld) Inc
Level 9, 193 North Quay
Brisbane Qld 4000
Telephone: (07) 3211 4466
Facsimile: (07) 3211 4655
Email: edoqld@edo.org.au

History of proceedings

4. The proceedings were commenced by originating application filed on 28 September 2006.[4] The applicant sought three enforcement orders under s 173D of the *Nature Conservation Act 1992* to restrain the killing of flying-foxes using an electric grid system on the respondents' property in North Queensland, the dismantling of the electric grids, and a donation for the care and rehabilitation of injured flying foxes.

5. Paragraph 3 of originating application, which was materially unchanged in the two later versions of the originating application,[5] defined "the electric grids" as follows:

> 3. Three aerial electric grids have been constructed on the land for the purpose of electrocuting flying foxes that approach, fly between or depart from the fruit trees on the land ("**the electric grids**").
>
> Particulars
>
> (a) The total length of the three electric grids is approximately 600-800 meters.
>
> (b) The electric grids are constructed of approximately 15 wires, spaced approximately 20 centimeters apart.
>
> (c) The wires are positioned above the height of lychee fruit trees on the land, commencing approximately 3 meters above the ground to a height of approximately 6 meters above the ground.
>
> (d) The wires are strung horizontally between metal poles.

6. Judge Rackemann made the following interlocutory order on 3 November 2006 following a hearing at which the first respondent appeared in person and both respondents were represented by Mr David Walter as an agent (emphasis added):[6]

> I order that, pending a decision of the proceedings for an enforcement order, or other earlier order varying or discharging this order, and unless and until the respondents have obtained an authority under the Nature Conservation Act to take flying foxes by the use of the electric grid on their property at Hosking Road, Mirriwinni, being land described as Lot 1 RP712412 County of Nares, Parish of Bellenden Ker, the respondents stop and/or not start electrocuting flying foxes by the use of the grid system on that property and forthwith disconnect the electricity supply from the grid system and not reconnect it during the currency of this order.

7. Judge Wilson SC DCJ made the following final orders ("the Court orders") on 30 November 2006 following a hearing at which the respondents did not appear either in person or by their agent:[7]

> 1. Unless and until the respondents have obtained an authority under the Nature Conservation Act 1992 to take flying-foxes (Genus Pteropus) by the use of the electric grids on their property at Hosking Road, Mirriwinni (the land described as Lot 1 on RP 712412, County of Nares, Parish of Bellenden Ker) the respondents stop and/or not start electrocuting flying-foxes by use of the grid system on that property;
>
> 2. Within three months of the date of this order the First Respondent and the Second Respondent dismantle or cause to be dismantled any electric grid system constructed for the purpose of electrocuting flying-foxes (Genus Pteropus) on that property unless the taking of flying-foxes by electrocution using such an electric grid is specifically authorised under s 88 of the Nature Conservation Act 1992.

---

[4] eCourt document No. 1.

[5] The second version is eCourt document No. 7. The third version was handed up on 17 November 2007 and did not receive a Court document number according to the eCourt website.

[6] *Booth v Yardley* [2006] QPEC 116 (Rackemann DCJ).

[7] *Booth v Yardley* [2006] QPEC 119 (Wilson SC DCJ).

8. A sealed copy of the Court orders[8] was faxed and posted to the respondents and their agent, Mr Walter, by the applicant's solicitors on 19 December 2006.[9]

9. A letter of demand was faxed and posted to the respondents and their agent by the applicant's solicitors on 19 March 2007, after the respondents failed to dismantle the electric grids on their property by 28 February 2007 as ordered by the Court.[10] No reply was received to that correspondence by the applicant's solicitor.[11]

10. A process server, Mr Crowther, personally served a copy of the Court orders and a further letter of demand on the first and second respondents on 23 June 2007.[12] At that time the process server observed the electric grids were still erected on the respondents' land.

11. The process server personally served the contempt application and a further letter of demand on the second respondent on 8 October 2007.[13]

12. A further letter of demand was sent to the respondents on 11 October 2007 by the applicant's solicitors.[14]

13. On 23 October 2007 the applicant's solicitors received a facsimile from Mr Walter stating that correspondence had been sent to the Court on 22 March 2007 (no copy of which was received by the applicant or her solicitor[15]) stating, *inter alia*:[16]

> As soon as reading His Honour Judge Wilson's order on the Queensland Courts website, Mr and Mrs Yardley effectively dismantled the electric grids.
>
> As the order showed – "to dismantle or cause to be dismantled any electric grid system". The electric wires approximately 100metres in length, which were required to take electricity from the shed to the electric grid system have been removed by a qualified electrician, dismantled and removed. The electrical connection to the 100 metres of wiring has been dismantled, removed and totally disconnected. What used to be the electric grids can not longer be turned on or operated as such as there is no electricity connected to them. The poles and the wires between those poles are now being utilized for another purpose. …

14. Mr Walter's facsimile went on to state that the electric grid had been dismantled and "they are no longer electrical grids they are wires placed between poles now used as bird perches."[17]

15. There appears to be no dispute that the wire and poles of the electric grid system remain in place on the property or that the respondents have not obtained approval to operate the electric grids under the *Nature Conservation Act 1992*. Mr Leon Hill, Principal Conservation Officer with the Environmental Protection Agency, observed and photographed the electric grids in place on 12 July 2007.[18] A search of the EPA's

---

[8] eCourt document No. 46.
[9] Affidavit of Jo-Anne Bragg (affirmed 12 October 2007, eCourt document No. 52), para [2] and JAB-1.
[10] Affidavit of Jo-Anne Bragg (affirmed 12 October 2007, eCourt document No. 52), para [3] and JAB-2.
[11] Affidavit of Jo-Anne Bragg (affirmed 24 October 2007, eCourt doc No. 54), para 5.
[12] See two separate affidavits for service on each respondent of Gregory John Crowther (both sworn 25 June 2007, eCourt document Nos. 49 and 51).
[13] Affidavit of Gregory John Crowther (sworn 20 October 2007, eCourt document No. 53).
[14] Affidavit of Jo-Anne Bragg (affirmed 12 October 2007, eCourt document No. 52), para [6] and JAB-4.
[15] Affidavit of Jo-Anne Bragg (affirmed 24 October 2007, eCourt doc No. 54), para 5.
[16] See annexure JAB-1 to the affidavit of Jo-Anne Bragg (affirmed 24 October 2007, eCourt doc No. 54).
[17] See annexure JAB-1 to the affidavit of Jo-Anne Bragg (affirmed 24 October 2007, eCourt doc No. 54).
[18] Affidavit of Leon Lindsay Hill (sworn 7 August 2007, eCourt document No. 48).

records indicates that no application has been received, nor any permit granted, for the use of the respondents' electric grids.[19]

Contempt

16. Failing to comply with an order of the Court is a contempt of court.[20]

17. 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,[21] 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.[22] The applicant does not allege the respondents' actions constitute deliberate defiance or were contumacious and, consequently, only a civil contempt is at issue in these proceedings.

18. Proceedings for contempt, whether civil or criminal contempt is alleged, are criminal in nature and contempt charges must be proved beyond reasonable doubt.[23]

19. In the recent decision 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.

20. 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 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:
>
> > "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".

---

[19] Affidavit of Leon Hill (sworn 17 October 2007, eCourt document No. 53).

[20] 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.

[21] *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).

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

[23] *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.

> … 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.

21. 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."

22. 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.

23. 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.
>
> …
>
> [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.

24. 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.

25. In this case there is no dispute that the respondents have deliberately failed to dismantle the wires and poles. The dispute is over whether this failure is a breach of the order of the Court. 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.

26. The central issue in dispute is whether the respondents have complied with the orders made by the Court. The meaning of an order must be clear if it is to be enforced by contempt proceedings.[24] 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.[25] 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.[26]

27. 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:
>
> > "The court will always discourage subtle attempts to tease some ambiguity out of an injunction which, fairly viewed, bears a plain meaning."

28. 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 the "any electric grid" in the order is to the electric grid erected on the respondents property comprising three electric grids of approximately 600-800 meters in length, constructed of approximately 15 wires, spaced approximately 20 centimeters apart and strung horizontally between metal poles. 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."[27]

29. The fact that Judge Rackemann made an interlocutory order in the proceedings[28] that required the respondents to "forthwith disconnect the electricity supply from the grid system and not reconnect it during the currency of this order" made it even more abundantly clear that disconnecting the power supply did not constitute dismantlement.

Chris McGrath
Counsel for the applicant
27 November 2007

---

[24] *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).
[25] *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); and *Bakir v Doueihi & Ors* [2002] QSC 019 at [16]-[24] (Atkinson J).
[26] *Bakir v Doueihi & Ors* [2002] QSC 019 at [24] (Atkinson J).
[27] *Macquarie Dictionary* (Revised 3rd ed, 2001), p 546.
[28] *Booth v Yardley* [2006] QPEC 116 (Rackemann DCJ).