

BETWEEN: **CAROL JEANETTE BOOTH**
Applicant

AND: **RICHARD GEORGE YARDLEY**
First Respondent

ANTJE GESINA YARDLEY
Second Respondent

**APPLICANT'S OUTLINE OF ARGUMENT
FOR SECOND CONTEMPT PROCEEDINGS**

Introduction

1. For the second time in these proceedings the applicant seeks¹ 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.
2. The issues in dispute are:
 - (a) Whether the respondents have committed the alleged contempt;
 - (b) If so, what penalty (if any) ought be imposed on the respondents; and
 - (c) Whether costs should be awarded to the applicant on an indemnity basis.
3. The first of these issues hardly appears to be contested as the respondents do not dispute that the wires and poles used in the electric grid system remain in place on their property, thereby contravening the Court's orders. Mr Walter, their agent, has filed a lengthy application that, while difficult to understand, appears to continue to dispute the validity of the *Nature Conservation Act 1992* (NCA) applying to the respondents' land.² Variations of these arguments have been rejected on three occasions by the Court in these proceedings.³ Mr Walter's application seeks orders that are outside the Court's jurisdiction⁴ and raises matters that are both fundamentally

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 Mr Walter's "Application in Proceeding", dated 7 May 2008.

³ *Booth v Yardley* [2006] QPEC 116 at pp 13-14 and 18-22 (Rackemann DCJ); *Booth v Yardley* [2006] QPELR 229; [2006] QPEC 119 at [32]-[49] (Wilson SC DCJ); and *Booth v Yardley* [2008] QPEC 5 at [19] (Wilson SC DCJ).

⁴ The Court has no general power to make a declaration, order a matter be registered on the Land Title Register, or order payment of punitive damages, even if the arguments raised by Mr Walter had merit.

APPLICANT'S OUTLINE OF
ARGUMENT FOR CONTEMPT
PROCEEDINGS
Filed on behalf of the Applicant

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mistaken and irrelevant to the issues in dispute. It should be dismissed. More germane to the issues in dispute here, the respondents have provided no evidence⁵ of any attempt by them to comply with the Court's orders or their financial circumstances which Mr Walter has previously suggested prevents them from complying with the Court's orders.

4. At the hearing of the first contempt application the Court gave the respondents the benefit of the doubt that it was "probable, and at least possible, that they honestly believed they were complying with the order in simply disconnecting the electricity" from the grid.⁶ That conclusion, while reasonable at the time (and which the applicant accepted was open), now appears to have been mistaken. In light of respondents' subsequent refusal to comply with the orders of the Court it appears that they are continuing a course of calculated and deliberate disobedience of the law. In granting the original enforcement order the Court observed that the respondents' conduct was "not merely a technical breach or one committed because of an honest, but mistaken belief" but rather the respondents' actions are "calculated and deliberate."⁷ At that time the Court observed that "the respondents will not voluntarily comply with the legislation".⁸ These matters are very relevant to the penalty that ought to be imposed by the Court.

Particulars

5. As a further introductory matter, the applicant particularizes the contempt as having occurred from 31 March 2008 until 3 July 2008, the date of the hearing of the second contempt hearing. The reason for particularizing the contempt as lying being these dates is to avoid the possibility of a claim of *res judicata* or double jeopardy 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 proceedings

6. The Court is familiar with the history of these proceedings and there is no need to summarise it here. The background to the interlocutory orders, trial decision, and first contempt proceedings are set out in the Court's reasons for decisions.⁹
7. The respondents are now alleged to have contravened order 1 made by the Court in the first contempt proceedings:¹⁰

⁵ Mr Walter has filed an affidavit annexing a number of pieces of legislation, none of which are relevant to these proceedings. The affidavit filed by Mrs Yardley is also irrelevant to the issues in dispute.

⁶ *Booth v Yardley* [2008] QPEC 5 at [19] (Wilson SC DCJ).

⁷ *Booth v Yardley* [2006] QPELR 229; [2006] QPEC 119 at [22] (Wilson SC DCJ).

⁸ *Booth v Yardley* [2006] QPELR 229; [2006] QPEC 119 at [26] (Wilson SC DCJ).

⁹ *Booth v Yardley* [2006] QPEC 116 at pp 13-14 and 18-22 (Rackemann DCJ); *Booth v Yardley* [2006] QPELR 229; [2006] QPEC 119 at [32]-[49] (Wilson SC DCJ); and *Booth v Yardley* [2008] QPEC 5 at [19] (Wilson SC DCJ).

¹⁰ *Booth v Yardley* [2008] QPEC 5 (Wilson SC DCJ).

1. That on or before 31 March 2008 the respondents dismantle (or cause to be dismantled) the three electric grids constructed on their land at Hosking Road, Mirriwinni being the land described as Lot 1 on RP 712412, County of Nares, Parish of Bellenden Ker in the State of Queensland by pulling down and taking apart the horizontal wires and metal poles constituting the electric grids.
 2. That there be liberty to apply on 14 days notice.
8. The respondents have contravened order 1 by failing, before 31 March 2008, to dismantle (or cause to be dismantled) the three electric grids constructed on their land.
 9. The respondents' electric grids had not been dismantled as at 3 April 2008¹¹ and they do not dispute that the grids have still not been dismantled as at the date of the hearing of the second contempt proceedings, 3 July 2008.

Contempt

10. Failing to comply with an order of the Court is a contempt of court.¹² Given the history of these proceedings and the first contempt proceedings there can be no question that the meaning of the order by the Court was clear applying ordinary principles of construction and the matrix of facts in which it was given.¹³
11. 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,¹⁴ in terms of the traditional dichotomy, the contempt alleged against the respondents is now criminal contempt rather than a civil contempt.¹⁵ 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.¹⁶ The respondents' continued refusal to dismantle their electric grids appears to involve deliberate defiance and be contumacious.
12. Proceedings for contempt, whether civil or criminal contempt is alleged, are criminal in nature and contempt charges must be proved beyond reasonable doubt.¹⁷
13. It appears to be beyond reasonable doubt that the respondents' failure to dismantle the grids is a deliberate act or omission which is in fact in breach of the Court's order so as to constitute contempt. The failure to dismantle the grids is not casual, accidental or unintentional and it is no defence to a charge of contempt if a party wrongly believes

¹¹ See the affidavit of Paul Gerard O'Callaghan (sworn 10 April 2008; filed 14 April 2008).

¹² 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 Doueihy & Ors* [2001] QSC 414 and *Bakir v Doueihy & Ors* [2002] QSC 019.

¹³ *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 Doueihy & Ors* [2002] QSC 019 at [16]-[24] (Atkinson J).

¹⁴ *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).

¹⁵ At the first contempt proceedings only a civil contempt was alleged.

¹⁶ *Witham v Holloway* (1987) 183 CLR 525 at 530 per Brennan, Deane, Toohey and Gaudron JJ; and 538-539 per McHugh J.

¹⁷ *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 party's inadequate steps are reasonable ones, if there is a deliberate choice made not to do more.¹⁸

14. As a consequence, the respondents have committed contempt of court. The more difficult issue is what penalty should be imposed upon them.

Penalty

15. 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*.
16. The general principles for sentencing of offences under the *Penalties and Sentences Act 1992* should be applied to sentencing for contempt.¹⁹ 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.
17. 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.²⁰ Proceedings for breach of an order have the effect of vindicating judicial authority as well as a remedial or coercive effect.²¹
18. 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.
19. In relation to the maximum penalty for the contempt, the references in s 4.1.5(4) of the IPA to maximum penalties of 3,000 penalty units and 2 years imprisonment by reference to s 129(4) of the *District Court of Queensland Act* appear to be an artifact of legislative history as s 129(4) was recently amended. Rackemann DCJ noted this artifact in *Stapleton v Pool & Anor* [2006] QPEC 073 and that by virtue of s 14H of the *Act's Interpretation Act 1954* the reference to s 129 of the *District Court of Queensland Act* in s 4.1.5 of the IPA should be taken to be a reference to s 129 in its current form. The consequence of this is that the Court may punish contempt by any order that may be made under the *Penalties and Sentences Act*.
20. As no maximum sentences are stated in either s 129 of the *District Court of Queensland Act* or r 930 of the UCPR, the maximum fine that the Court may impose

¹⁸ The slightly differing views in *Lade & Co P/L and Ors v Black* [2006] 2 Qd R 531, of Jerrard JA, Keane JA, and Jones J as to what constitutes contempt are not material here.

¹⁹ See *Stapleton v Pool* [2006] QPEC 073 (Rackmann DCJ).

²⁰ *Bakir v Doueihy & 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).

²¹ *Witham v Holloway* (1995) 183 CLR 525 at 533.

for the contempt is 4175 penalty units or \$17,430,625 and the maximum term of imprisonment is 2 years.²²

21. 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 penalty for technical and minor breaches of court orders,²³ to substantial fines²⁴ and sentences of imprisonment where the contempt is of a serious nature.²⁵
22. The case with the closest analogous facts as the present case that counsel has located is *Formal Wear Express Franchising Pty Ltd v Roach* [2004] QCA 339, which, as here, involved repeated contempts. In that case the defendant to proceedings in the District Court repeatedly breached an undertaking to the court that was incorporated into an order not to conduct a formal menswear hire business. At the first contempt proceedings the defendant was fined \$3,000. At the second, later contempt proceedings the defendant was sentenced to 6 months imprisonment for each of 3 separate contempts, with the sentences to be served concurrently. Williams JA (with whom McPherson JA and White J agreed) found the sentences of 6 months imprisonment were manifestly excessive but imposed sentences of 3 months imprisonment to be served concurrently. Williams JA found that the lack of remorse and his continued refusal in the face of being fined for contempt to abide by the undertaking and order to be the most significant feature of the case. Williams JA found:

Here it would be futile to impose a fine. Because of the contemptuous behavior of the [defendant] in continuing to breach the undertaking so soon after being fined for contempt, it was appropriate in my view to impose a custodial sentence. That was particularly so where there was no acknowledgment of wrongdoing at the sentence hearing or subsequently.
23. 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 note 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.
24. The contempt in this case is very serious in nature and has several aggravating features. The contempt is clearly a deliberate disobedience of the Court's authority and done as part of a continuing a course of calculated and deliberate disobedience of the law. This is not merely a technical breach or one committed because of an honest, but mistaken belief. Rather, the respondents' actions appear calculated and deliberate.
25. The respondents show no remorse for their disobedience of the Court's orders. Quite to the contrary, their agent Mr Walter continues to dispute the validity of the law applying to the respondents actions. This conduct is reprehensible and an aggravating factor here. There appears little doubt that the respondents intend to continue to flout the Court's orders in the future.

²² Sections 5, 46(1)(b) and 153A of the *Penalties and Sentences Act 1992*.

²³ E.g. *Battle Pty Ltd v Hoy* [2000] QDC 043 (McGill DCJ). In *Stapleton v Pool* [2006] QPEC 073 Rackmann DCJ ordered 100 hours community service for contempt.

²⁴ E.g. *Purtill v Landfix Pty Ltd* [2004] QPEC 067 (Wilson SC DCJ).

²⁵ 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).

26. Despite the seriousness of the contempt and the respondent's lack of remorse, a major factor weighing against the imposition of very significant fine is the apparent very limited financial means of the respondents.²⁶ While the respondents have chosen not to provide any evidence to the Court of their financial circumstances, the applicant accepts that the Court may infer that they have very limited financial means to pay a fine. The respondents hold the freehold title of their land, a significant asset, but there is no evidence as to whether the land is encumbered by a mortgage. The applicant has no desire for the respondents to have to sell their land to pay a fine.
27. 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. The respondents have previously alleged that the cost of dismantling of the grids would be over \$25,000.²⁷ However, the applicant submits that this figure appears to be a gross exaggeration and should not be relied upon.
28. 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. Despite the seriousness of the contempt and the respondents lack of remorse their very limited financial means suggests that an appropriate fine in all of the circumstances would be at the lower end of the range, and the applicant submits that a fine of \$10,000 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. Should such a further contempt proceeding be brought an appropriate penalty would be 3 months imprisonment as imposed in *Formal Wear Express Franchising Pty Ltd v Roach* [2004] QCA 339.

Costs

29. The applicant applies for indemnity costs. While the normal rule for costs in the Court is that each party bear their own costs in accordance with s 4.1.23 of the *Integrated Planning Act 1997* (IPA), the Court has awarded indemnity costs in the past in contempt proceedings.
30. In *Purtill v Landfix Pty Ltd* [2004] QPEC 067 at [25], Wilson SC DCJ awarded indemnity costs, apparently by consent, against a party found to have contravened orders of the Court under s 505 of the *Environmental Protection Act 1994*. The substantial fine that would have been imposed was reduced because of the award of indemnity costs. His Honour held that r 932 of the UCPR provided a power to the Court to award costs in contempt proceedings and that s 4.1.23 of the IPA did not apply in such proceedings.
31. In *Noosa Shire Council v Cotton On Clothing Pty Ltd* [2008] QPEC 13, Dodds DCJ also awarded indemnity costs, by consent, against a party found to have contravened an order of the Court granting development consent for a display shop. The fine imposed was reduced because of the award of indemnity costs.

²⁶ 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.

²⁷ See *Booth v Yardley* [2008] QPEC 5 at [16].

32. However, in *Hervey Bay City Council v George Stathopoulos* [2000] QPE 067, Quirk DCJ declined to award costs for successful contempt proceedings because he considered s 4.1.23 of the IPA did not allow costs to be awarded.
33. While it is contrary to the applicant's interests, to fulfill my duty as counsel to assist the Court, I submit that the decision in *Stathopoulos* is correct and that the awards of indemnity costs in the *Landfix* and *Cotton On Clothing* cases were mistaken. Section 4.1.23 of the IPA governs the award of costs in the Court, including in contempt proceedings. Rule 932 of the UCPR, a mere regulation, cannot override the legislative provision in s 4.1.23 of the IPA. The principle applied by other courts that are not governed by similar rules to s 4.1.23, particularly the Supreme Court, that indemnity costs should be awarded in contempt proceedings, should not be applied in the Planning and Environment Court.

Chris McGrath
Counsel for the applicant
1 July 2008