# DISTRICT COURT OF QUEENSLAND

| | |
|---|---|
| CITATION: | *Hourigan & Anor v Grimes* [2020] QDC 215 |
| PARTIES: | **GEOFFREY MATTHEW HOURIGAN**<br>**and**<br>**LISA MAREE HOURIGAN**<br>(plaintiffs)<br>**v**<br>**ROSS FRANCIS GRIMES**<br>(defendant) |
| FILE NO: | D089/2019 |
| DIVISION: | Civil |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Southport |
| DELIVERED ON: | 2 September 2020 |
| DELIVERED AT: | Southport |
| HEARING DATE: | 21 July 2020 |
| JUDGE: | Kent QC, DCJ |
| ORDER: | **The respondent has a case to answer on the contempt proceeding, apart from particular (h)** |
| CATCHWORDS: | COURTS AND JUDGES – CONTEMPT – GENERAL PRINCIPLES – CIVIL AND CRIMINAL CONTEMPT – where orders were made restraining the defendant from retaking or attempting to retake possession of certain property and from interfering with the plaintiff's occupation and use of premises – where the plaintiff filed an application for an order of contempt for breaching those orders – where the matter was adjourned so that the respondent could advance a no case submission – whether a case is established to a prima facie standard.<br><br>*Australian Securities Commission v Macleod (No. 1)* (1993) 40 FCR 155 at 157.<br>*Doney v R* (1991) 171 CLR 207.<br>*Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd* (1976) 2 NSWLR 15.<br>*R v Sutton* (1986) 2 Qd R 72.<br>*Witham v Holloway* (1995) 183 CLR 525. |
| COUNSEL: | T. Matthews QC with M. Campbell for the |

applicants/plaintiffs
A. O'Brien for the respondent/defendant

SOLICITORS: Simmons & McCartney for the applicants/ plaintiffs
Nyst Legal for the respondent/ defendant

**Introduction**

[1] This is an application for orders and relief related to alleged contempt of court by the defendant in the context of orders made in the course of the proceeding. The plaintiffs' application was filed 25 May 2020 and the application was heard on 21 July 2020.

[2] The procedure adopted by consent of the parties was that affidavit material was filed on behalf of the applicant and witnesses were cross-examined. The matter was then adjourned so that the respondent/defendant could advance a no case submission. The submissions have been provided in writing.

**Nature of the case**

[3] The parties have been involved in a dispute the subject of proceedings in this Court. On 20 March 2020 orders were made restraining the defendant from retaking or attempting to retake possession of certain commercial units on the subject property (in essence, a small industrial complex) at Staplyton, and from interfering with the plaintiffs' occupation and use of those premises[1]. The present application was filed on 25 May 2020, for orders that the defendant be committed to a correctional facility or otherwise punished for contempt of court in breaching the orders. Particulars were alleged including various conduct of the defendant, broadly, the use of weed killer sprayed in various locations which made the occupation and use of the premises more difficult or dangerous and thus interfered with it. The details of the particulars, some of which are abandoned, are set out in the narrative below.

**The submissions**

***Defendant's Submissions***

[4] On behalf of the defendant it is submitted that there is no case to answer. The parties agree that the application should be determined on the basis of present evidence, and taking the plaintiffs' evidence at its highest; *Australian Securities*

---

1 The order is court file document no. 76

*Commission v Macleod (No. 1)*.[2] The nature of contempt proceedings is that they are essentially criminal.[3] Thus the principles as to a no case submission in criminal cases apply.

[5] The underlying dispute the subject of the proceedings resolved by a compromise resulting in a deed of settlement. Thereafter the plaintiffs had a right to remain in occupation of two sheds, referred to as Units 1 and 4 and the defendant was otherwise entitled to continue to be in possession of the rest of the property. It is submitted by the defendant that the rights that the plaintiff had did not extend to areas external to Units 1 and 4, save for rights in respect of using the hard stand and parking areas.

[6] The defendant submits that the relevant right in this case was to occupy the property for one month, which includes quiet enjoyment of Units 1 and 4. Thus it is submitted that the plaintiff will need to demonstrate that the defendant committed some positive act intending the interference with the plaintiffs' rights to happen, and that it was not merely casual, accidental or unintentional.

*Threshold Issue*

[7] The defendant submits that a threshold issue arises, namely that on the day in question, 16 May 2020, in respect of Unit 4 it was Vitawerx Pty Ltd (apparently a food supplement business) that was the occupier, alternatively Joshua Hourigan, rather than the plaintiffs. Thus the plaintiffs' right of occupation and possession could not have been infringed because they were not the relevant occupiers.

*The Evidence*

*First Particular – (a)*

[8] The first particular in the application is that about 10:21am on 16 May the defendant, while in a vehicle, drove to Unit 4 and using a spray gun held in his hand sprayed the door of Unit 4 and some pallets, a fridge, a dumpster bin outside of Unit 4 and the air conditioners to Unit 4 with the weed killer Roundup or alternatively some other liquid.

---

2 (1993) 40 FCR 155 at 157.
3 See e.g. *Witham v Holloway* (1995) 183 CLR 525

[9] The evidence includes recordings from CCTV cameras[4]. These show varying acts of spraying liquid, conceded to be weed killer, by the defendant in various areas on the property. Dealing with the footage of spraying the fridge and dumpster, the defendant argues these were all outside of Unit 4 in the grass and spraying them could not interfere with the plaintiffs' occupation and use of Unit 4 or the associated hard stand area. The defendant submits that there is no evidence those items were being used for a business purpose and they were in long grass; thus Mr Grimes was "free to apply weed killer to those areas".

[10] The defendant submits that the CCTV footage does not show any direct application of the weed killer to the air-conditioner which supplied Unit 4. It is also submitted that in context the allegation that Mr Grimes sprayed "the door of Unit 4" is not made out, at least on the CCTV footage.

*Second Particular – (b)*

[11] The second particular is that the defendant then drove closer to the door of Unit 4 and while in his vehicle used the spray gun to spray the door to Unit 1 (*sic* – presumably reference to Unit 4 is intended) with the weed killer Roundup or alternatively some other liquid.

[12] The defendant submits that the plaintiffs had a right to occupy Unit 4 but did not own it or the door, nor do they have rights with respect to the external part of the door. The example given is that Mr Grimes could have painted the exterior of the building including the door. He submits that it is not alleged that spraying the door with weed killer interfered with their enjoyment or use of the premises and as the plaintiffs were not present at the time, there is no evidence of interference. It is argued that there is no evidence that the weed killer was poisonous or harmful to humans, or that it posed a threat in some other way. It is submitted that any interference that did occur was not substantial and only temporary. The argument is that spraying weed killer on the door might have been annoying or childish but did not cause an interference with the plaintiffs' use and occupation of Unit 4.

[13] Particular (c) is abandoned.

---

4 Relevantly presented on a USB stick, exhibited to the affidavit of Geoffrey Hourigan

*Third Particular – (d)*

[14] At approximately 10:58am the defendant drove over to Unit 4 and while in his vehicle sprayed the weed killer Roundup or some other liquid over the plaintiffs' forklift parked outside Unit 4. The defendant's submission is that the forklift was parked in long grass which the defendant was entitled to spray and there is no evidence that he deliberately sprayed the forklift nor that his activities interfered with the possession and use of the sheds.

*Fourth Particular – (e)*

[15] The defendant then backed his vehicle into the driveway of Unit 1 and whilst in the vehicle used the spray gun to spray the plaintiffs' work bench, toolbox, shelving and other equipment outside Unit 1. To this the defendant argues that the various chattels were strewn across the concrete and onto the grass and grass was growing around them. Thus it is argued that Mr Grimes was entitled to spray those areas and it is said that the CCTV footage shows that it was the grass that was the principle target of the spray. The items were outside the shed and the action did not interfere with the plaintiffs' occupation or use of Unit 1 or the associated hard stand.

[16] Particulars (f) and (g) are abandoned.

*Fifth Particular – (h)*

[17] At approximately 11:10am the defendant, inside the administration office, went through the plaintiffs' documents and attempted to enter Unit 1which adjoins. The defendant drew a smiley-face on a message on a piece of paper the male plaintiff had left on his desk. The defendant submits that CCTV footage does not bear out Mr Grimes going through the plaintiffs' documents. Further, merely trying a locked door handle does not amount to an interference with the use or occupation of the premises, nor does the smiley-face. In any event the defendant submits that the administration office was not protected by the injunction.

[18] Particulars (i) and (j) are abandoned.

[19] All of this leads to the defendant's conclusion that there is no case to answer.

***Plaintiff's Response***

[20] The plaintiff submits that it is beyond doubt that a "weed killer" was sprayed; this is what was put to the plaintiffs' witnesses. The liquid was sprayed over the door to Unit 4 and over pallets, a fridge, a dumpster bin, a forklift and air conditioners, situated outside Unit 4. It was also sprayed over the work bench, toolbox, shelves and other equipment outside Unit 1.

[21] The plaintiff points out that evidence was led by affidavit and oral testimony that the property was sprayed with Roundup and its distinctive odour was still present when the witnesses arrived at the property some three hours after it had been sprayed. The witnesses gave evidence of a familiarity with Roundup through the use of and other exposure to it, and their evidence in that regard was not challenged. The plaintiff submits that I would accept the evidence as demonstrating their experience in the use and detection of Roundup and thus the weed killer sprayed was Roundup or at least a product with the same active ingredient, namely Glyphosate, a herbicide.

[22] Clearly enough the defendant was spraying weed killer; this is common ground and photographic evidence seemed to be to the effect that it killed grass.[5] It was suggested in cross-examination of Geoffrey Hourigan that the product was "Surefire 360 Herbicide", which, like Roundup, contains Glyphosate[6]. Given that this is what was advanced in cross-examination, any suggested distinction between that product and Roundup seems, with respect, to be a distinction without a difference.

[23] **Geoffrey Hourigan**, in his affidavit at paras 29 and 30 described the strong smell of Roundup. In para 33 he gave uncontradicted evidence that he is familiar with the smell and characteristics of this herbicide having used it for many years.

[24] **Johnathon Hourigan** in his affidavit at para 23 also described the strong chemical smell which he believed to be Roundup. He adhered to this in cross examination, and said the odour persists for some time.[7] He knew the distinctive smell as in approximately 2018, whilst spraying Roundup at his property he accidentally came into skin contact with it resulting in two weeks illness. He also disagreed with the

---

5 T 1-33 ll 8-14; Exhibit 6.
6 T1-51 ll26-30
7 T1-66 ll30-45

proposition that the spraying of property was incidental.[8] He could smell the Roundup strongly inside Unit 4; para 29.

[25] **Joshua Hourigan** in para 19 of his affidavit also noticed the similar smell and also was familiar with Roundup. He could also smell it strongly inside Unit 4; para 27. He also adhered to this in cross examination.[9]

[26] These passages, including the oral evidence, in the plaintiff's submission establish to a *prima facie* level that a weed killer was used containing Glyphosate and that its application to the plaintiff's property and the exterior of the Units was not incidental.

[27] The plaintiff also submits that it is incorrect for the defendant to argue that there must be a "substantial" breach before the contempt is established. There is a reference to the dictionary meaning of "quiet enjoyment". This includes the observation that conduct making the ordinary use and enjoyment of the premises impossible (for example, by blocking entrances to the premises) is sufficient and any physical interference with the premises will amount to a breach of a covenant for quiet enjoyment; *Martins Camera Corner Pty Ltd v Hotel Mayfair Ltd*.[10] In that case, it was sufficient for a breach of a covenant for quiet enjoyment where entry on to the demised premises of rainwater caused by the failure of the lessor to keep roof gratings and drainpipes clear of rubbish.[11]It is submitted that the proven conduct in the circumstances amounts to a *prima facie* case of breach of the orders.

**Consideration**

[28] The present issue, therefore, is whether there is a case established to a *prima facie* standard. The present question is not whether on the evidence as it stands the defendant ought to be found to be in contempt, but whether he could lawfully be so found.[12] The situation of no case to answer will normally only arise if there is a

---

8 T1-66 l15
9 T1-57 l24 – 1-58 l27
10 (1976) 2 NSWLR 15.
11 At p27; see also *Aussie Traveller Pty Ltd v Marklea Pty Ltd* (1998) 1 Qd. R. 1 at p9 per McPherson J.A. and the cases there discussed; in that case sawdust and noise were sufficient
12 *R v Sutton* (1986) 2 Qd R 72.

defect in the evidence such that, taken at its highest, it would not sustain a conclusion of guilt.[13]

[29] In my view, the plaintiff's submissions on the issue of a *prima facie* case must be accepted, with one qualification set out below. The spraying of the weed killer was at least potentially dangerous to humans, as is established by the uncontradicted evidence of Jonathon Hourigan, who was previously injured by it, or at least a similar product with the same active ingredient. The evidence shows it was sprayed in various areas, in my present view somewhat indiscriminately, including areas where at least access to and enjoyment of the premises would be restricted by natural aversion to coming into contact with a substance which at least Jonathon Hourigan had been previously injured by. The witnesses rejected the idea of the defendant demonstrably spraying the grass and any spraying of the property being accidental;[14] and the evidence must be taken at its highest for present purposes.

[30] The defendant's position is not assisted by his spraying of various areas from the vehicle, at some distance. This gives an impression of indifference at best to human safety; it is quite different from alighting from the vehicle and engaging in precisely targeted spraying of weeds or grass. It is also not assisted by what appears to be targeted spraying of the door to Unit 4; clearly enough there were no weeds there, and touching the door is necessary to access Unit 4.

[31] As to the defendant's submission about the threshold issue of the occupier of Unit 4 being Vitawerx Pty Ltd rather than the plaintiff, it is difficult for me to reach a conclusion as to this on the present state of the evidence, but I do note the terms of the order made by the Court on 20 March which restrained the defendant from interfering with the *plaintiff's* occupation of and use of Units 1 and 4. If the point as to the lack of the plaintiff's connection with Unit 4 is valid, it begs the question as to the defendant's apparent concurrence in the making of that order. Geoffrey Hourigan in para 5 of his affidavit gives uncontradicted evidence that he occupied both sheds with Joshua. It might be, if that issue is to be pursued, that further evidence can be put on in relation to it.

---

13 *Doney v R* (1991) 171 CLR 207.

14 e.g. Geoffrey Hourigan T1-38 ll 24-40; T1-44 ll40-45; also Jonathon's evidence referred to at footnote 8 above

[32] As to the defendant's criticism of Particular (a), the spraying of the door of Unit 4 and the pallets, fridge and dumpster outside it and the air conditioners to Unit 4, it is clear enough in my view, as outlined above, that the spraying of the door with a weedkiller with a distinctive odour could certainly interfere with the use of the door, and in a substantial way (if "substantiality" is necessary). As to the other items in the first particular, namely the pallets, fridge, dumpster and air conditioners, Geoffrey Hourigan in cross-examination rejected the proposition that the weed killer was only sprayed at the grass. His evidence is not contradicted, including, in my view, by the CCTV footage. Further, I do not accept that for the purposes of the present proceedings, the forklift, pallets and dumpster were so far from the premises as to be separate therefrom to any relevant degree.

[33] The order prevented interference with the plaintiffs' occupation and use of the premises *including* the space occupied and used conjointly with the defendant comprising the adjacent hardstand parking area, for the conduct of the plaintiffs' current business. It may well be that weedkiller sprayed on the chattels referred to did amount to an interference with the plaintiffs' occupation of and use of the premises including the adjacent areas; certainly that is the tenor of Geoffrey Hourigan's evidence particularly at paras 29 – 37 of his affidavit[15]. The contrary proposition does not seem to have been expressly put to Geoffrey Hourigan or the other witnesses. What was suggested was that the recorded footage showed the defendant merely spraying grass and that any contact with the other items was purely incidental. The witnesses firmly disagreed with that proposition, and theirs is not a characterisation which I would be prepared to reject at this stage.

[34] It is true that direct application to the air conditioner is not demonstrated on the CCTV footage, however there is clear evidence of the strong smell of weedkiller inside the premises such as to give the rise to the inference for which the applicant contends, at least at this stage. Whether that inference will be drawn to the required standard at the conclusion of the proceedings is another matter, however my conclusion at the moment is that such an inference is available to a *prima facie* level.

---

[15] He also agreed with the proposition that what he saw of the conduct on his phone was "something serious"; T 1-35 l10

[35] As to Particular (b), the door to Unit 4, in my view spraying the door, which was the entrance point, in the way demonstrated by evidence which is not significantly in dispute, does support this particular to a *prima facie* standard. Clearly enough, anyone who recognises the smell, and particularly someone who had previously been injured by a similar substance, would be reluctant to touch or use such a door. This in turn clearly enough, in my view, is capable of amounting to an interference with the plaintiffs' occupation and use of the premises; access is restricted, and on more than a momentary basis. Jonathon Hourigan said the smell would persist for a couple of days.

[36] In relation to Particular (d), the forklift, there is evidence that the forklift was used in the activities at the premises (albeit not recently), so interfering with its use could amount to an interference with the use of the premises. The same applies to the chattels referred to in Particular (e).

[37] The one area in which the plaintiff faces significant difficulty is in relation to Particular (h), which is the activities inside the administration office. It seems common ground that Unit 1 was not entered by the defendant, and some perhaps mischievous and childish activities where undertaken in the administration office. It also seems common ground that the defendant did have access lawfully to the administration office; Geoffrey Hourigan seemed to agree with this proposition in cross-examination and it is not submitted to me otherwise. There was no damage done in the administration office other than the drawing of the smiley face on a document. This may have damaged the document, but I could not conclude at this stage that the document was something within the purview of the relative order of the Court. At this stage, I would uphold the defendant's submission that he has no case to answer in relation to Particular (h). Otherwise the defendant's submission of no case to answer is dismissed.