SUPREME COURT OF QUEENSLAND

CITATION:	*Dubois v Rockhampton Regional Council* [2014] QCA 215
PARTIES:	**JOHN WILLIAM DEMPSTER DUBOIS** (applicant) **v** **ROCKHAMPTON REGIONAL COUNCIL** (respondent)
FILE NO/S:	Appeal No 3277 of 2014 P & E Appeal No 87 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave *Sustainable Planning Act*
ORIGINATING COURT:	Planning and Environment Court at Rockhampton
DELIVERED ON:	29 August 2014
DELIVERED AT:	Brisbane
HEARING DATE:	18 August 2014
JUDGES:	Muir and Gotterson JJA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**Amend the order at first instance by inserting the following paragraph 2A:** **"If the Planning and Environment Court is satisfied that any of the terms of the order of 11 June 1999 were breached by the Respondent after 3 April 2014 and prior to the expiration of the three months term of the sentence the Planning and Environment Court may order the Respondent to serve the whole or part of the suspended imprisonment."** **Vary paragraph 3 of such order by deleting "7 April 2014" and inserting in lieu thereof "29 August 2014".** **Otherwise order that:** **1. The application for leave to appeal be allowed.** **2. The appeal be dismissed.** **3. The applicant pay the respondent's costs of and incidental to the appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – GENERALLY – where the applicant seeks leave to appeal under s 498 of the

Sustainable Planning Act 2009 (Qld) against his conviction for contempt of court – where the applicant carried on a motor garage business on the subject land servicing a variety of vehicles from a workshop – where in 1999 an order was made that delineated the boundaries of the existing lawful non conforming use – where the 1999 order required the applicant to move a vehicle hoist and associated equipment from an area of the land to inside the workshop within seven days – where the primary judge held that the applicant knowingly and without lawful excuse failed to comply with the 1999 order – whether the primary judge erred in holding that the certain activities done to the applicant's own utility vehicle, trucks and tractors in a prescribed area of the land were not permitted as a residential use of the land

PROCEDURE – CONTEMPT, ATTACHMENT AND SEQUESTRATION – POWER OF COURT TO PUNISH FOR CONTEMPT – SUPREME COURT – IN RESPECT OF CONTEMPT OF INFERIOR COURT OR TRIBUNAL – where it was submitted by the applicant that the primary judge erred in that the sentence was manifestly excessive – where the applicant submitted the primary judge failed to take into account a number of relevant considerations when sentencing – where the sentence imposed on the applicant was three months imprisonment suspended after one month – whether the primary judge failed to adequately take the applicant's apology into account – whether the primary judge should have taken the applicant's period of compliance before he breached the 1999 order into consideration – whether the *Penalties and Sentences Act* 1992 (Qld) has a general application to contempt orders – whether the sentence was manifestly excessive

District Court of Queensland Act 1967 (Qld), s 129
Integrated Planning Act 1997 (Qld)
Penalties and Sentences Act 1992 (Qld), s 9(2), s 143, s 144, s 146, s 152, s 163
Planning and Environment Court Rules 2010 (Qld), r 6
Supreme Court of Queensland Act 1991 (Qld), s 85, Sch 1
Sustainable Planning Act 2009 (Qld), s 439, s 457, s 481, s 498, s 945
Sustainable Planning and Other Legislation Amendment Act (No 2) 2012 (Qld), s 61
Uniform Civil Procedure Rules 1999 (Qld), r 926(2), r 930, r 931

Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd (1986) 161 CLR 98; [1986] HCA 46, applied
Bakir v Doueihi [2002] QSC 19, cited
Booth v Yardley [2009] QPLR 299; [2008] QPEC 100, considered
Cheney v Spooner (1929) 41 CLR 532; [1929] HCA 12, considered

Chesser v Morris [1959] VR 307; [1959] VicRp 51, cited
City Hall Albury Wodonga Pty Ltd v Chicago Investments Pty Ltd [2006] QSC 31, considered
Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 219; [2009] QCA 66, distinguished
Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch) [2001] 2 Qd R 118; [2000] QCA 108, cited
Formal Wear Express Franchising Pty Ltd v Roach [2004] QCA 339, distinguished
Franconi v Shire of Perth [1965] WAR 37; (1965) 11 LGRA 380, cited
Hall v Nominal Defendant (1966) 117 CLR 423; [1966] HCA 36, followed
O'Connor v Witness G [2013] QSC 281, followed
Purtill v Landfix Pty Ltd [2004] QPEC 67, cited
Re Colina; Ex parte Torney (1999) 200 CLR 386; [1999] HCA 57, considered
Rockhampton Regional Council v Dubois [2014] QPEC 13, considered
Shergold v Tanner (2002) 209 CLR 126; [2002] HCA 19, cited
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, considered
Strbak v Newton (unreported, New South Wales Court of Appeal, Gleeson CJ, Samuels and Priestley JJA, 18 July 1989), considered
Warringah Shire Council v Raffles [1979] 2 NSWLR 299; (1978) 38 LGRA 306, distinguished

COUNSEL: C McGrath for the applicant
M Hinson QC, with S M Ure, for the respondent

SOLICITORS: CQ Legal for the applicant
King and Company for the respondent

[1] **MUIR JA**: **Introduction** The applicant seeks leave to appeal under s 498 of the *Sustainable Planning Act* 2009 (Qld) (the SPA) against his conviction on 3 April 2014 for contempt of court and the sentence imposed on him of three months imprisonment suspended after one month.

The features of the subject land

[2] The applicant, at relevant times, carried on a motor garage business on the subject land servicing a variety of vehicles from a workshop. The workshop is located in the north-western corner of the land, the northern boundary of which abuts Paterson Avenue. The applicant's dwelling house is in the southern-central section of the land. The primary judge described the uses to which other parts of the land were put as follows:[1]

> "In the north-eastern corner is a driveway area allowing access from Paterson Avenue. This area is divided into a northern section, known

[1] *Rockhampton Regional Council v Dubois* [2014] QPEC 13 at [7].

as '**Area B**', and a southern section, known as '**Area A**'. In the southwestern corner is a driveway area allowing access from Rhodes Street. This area is known as '**Area C**'." (footnotes omitted)

[3] Area B is bounded in the west by the workshop, in the north by Paterson Avenue and in the south by Area A, which is approximately identical to area B in size and shape (8m by 8m). Area C extends from Rhodes Street to the workshop which is in the north-west corner of the land.

The history of litigation in respect of the use of the land

[4] The history of litigation in respect of the applicant's use of the land is conveniently recorded as follows in the primary judge's reasons:[2]

"**1996 Order**

[8] In 1995 the Council applied to the Court to close down Koongal Motors for noncompliance with the [Rockhampton City Plan]. On 7 June 1996 Nase DCJ declined to close down the business but made an order defining the extent of the lawful nonconforming use of the Land by the Respondent ('1996 Order').

1997 – First Conviction for Contempt of Court

[9] In 1997 the Respondent was convicted in the Rockhampton Magistrates Court for contempt for contravening the 1996 Order. He was fined $1,000.00 and ordered to pay court costs of $49.95 and the Council's legal costs of $3,000.00.

1999 Order

[10] As can be seen from Annexure A, the 1999 Order delineated the boundaries of the existing lawful non conforming use and Order 2 of the 1999 Order required the Respondent to move the vehicle hoist and associated equipment ('Hoist') from Area C to inside the Workshop within seven days.

[11] Initially the Respondent complied with Order 2 by relocating the Hoist inside the Workshop within seven days.

2001 – Second Conviction for Contempt of Court

[12] In 2001 the Respondent was convicted for contempt of the 1999 Order for using Area B for repair work. He was fined $1,500.00 and was ordered to cease carrying out the environmentally relevant activity.

Subsequent Events

[13] Sometime in 2010 the Respondent returned the Hoist to Area C.

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2 *Rockhampton Regional Council v Dubois* [2014] QPEC 13 at 4–5.

> [14] On 19 September 2013 the Council filed the present Application particularising the breach of the 1999 Order in these terms:–
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> (a) the Respondent failed to remove the Hoist located in Area C over various dates from 22 October 2010 to 9 May 2013; and
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> (b) the Respondent carried out mechanical repairs to vehicles in areas not permitted by the 1999 Order.
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> [15] On 15 December 2013, after being served with the Application, the Respondent removed the Hoist." (citations omitted)

Evidence of the applicant's use of the land

[5] The primary judge's findings of breach of paragraph 3 of the 1999 Order are much narrower than the evidence would support. The affidavit of Judith Noland deposes to the use of Area C for the purpose of mechanical work on a variety of vehicles, apart from the applicant's work utility, at different times.

[6] Ms Noland swore that she witnessed the presence of the hoist in Area C on 18 occasions between 22 October 2010 and 9 May 2013 inclusive. She stated that she saw a white sedan on the hoist on 10 of those days. She later observed the white sedan parked on the lowered hoist on six separate days.

[7] Other relevant observations made by Ms Noland of things or activities on Area C were:

- the applicant was "at the engine" of his utility on 27 August 2012; and
- the applicant was seen by her on 19 April 2013 leaning over the engine of a blue all-wheel drive vehicle with its bonnet up. He appeared to be doing mechanical work.

[8] Ms Noland also gave evidence of admissions made by the applicant. She said that on 14 June 2012 at a meeting at the City Hall he had admitted that he "had undertaken work in [Area C] for years" and that he "worked all over the site". He also said that the Court rulings were irrelevant because the respondent had misled the Court, he did not argue with the Court order and was not restricted by it.

[9] Ms Elsie Larkins, an immediate neighbour of the applicant, stated that work was often carried out on the white Mack prime mover and another Mack prime mover on Area C. She said that she saw the applicant doing mechanical work on the white Mack prime mover on 28 April 2013 and 10 May 2013. The applicant said, in relation to the 28 April 2013 work:

> "The white Mack prime mover belongs to me. It is necessary to lower the '[bullbar]', so that the bonnet can be lifted to do routine fluid checks and I would not class this as mechanical work."

[10] The applicant gave a similar explanation in respect of work on the Mack prime mover on 10 May 2013.

[11] Mr Leslie Wilson, a retired truck driver and neighbour of the applicant, stated that he saw the applicant's white Mack truck arrive at the land on 28 April 2013 and park on Area C. On 29 April, he observed the applicant leaning into the engine area of the truck which had its bonnet raised. It was still located on Area C.

The declaration and orders of 11 June 1999

[12] Judge Britton declared on 11 June 1999 that the existing lawful use of the land was:

> "1. …
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> (a) the carrying out of mechanical repairs to motor vehicles (other than panel beating or spray painting) within the existing workshop constructed pursuant to building approvals 32535 and 36219 and shown as "EXISTING WORKSHOP" outlined in green on the plan attached hereto and marked as "Annexure 1" and the hoist area as shown on that plan outlined in red and marked with the letter "A".
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> The carrying out of mechanical repairs referred to in (a) supra includes welding or grinding ancillary to and subservient to the carrying out of those repairs but does not include welding or grinding for the purposes of motor body building, motor body repairs, coach work or metal fabrication.
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> (b) The use of the fuel tank and bowser on the land to supply fuel to motor cars at the time they are being serviced and for no other use.
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> (c) The use of the land outlined in blue and marked with the letter "B" for the purpose of supplying such fuel to such motor vehicles or for the purpose of obtaining access to the existing workshop and area "A" or the parking of motor vehicles awaiting access to the existing workshop or area "A" and for no other purpose."

[13] It was ordered by consent:

> "2. That within seven (7) days of the date [of the order] the [applicant] remove the hoist and associated equipment located outside the south-western corner of the existing workshop and depicted in the copy photograph annexed hereto [to the order] and marked as 'Annexure 3'.
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> 3. That the [applicant] do forthwith cease using the land for any purpose other than:–
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> (a) the existing lawful non-conforming use as declared by the Court in this Order; and
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> (b) a use permitted in the Residential A zone pursuant to the transitional Planning Scheme for the City of Rockhampton; and
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> (c) in Area C on Annexure 1 for gaining access to the existing workshop as described herein."

The primary judge's findings of breach of the 1999 Orders

[14] The primary judge held that the applicant knowingly and without lawful excuse failed to comply with order 2 on the 18 occasions particularised by the respondent.[3] That finding, which related to the 18 occasions on which Ms Noland saw the hoist on Area C, was not challenged on appeal.

[15] The primary judge stated in respect of order 3 that he was satisfied beyond reasonable doubt that Area C had been continually used by the applicant for purposes other than those permitted by the 1999 Order. He held, in particular, that the applicant had undertaken the following activities in Area C:[4]

> "1. lifting the bonnet of a vehicle;
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> 2. checking the engine of a vehicle;
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> 3. checking the water of a vehicle;
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> 4. checking the oil of a vehicle; and
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> 5. lowering the [bullbar] on a vehicle."

[16] His Honour held:[5]

> "These activities have been undertaken on vehicles owned by the [applicant] for a business use and a vehicle owned by a customer of his business. None of the activities undertaken can be considered residential use or 'access'."

Ground 3 – The primary judge erred in holding that the following activities done to the applicant's own utility vehicle, trucks and/or tractors in Area C were not permitted as a residential use of the land: lifting the bonnet of a vehicle; checking the engine of a vehicle; checking the water of a vehicle; checking the oil of a vehicle; and lowering the bullbar on a vehicle

[17] It is now convenient to consider the grounds in the notice of appeal commencing with ground 3.

The applicant's submissions

[18] The applicant submitted that "merely inspecting vehicles in Area 'C'" is a use "incidental to and necessarily associated with the use of the premises" for mechanical repairs to motor vehicles and access to the workshop, as "use" was defined under the *Integrated Planning Act* 1997 (Qld) (repealed) (the IPA) when the 1999 Orders were made and is currently defined under the SPA. It was further submitted that inspection and basic maintenance checks on the applicant's own vehicles, regardless of whether they were utilities, prime movers or tractors, are part of the normal residential use of the land and that the primary judge erred in holding the contrary. In that regard, it was submitted that if the primary judge's interpretation of the Interim Town Planning Scheme for the City of Rockhampton (the Planning Scheme) is correct, any taxi driver living in the residential A zone in Rockhampton who parked his taxi on his property and lifted the bonnet to check the engine, water or oil would commit an unauthorised "use" under the SPA.

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3 *Rockhampton Regional Council v Dubois* [2014] QPEC 13 at [44].
4 *Rockhampton Regional Council v Dubois* [2014] QPEC 13 at [62].
5 *Rockhampton Regional Council v Dubois* [2014] QPEC 13 at [62].

[19] Another submission related to the evidence of Ms Noland that on 19 April 2013 she saw a blue all-wheel drive vehicle parked in Area C with its bonnet up and observed the applicant, who had been leaning over the engine of the vehicle, wipe his hands on a rag. Ms Noland, who photographed the vehicle, said that it appeared that the applicant was undertaking mechanical work.

[20] The applicant swore that the vehicle had been parked where Ms Noland saw it by the customer who delivered it for repairs. He said that the "bonnet was lifted so that the owner could provide [him] with instructions" in regard to the problem and that the vehicle was not parked in that position for long before being moved to Area A and placed on the hoist.

[21] In these circumstances it was submitted that Area C was used for the purpose of gaining access to the workshop.

[22] The parking of the applicant's utility on Area C was submitted to be "a use permitted in the Residential A zone pursuant to the [Planning Scheme]". That scheme provided in Division 11 of Part 5:

> "No person shall on land within the Residential 'A' zone … park a commercial or industrial vehicle exceeding two (2) tonnes tare weight or exceeding two point five metres in height unless it is housed in a Class I or Class X building … and approved by Council."

[23] There was no evidence of the weight of the utility but counsel for the applicant proceeded on the basis that it weighed less than two tonnes. There was no submission to the contrary.

Consideration

[24] The vehicles referred to in paragraph [62] of the reasons, quoted in part in paragraph [15] hereof, were: a white utility; a white Mack prime mover owned by the applicant and used by him for carting fertiliser; and a blue all-wheel drive vehicle owned by a customer. The white utility, which was a small truck of the kind commonly used by tradesmen, was said by the applicant to be his own workshop vehicle.[6]

[25] The keeping of business vehicles on a parcel of residential "A" land would not normally be regarded as a residential use of the land. In *Warringah Shire Council v Raffles*,[7] Waddell J relevantly observed:

> "Where land is used for the purpose of a dwelling-house, the use of some part of that land for some means of private transport seems to me necessarily to be use of the land for the purpose of a dwelling-house. The very idea of a dwelling-house presupposes that the occupants may have some means of private transport kept at hand to travel from the dwelling-house to their places of work, shops, social occasions, and other places."

[26] His Honour had earlier referred to cases in which it was held that the parking on the defendant's residential land of trucks used in the defendant's business was a use for business purposes.[8]

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6 *Rockhampton Regional Council v Dubois* [2014] QPEC 13 at [59].

7 [1979] 2 NSWLR 299 at 303.

8 *Chesser v Morris* [1959] VR 307; *Franconi v Shire of Perth* [1965] WAR 37.

[27] There was no suggestion that the utility was used for private transportation purposes.

[28] The breaches of order 3 of the 1999 Order did not allege merely that the applicant was using area C for a use other than "a use permitted in the residential A zone pursuant to the [Planning Scheme]". The allegations of breach were more confined. The breaches particularised in the respondent's application were the undertaking of "mechanical repairs … on a number of vehicles, including prime movers in area C … and on the balance of the residential land".

[29] Six instances of alleged "mechanical work" on a white prime mover, a tractor, a white utility and a blue all-wheel drive vehicle were then particularised. The seventh particular was of the applicant having been "seen working on a white Mack prime mover in area C".

[30] The application concluded with the following paragraph:

> "The conduct of mechanical work to a prime mover or other vehicle is not a use permitted in the Residential A Zone pursuant to the Transitional Planning Scheme for Rockhampton City 2002 nor in the Lakes Creek Residential Area Zone pursuant to the Rockhampton City Plan 2005, and is not otherwise lawful".

[31] The application could have been more carefully expressed. Although the introductory words of the particulars refer to the undertaking of "mechanical repairs", six instances of breach particularised are of "mechanical work". The seventh merely alleges that the applicant was "working on" a white Mack truck. Paragraph 8 picks up the wording of paragraph 3(b) of the 1999 Order, stating that the conduct of mechanical work to a prime mover or other vehicle is not a use permitted in a residential "A" zone pursuant to the Planning Scheme.

[32] It is clear that the breaches of the order alleged are not confined in meaning to mechanical repairs and extend to "mechanical work". The contrary was not suggested at first instance or on appeal. Moreover, particulars (i) to (vii) inclusive in the application were supported by written evidence that precisely identified the evidence on which the respondent intended to rely. In that sense, the evidence further particularised the respondent's allegations of breach of the 1999 Order.

[33] The primary judge was right, with respect, to find that the work set out in paragraph [15] above was not within the scope of that permitted by paragraph 3 of the 1999 Order.

[34] In order to establish breaches of order 3, the respondent needed to show that the conduct on which it relied was not a use permitted in the residential A zone pursuant to the Planning Scheme (residential use) and that it was not a use of Area C for the purpose of gaining access to the workshop.

[35] It was not a permitted use of Area C to bring onto it the white prime mover or a customer's vehicle for any purpose other than access to the workshop. The applicant's actions in relation to those vehicles, as described in paragraph [62] of the reasons, constituted mechanical work. The work pertained to machines and, as has been mentioned, was further particularised.

[36] It was not suggested that the prime mover was on Area C for the purposes of accessing the workshop. The evidence was that the prime mover was used in

a carting business. Its maintenance, even if limited in the way described by the applicant, could not be regarded as integral with or incidental to the residential use of the land. There was nothing of a residential flavour about the use of Area C at relevant times. Photographs and the evidence of Ms Noland show that it was normally the repository of a variety of commercial and industrial vehicles, as well as assorted pieces of machinery. She stated that she had observed that some of these vehicles, including prime movers, had been on Area C for years. These matters are relevant to the determination of whether the activities in relation to the prime mover, utility and all-wheel drive vehicle amounted to residential use.

[37] Clause 2(1) of Division 2 of Part 5 of the Planning Scheme, quoted above, supports the conclusion that the mechanical work particularised was not a residential use or integral with or incidental to a residential use. The primary judge found that the applicant's evidence was not to be believed. That finding was not challenged. Consequently, the evidence of the applicant as to the nature and extent of his work on and in relation to the vehicles on Area C may be disregarded for present purposes.

[38] The evidence in relation to the blue all-wheel drive vehicle that is set out in paragraph [19] above is inconsistent with Area C being used for the purpose of accessing the workshop. In order to determine whether Area C was used for the purposes of access, it is necessary to consider the circumstances in which the use is said to have occurred. In this case, Ms Noland observed the things described in paragraph [19], the applicant moving away from the vehicle after seeing her and the presence, it may be inferred, of no other person. The primary judge was entitled, on that evidence, to conclude that Area C was not being used for the purpose of gaining access to the workshop. No evidence accepted by the primary judge supports the conclusion that the vehicle was on Area C as part of a continuum or process under which it was left by the customer, subjected to visual inspection and taken into the workshop. Whatever was being done in relation to the vehicle was not incidental to and necessarily associated with the use of Area C for the purpose of gaining access to the workshop.

[39] As for the utility, Ms Noland saw the applicant at its engine. It appeared that he was working on it. There were a number of items, including a red bucket, on the driveway in front of it. The applicant immediately moved away from the vehicle when he noticed the presence of Ms Noland.

[40] The applicant sought to draw support for the conclusion that the conduct just described was incidental to residential use from cl 2(1) of Division 11 of Part 5 of the Planning Scheme which does not prohibit the parking of commercial or industrial vehicles not exceeding two tonnes tare weight on land zoned residential A. However, cl 3(1) prohibits the carrying out of "any maintenance or repair work on any commercial or industrial vehicle …" on such land without the consent of the Council. As observed earlier, at relevant times there was nothing of a residential flavour about the use of Area C. What the evidence disclosed was the carrying out of maintenance work on a work vehicle on a laneway to a motor repair workshop which served as a repository for other vehicles and machinery.

[41] It may well be the case, as counsel for the applicant submitted, that the mere inspection by a taxi driver of his taxi parked in the driveway of his home for oil and water levels would be an incident of domestic use. That is not this case. In addition to other considerations mentioned above, the utility was used in a business conducted on and from the land. It had no domestic use disclosed by the evidence.

[42] Accordingly, the applicant has not identified any error in the primary judge's reasons in relation to his conviction. In any event, the challenges to the primary judge's findings did not relate to the many breaches of order 2.

Appeal against sentence – Grounds 1, 2, 5, 6, 7, 8 and 9

The applicant's contentions

[43] It was submitted by the applicant that the primary judge erred in that the sentence was manifestly excessive and in failing to take into account a number of relevant considerations. One such consideration was the applicant's remorse demonstrated by his apology to the Planning and Environment Court. Another was the applicant's compliance with the 1999 Order by removing the hoist and not replacing it on Area C until "sometime in 2010". That was submitted to be a mitigating factor which the primary judge was required to take into account under s 9(2)(g) of the *Penalties and Sentences Act* 1992 (Qld) (the PSA).

[44] It was contended that the primary judge also failed to take into account the totality of the penalty imposed on the applicant, namely:

(a) three months imprisonment, suspended after one month;

(b) loss of income as a self-employed mechanic and truck driver during and arising from the term of actual imprisonment;

(c) the effect on the applicant's business of the recording of a conviction that was required to be imposed by s 152 of the PSA if a sentence of imprisonment was imposed; and

(d) indemnity costs likely to exceed $10,000.

[45] The failure to record a conviction as required by s 143 and s 152 of the PSA and the failure to state an operational period for the suspended period of the sentence as required by s 144(5) of the PSA were also submitted to be errors of law requiring the conviction to be set aside.

Consideration

[46] The apology, such as it was, was proffered in an affidavit sworn by the applicant. The affidavit relevantly stated:

> "To the extent that I have contravened the Court's 1999 orders I apologise to the Court. I have made errors in the past with complying with the Court's orders but I will do my best to comply with the Court's orders in the future. I ask the Court to explain what I can do in area 'C' so that I know what is allowed under the 1999 orders for providing access to my workshop and as part of a normal residential use of my land."

[47] The mere fact that the primary judge did not specifically mention remorse, the applicant's apology and his belated compliance with the 1999 Orders by removal of the hoist before returning it to Area C on a later date in his sentencing remarks did not establish that the primary judge did not have regard to those matters. It is

apparent from the sentencing remarks that he had regard to the principles in s 9(2) of the PSA. His finding, plainly open on the evidence, that a further fine of $5,000 or more would do little to "discourage the [applicant] from continuing his anarchistic conduct in ignoring the 1999 Order"[9] necessarily implies that his Honour concluded that the applicant was far from remorseful. So too does the findings that the applicant's "entire conduct regarding both contempt counts reflects a contumelious disregard of the 1999 Order".[10] These findings, coupled with the finding that the applicant was not to be believed made it abundantly plain that the primary judge gave no credence to the applicant's apology which was proffered without admission of breach of the requirements of the 1999 Order.

[48] The applicant's contention that the primary judge erred in failing to give adequate reasons "regarding [his] consideration of the applicant's remorse and apology for the contempt" is ill founded.

[49] Counsel for the applicant relied on *Drew v Makita (Australia) Pty Ltd*,[11] to support his argument. It does not. I observed in that case that:

> "[59] The extent to which a trial judge must expose his or her reasoning for the conclusions reached will depend on the nature of the issues for determination and 'the function to be served by the giving of reasons'. For that reason, what is required has been expressed in a variety of ways. For example, in *Soulemezis v Dudley (Holdings) Pty Ltd*, Mahoney JA said:
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> '… And, in my opinion, it will ordinarily be sufficient if – to adapt the formula used in a different part of the law … by his reasons the judge apprises the parties of the broad outline and constituent facts of the reasoning on which he has acted.'
>
> [60] McHugh JA's view was that reasons sufficient to meet the above requirements do not need to be lengthy or elaborate but '… it is necessary that the essential ground or grounds upon which the decision rests should be articulated'.
>
> [70] In *Strbak v Newton*, Samuels JA said:
>
> '…What is necessary, it seems to me, is a basic explanation of the fundamental reasons which led the judge to his conclusion. There is no requirement, however, that reasons must incorporate an extended intellectual dissertation upon the chain of reasoning which authorises the judgment which is given.'" (citations omitted)

[50] It seemed to be implicit in the arguments of counsel for the applicant that if a question of remorse was relevant, a sentencing judge would err unless he or she explicitly addressed the matter in the sentencing remarks. That is not a requirement of sufficiency of reasons. The requirements, as expressed in the above passages

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9 *Rockhampton Regional Council v Dubois* [2014] QPEC 13 at [71].

10 *Rockhampton Regional Council v Dubois* [2014] QPEC 13 at [63].

11 [2009] 2 Qd R 219.

from *Soulemezis v Dudley (Holdings) Pty Ltd*[12] and *Strbak v Newton*,[13] were met. Why the primary judge gave no apparent weight to remorse and the apology were perfectly plain. Having regard to the history of repeat offending detailed by the primary judge, the conclusion that the applicant showed no remorse was justified.

[51] The fact that the applicant belatedly and temporarily complied with the 1999 Order by removing the hoist is hardly a mitigating factor. It is merely a part of the facts which show the nature, extent and culpability of the offending conduct. As long as the hoist was not on area C, there was no continuing breach of the terms of the order in that regard. The primary judge referred to the evidence given by Ms Noland concerning the use of the hoist on stated dates and to the applicant's evidence of the removal, replacement and final removal of the hoist. It is not to be supposed that these matters were not in his mind when sentencing. The sentencing remarks form part of the primary judge's reasons and cannot be construed or assessed for adequacy in isolation from the remainder of the reasons.

[52] The fact that the primary judge did not expressly state in his sentencing remarks that he had taken into account the cumulative effect of the term of imprisonment, the applicant's loss of income, the effect of imprisonment on the applicant's business and the amount of indemnity costs does not establish that his Honour failed to take those matters in to account. There was no evidence before the primary judge, however, that the applicant would suffer any particular financial hardship as a result either of a short term of imprisonment or loss of income. There was no evidence, for example, that the continued operation of the business was dependent on the presence of the applicant. Nor was there evidence that the applicant's absence from the business for one month would cause substantial or permanent harm to the business.

[53] The applicant submitted that the primary judge appeared to have regarded the sentence of imprisonment "as the only penalty imposed". The submission was based on these observations by the primary judge:[14]

> "[72] I believe the [applicant's] continued offending in the face of his previous convictions supports the reasonable inference that any [monetary] penalty will not deter him from any future similar conduct.
>
> [73] Having regard to the history of the matter and being conscious of the seriousness of imposing a prison term, I have nevertheless come to the view that imprisonment is the appropriate penalty. I order that the [applicant] be imprisoned for three months, to be suspended after he has served one month."

[54] His Honour had earlier remarked that a further fine of $5,000 or more would do little to discourage the applicant. After the observations just quoted, the primary judge dealt with the question of costs. It was open to his Honour to take the costs order into account in formulating the sentence but not to do so would not have constituted an error in law on the facts addressed and found by the primary judge. Different considerations applied to the formulation of the costs order on the one

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12 (1987) 10 NSWLR 247 at 273.

13 (unreported, New South Wales Court of Appeal, Gleeson CJ, Samuels and Priestley JJA, 18 July 1989).

14 *Rockhampton Regional Council v Dubois* [2014] QPEC 13 at [72]–[73].

hand and the sentence on the other. In sentencing the applicant to a term of imprisonment, the primary judge, rightly, had particular regard to personal and general deterrence. He referred to the applicant's continuing offending in the face of his previous convictions, in respect of which monetary penalties had been imposed. Relevant to the costs order were considerations such as the persistence by the applicant in maintaining unarguable points such as the assertion that order 2 had not been breached. Moreover, it is not apparent that the primary judge did not have regard to the proposed costs order in determining the sentence to be imposed. The term of actual imprisonment ordered was as short a sentence as a court would normally contemplate ordering.

[55] An order that the applicant pay costs on the indemnity basis was always well within the ambit of a sound exercise of the primary judge's discretion. Indemnity costs orders are not uncommon in contempt cases, particularly where there has been a contumelious flouting of court orders or undertakings to the Court.[15]

[56] In arguing that the sentence imposed was manifestly excessive, counsel for the applicant relied on the alleged errors discussed and rejected above. He also contended that the authorities did not support the sentence imposed. Counsel referred to *Booth v Yardley*;[16] *Formal Wear Express Franchising Pty Ltd v Roach*;[17] and *City Hall Albury Wodonga Pty Ltd v Chicago Investments Pty Ltd*.[18]

[57] In *Booth*, no term of imprisonment was imposed for a contempt constituted by non-compliance with a court order. None was sought by the applicant. There was no history of previous convictions for contempt and no finding of contumelious disregard of the court's order. *Booth* has little relevance for present purposes.

[58] The contempt in *Formal Wear* was the breach, on three occasions, of an undertaking by the applicants for leave to appeal not to be concerned or interested in "any business for the mobile hire of formal menswear" for a particular period within a particular area. The male applicant, who was self-represented, informed the sentencing judge that a fine would be "a waste of time" as he had trouble paying the fine previously imposed for a similar breach. He said that his business had "folded", his wife had a serious medical condition and he had three dependent children.

[59] The applicant's sentence of six months imprisonment was set aside and concurrent three month terms of imprisonment were substituted. This Court concluded that a custodial sentence was appropriate as the breaches of the order were committed after the applicant had been fined for a similar offence, imposing a fine would be futile and there was no acknowledgement of wrongdoing.

[60] The applicant in *Formal Wear* committed three breaches of an order over a period of no more than four months. This applicant, against a more extensive history of prior contempts, breached the 1999 Order on many occasions and, in the case of order 2, for protracted periods. The decision in *Formal Wear* does not suggest that the subject sentence was excessive.

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15 *Evenco Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)*[2001] 2 Qd R 118 at 146; *City Hall Albury Wodonga Pty Ltd v Chicago Investments Pty Ltd* [2006] QSC 31 at [185]; *Bakir v Doueihi* [2002] QSC 19 at [149]; *Purtill v Landfix Pty Ltd* [2004] QPEC 67.

16 [2009] QPLR 299.

17 [2004] QCA 339.

18 [2006] QSC 31.

[61] In *Chicago Investments*, the male and female defendants, who were found to have committed a number of serious and deliberate breaches of undertakings given to the Court, were ordered to serve four months and two months imprisonment respectively. The defendants had no criminal record and had not previously been in contempt of court. The elderly parents of the female defendant were dependent for their full time care on the defendants. The defendants were ordered to pay costs on the indemnity basis. The penalty imposed on the male defendant was substantially more severe than the applicant's sentence. The case also offers little assistance for present purposes.

[62] Having regard to the applicant's history of non-compliance with court orders, the finding that a monetary penalty would not act as a deterrent and the finding of contumelious disregard of the 1999 Orders, the penalty imposed was within the range of the sound exercise of the sentencing discretion.

[63] I will now address the contention that the primary judge erred in failing to record a conviction and in failing to state an operational period for the period of suspension of the sentence. Section 152 of the PSA provides that a court may make an order of imprisonment only if it records a conviction. Section 143 of the PSA provides that a court may make an order under s 144(1) only if it records a conviction. Section 144(1) makes provision for suspended sentences. Sub-section (5) provides:

> "The court must state an operational period during which the offender must not commit another offence punishable by imprisonment if the offender is to avoid being dealt with under section 146 for the suspended sentence."

[64] Rules 930 and 931 of the *Uniform Civil Procedure Rules* 1999 (Qld) (the UCPR) respectively provide:

> **"930 Punishment**
>
> (1) This rule applies if the court decides that the respondent has committed a contempt.
>
> (2) If the respondent is an individual, the court may punish the individual by making an order that may be made under the *Penalties and Sentences Act 1992*.
>
> (3) …
>
> (4) The court may make an order for punishment on conditions, including, for example, a suspension of punishment during good behaviour, with or without the respondent giving security satisfactory to the court for good behaviour.
>
> **931 Imprisonment**
>
> (1) An order for imprisonment of the respondent may specify the prison in which the respondent is to be imprisoned.
>
> (2) If a respondent is imprisoned for a term, the court may order the respondent's discharge from prison before the end of the term."

Consideration

[65] The power to make rules for "contempt of court and proceedings for failure to comply with an order [of the Court]" is found in s 85 and Schedule 1 to the *Supreme Court of Queensland Act* 1991 (Qld).

[66] The nature of contempt of court and the Court's power to punish for it were discussed as follows by Hayne J in *Re Colina; Ex parte Torney*:[19]

> "… As was said in *Hinch v Attorney-General (Vict) [No 2]*:
>
> > 'Notwithstanding that a contempt may be described as a criminal offence, the proceedings do not attract the criminal jurisdiction of the court to which the application is made. On the contrary, they proceed in the civil jurisdiction and attract the rule that ordinarily applies in that jurisdiction, namely, that costs follow the event.'
>
> The power to punish for contempt is an inherent power of courts charged with 'the function of superintending the administration of justice'. It is a power that is invoked sparingly but in a very wide variety of circumstances. There are, in that sense, many forms of contempt; there is no single 'offence' of the kind that the criminal law knows." (citations omitted)

[67] After discussing the onus of proof, Hayne J said:[20]

> "Further, unlike other offences, proceedings for contempt can be, and often are, instituted by a court of its own motion. No separate prosecuting authority (with a discretion about whether to charge an offence or what offence to charge) intervenes in such a case. (The fact that rules of court often provide, as the Family Law Rules do in this case, that proceedings may be brought by a court officer, like the Marshal, should not obscure that such proceedings are brought at the direction of the court concerned.)
>
> The interposition of a prosecuting authority (whether law officer or director of public prosecutions or the like) and the consequent interposition of the exercise of discretions by that prosecuting authority would deny the cardinal feature of the power to punish for contempt; that it is an exercise of judicial power *by the courts*, to protect the due administration of justice. And that would still be so even if, contrary to the position with other offences, the courts had power to review the exercise of such prosecutorial discretions in a case of contempt. The function that is exercised when a court proceeds against an alleged contemnor is not one to be exercised or controlled by the executive." (citations omitted)

[68] In *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd*,[21] Gibbs CJ, Mason, Wilson and Deane JJ, in considering the rationale underlying the Court's power to punish for contempt, said:

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19 (1999) 200 CLR 386 at 428.

20 *Re Colina; Ex parte Torney* (1999) 200 CLR 386 at 429.

21 (1986) 161 CLR 98 at 106–107.

> "Punishment for contempt serves two functions: (a) enforcement of the process and orders of the court, disobedience to which has been described as 'civil contempt'; and (b) punishment of other acts which impede the administration of justice, such as obstructing proceedings in court while it is sitting or publishing comments on a pending case, which have both been described as 'criminal contempt': Fox, *History of Contempt of Court* (1927), p. 1. As Lord Diplock said in *Attorney-General v. Leveller Magazine Ltd*., criminal contempts '... all share a common characteristic: they involve an interference with the due administration of justice either in a particular case or more generally as a continuing process'.
>
> … The theoretical distinction between the two classes overlooks the underlying rationale of every exercise of the contempt power, namely that it is necessary to uphold and protect the effective administration of justice. Although the primary purpose in committing a defendant who disobeys an injunction is to enforce the injunction for the benefit of the plaintiff, another purpose is to protect the effective administration of justice by demonstrating that the court's orders will be enforced. As the authors of *Borrie and Lowe's Law of Contempt*, 2nd ed. (1983) say, at p. 3:
>
> > 'If a court lacked the means to enforce its orders, if its orders could be disobeyed with impunity, not only would individual litigants suffer, the whole administration of justice would be brought into disrepute.'" (citations omitted)

[69] Later in their reasons, their Honours observed that:[22]

> "There is, accordingly, much to be said for the view that all contempts should be punished as if they are quasi-criminal in character, notwithstanding the adoption of the contrary view by some members of this Court in the decisions to which we have already referred."

[70] Later, in dealing with the distinctive nature of the power to punish for contempt, their Honours said:[23]

> "There are ample precedents where courts have taken strong measures in order to coerce compliance with an order of the court. In the case of an individual contemnor, he may be imprisoned until the contempt is purged. The committal to prison is of a conditional nature, remaining in force until the contempt comes to an end or further order is made. As soon as the contempt is purged, the offender is entitled to release ex debito justitiae: *In re Freston*. In the case of a corporation, its assets may be seized and remain seized until the contempt ceases. Such an order again exhibits a conditional character. There is much to be said for securing to a superior court a wide range of remedies so that it will be better able to meet the

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22 *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 109.

23 *Australasian Meat Industry Employees' Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98 at 114–115.

> exigencies of particular circumstances. In the United States the suspended fine is well known: Miller, *Contempt of Court* (1976), p. 12. In *Doyle v. London Guarantee Co.*, a case of continuing civil contempt, the Supreme Court offered no criticism of a conditional order imposing a fine of $250 if certain books and papers were not produced by a certain date. Again, in *United States v. United Mine Workers of America* the Supreme Court imposed a fine of $2,800,000 conditioned on the failure of the union to comply with a labour injunction within five days. It was considered that such an order would effectively coerce the union into a future compliance with the Court's order. Another example of the flexibility of the orders available to the court may be seen in *Con-Mech (Engineers) Ltd. v. Amalgamated Union of Engineering Workers (Engineering Section)*, where the National Industrial Relations Court ordered sequestration of assets to the value of £100,000, but postponed a final decision on the amount of the fine which would become payable so as to give the union time for further reflection. On continued disobedience, a fine of £75,000 was imposed.
>
> These are considerable powers, resort to which imposes a heavy responsibility upon a court confronted with a determined challenge to its authority. The propriety of their exercise cannot be measured solely by reference to the established procedures attending the prosecution of ordinary breaches of the law. **Contempt of court is a distinctive offence attracting remedies which are sui generis**: *Morris v. Crown Office*. It is required of the chosen remedy that it be effective, no more but no less. For, if it is not effective, serious and lasting damage to the fabric of the law may result." (citations omitted; emphasis added)

[71] It may be seen from the above passages that, in applying its inherent power to punish for contempt, the Court is able to fashion its orders to meet the circumstances involved. An indefinite and conditional sentence of imprisonment may be ordered and fines may be imposed.

[72] Rule 930(2) of the UCPR, on which the applicant's argument strongly relies, is permissive, not mandatory, in terms and facilitative in its purpose. It does not require the Court to make only an order that may be made under the PSA. It is significant that r 930(4) provides for "punishment on conditions" without reference to any of the requirements of the PSA. Rule 931 is also inconsistent with the notion that r 930 implicitly detracts from the inherent jurisdiction and powers of the Court in relation to contempt. Rule 931(2) implicitly acknowledges that a person found guilty of contempt of court may be imprisoned for a term which is not fixed. If the applicant's arguments were to be accepted, r 931(2), although consistent with the common law, would be incompatible with the provisions of the PSA. Under the PSA, contempt of court is not one of the offences for which an indefinite sentence may be imposed.[24]

[73] However, the most significant point to be made by reference to the above discussion of the authorities is that, in the absence of clear and unequivocal language compelling

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24 *Penalties and Sentences Act* 1992 (Qld), s 163.

a contrary conclusion, a statute should not be taken as confining a superior court's inherent powers to punish for contempt.[25] In my view, it would be extraordinary if rules of court which did not refer to the court's inherent jurisdiction or purport to prescribe the only penalties which could be imposed, could be interpreted as confining the court's inherent powers to punish for contempt of Court.

[74] For the above reasons, the provisions of the PSA have no general application to contempt orders.

[75] There are difficulties in the way of the applicant's arguments. For example, it would not be appropriate in the case of an order punishing a person for contempt, particularly a civil contempt, to have the suspended term of imprisonment activated if the person committed "another offence punishable by imprisonment".[26] Where the Court imposes a suspended sentence for contempt, it should fashion the operational period by reference to the conduct or orders in respect of which the penalty is being imposed. Also, particularly in the case of a civil contempt, it would be inappropriate to record a conviction. In *O'Connor v Witness G*,[27] Margaret Wilson J concluded that r 930(2), although increasing the range of penalties which may be imposed, did not have the effect that a contemnor is, for all purposes, an "offender" within the meaning of the PSA. I respectfully agree.

[76] I am unable to accept the applicant's arguments that s 143 and s 144 applied to the subject order and that non-compliance with the statutory requirements rendered the order invalid. The Court had an inherent power to impose a suspended sentence and to frame terms appropriate to the facts found by the primary judge. If, as was the case, a conviction was not recorded and no operational period was stated, the order was not one made pursuant to s 144. The applicant's argument thus lacks merit. In my view, the respondent's contention that r 930(2) of the UCPR is concerned to identify that the forms of punishment of an individual for contempt are the forms of punishment available under the PSA and not to apply the conditions which regulate the making of orders under that Act in circumstances unrelated to the punishment of contempt is correct.

Was the costs order beyond power?

The applicant's arguments

[77] The applicant argued to the following effect. Section 457 of the SPA provides the statutory basis for the awarding of costs by the Planning and Environment Court. Prior to the amendment of s 457 by s 61 of the *Sustainable Planning and Other Legislation Amendment Act (No 2)* 2012 (Qld) (the SPOLA), which commenced on 22 November 2012, the general rule was that each party in a proceeding in the Planning and Environment Court bore its own costs subject to certain exceptions which are not presently relevant. The SPOLA amended the SPA by inserting s 945. It provides:

> **"945 Costs for existing court proceedings**
>
> (1) Former section 457 continues to apply to a proceeding in the court that has been brought before the commencement.

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25 See e.g., *Shergold v Tanner* (2002) 209 CLR 126 at 136.

26 Section 144(5).

27 [2013] QSC 281.

> (2) For subsection (1), a proceeding in the court (the ***originating proceeding***) includes any interlocutory proceeding relating to the originating proceeding that is brought after the commencement."

[78] The subject application is headed "Application in Pending Proceedings". Such proceedings are identified as No 5 of 1995. Consequently, the respondent, as it was entitled to do under r 926(2) of the UCPR, filed its application "in the proceeding in which the contempt was committed" rather than starting a new proceeding. It is pointed out that a proceeding in the Planning and Environment Court is commenced either by filing an originating application or an appeal.[28] Consequently, according to the argument, the respondent did not commence a new proceeding and the former s 457 continues to apply.

Consideration

[79] Section 439(2) of the SPA applies s 129 of the *District Court of Queensland Act* 1967 (Qld) to the Planning and Environment Court, giving a District Court judge the same power to punish for a contempt mentioned in sub-section (1) as a Supreme Court judge would have if the contempt were a contempt of the Supreme Court. By operation of sub-section (3) the failure to comply with an order of the Court is a contempt of Court.

[80] The application filed on 19 September 2013 is a proceeding in its own right. Under the SPA, the following proceedings may be brought in the Planning and Environment Court:

(a) appeals against various decisions under ss 461–480;

(b) a proceeding for a declaration under s 456C;

(c) a proceeding for an enforcement order or interim enforcement order under s 601; and

(d) an application to punish a person for contempt under s 439.

[81] It was held in *Cheney v Spooner*[29] that a "proceeding" for the purposes of s 16 of the *Service and Execution of Process Act* 1901 (Cth) (repealed) is some method permitted by law for moving a court or judicial officer to perform some authorised act.[30] Section 945(2) makes it plain that a "proceeding" within the meaning of the section is not limited to matters commenced by claims, writs and the like. In my view there is no tenable reason why an application for the punishment of a person for contempt of Court would not be a "proceeding in the court" for the purposes of s 457.

[82] For s 457 to apply by operation of s 945, the "proceeding" must be brought before the commencement of s 945 or be an "interlocutory proceeding relating to the originating proceeding that is brought after the commencement".[31] An application to punish for contempt is not an interlocutory proceeding.

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28 *Planning and Environment Court Rules* 2010 (Qld), r 6; *Sustainable Planning Act* 2009 (Qld), s 481.

29 (1929) 41 CLR 532.

30 *Cheney v Spooner* (1929) 41 CLR 532 at 536–537.

31 *Sustainable Planning Act* 2009 (Qld), s 945(2).

[83] The test of whether an order is interlocutory or not is whether it finally disposes of the rights of the parties. It is not "of the essence of an interlocutory order that it is one made in the course of a pending action or suit".[32] As Windeyer J said in *Hall v Nominal Defendant*,[33] it was "never enough to ask simply does the order finally determine the actual application or matter out of which it arises; because, subject to the possibility of an appeal, every order does that, unless it be an order that is expressly declared to be subject to variation".

[84] The subject orders finally disposed of the rights of the parties. Also, when the subject application was filed, application No 5 of 1995 was not extant. It had been disposed of by the orders made on 7 June 1996. Even though the subject application was described on its face as an "application in pending proceeding", it was in fact an originating application. In substance, if not in form, the subject application was a proceeding on its own right which came into existence on filing in the registry. This ground was not made out.

Conclusion

[85] Counsel for the applicant contended that the effect of the primary judge's failure to state an operational period for the suspended sentence was that the sentence, having been suspended, would continue indefinitely unless the applicant was convicted of a criminal offence for which imprisonment may be imposed.[34]

[86] I suspect that the primary judge intended to state an operational period but forgot to do so. However, neither that, nor the wording of paragraph 2 of the primary judge's order, leads to the result suggested by the applicant's counsel. Paragraph 2 states:[35]

> "The [applicant] is sentenced to imprisonment for three months, to be suspended after he has served one month."

[87] The intention could not have been to impose an indefinite operational period. The only reasonable alternative conclusion is that the suspension was to last until the expiry of the three month term of the sentence. However, the order as it stands, does not state, as it should, the circumstances under which it would be activated. It should be corrected to redress this deficiency. Although the primary judge may have intended stating a longer operational period and there would have been good reason for doing so, I do not consider that this Court on appeal should make the sentence more onerous.

[88] I would amend the order at first instance by inserting the following paragraph 2A:

> "If the Planning and Environment Court is satisfied that any of the terms of the order of 11 June 1999 were breached by the Respondent after 3 April 2014 and prior to the expiration of the three months term of the sentence the Planning and Environment Court may order the Respondent to serve the whole or part of the suspended imprisonment."

[89] I would also vary paragraph 3 of such order by deleting "7 April 2014" and inserting in lieu thereof "29 August 2014".

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32 *Hall v Nominal Defendant* (1966) 117 CLR 423 at 439 and 444.
33 (1966) 117 CLR 423 at 444.
34 *Penalties and Sentences Act* 1992 (Qld), s 146.
35 *Rockhampton Regional Council v Dubois* [2014] QPEC 13 at [81].

[90] I would otherwise order that:

1. The application for leave to appeal be allowed.

2. The appeal be dismissed.

3. The applicant pay the respondent's costs of and incidental to the appeal.

[91] **GOTTERSON JA:** I agree with the orders proposed by Muir JA and with the reasons given by his Honour.

[92] **ANN LYONS J:** I agree with the reasons of Muir JA and the orders he proposes.