SUPREME COURT OF QUEENSLAND

CITATION:	*En-Tzu Tseng v Brisbane City Council* [2022] QCA 222
PARTIES:	**EN-TZU TSENG** (applicant) **v** **BRISBANE CITY COUNCIL** (respondent)
FILE NO/S:	CA No 328 of 2021 DC No 3358 of 2019
DIVISION:	Court of Appeal
PROCEEDING:	Application for Leave s 118 DCA (Criminal)
ORIGINATING COURT:	District Court at Brisbane – [2021] QDC 327 (Sheridan DCJ)
DELIVERED ON:	11 November 2022
DELIVERED AT:	Brisbane
HEARING DATE:	14 October 2022
JUDGES:	McMurdo and Dalton JJA and Boddice J
ORDER:	**Application for leave to appeal is dismissed with costs.**
CATCHWORDS:	MAGISTRATES – JURISDICTION – COMMENCEMENT OF PROCEEDINGS – DUPLICITY, AMBIGUITY AND UNCERTAINTY – where pursuant to s 7 of the *Natural Assets Local Law 2003* ("NALL") the applicant was convicted of 62 charges of causing or permitting interference with a protected tree – where the applicant submits that the charges were duplicitous – whether the charges were duplicitous LOCAL GOVERNMENT – LEGAL RELATIONSHIPS AND PROCEEDINGS – PARTICULAR POWERS AND FUNCTIONS – where the Council issued a contravention notice to the applicant under s 35 of the NALL – where the notice required the applicant to remedy the contravention by replacement planting or paying a rehabilitation cost order – whether there was a lack of legislative basis for the calculation of the rehabilitation cost order EVIDENCE – ADMISSIBILITY – GENERAL PRINCIPLES – where, at the hearing before the magistrate, the Council tendered a certificate under s 95 of the *Evidence Act 1977* (Qld) which certified that the vegetation on the applicant's property was protected under the NALL – where the applicant submits that the evidence contained in the certificate was inadmissible – whether the magistrate erred in

relying upon the certificate

EVIDENCE – ADMISSIBILITY – ADMISSIONS – where the applicant voluntarily gave an interview to a Council officer admitting that she permitted the trees to be felled – whether the magistrate erred in relying upon the admissions contained in the interview – whether there was sufficient evidence before the magistrate as to the applicant's responsibility for the felling of the trees

Natural Assets Local Law 2003, s 7, s 35, s 39

Cohen v Macefield P/L & Ors [2010] QCA 95, distinguished

COUNSEL: The applicant appeared on her own behalf
S J Hamlyn-Harris for the respondent

SOLICITORS: The applicant appeared on her own behalf
City Legal Solicitors for the respondent

[1] **McMURDO JA:** I agree with the orders proposed by Dalton JA, and with her Honour's reasons save in one respect, which is that I express no opinion about the matters discussed at paragraph [14] of her judgment.

[2] **DALTON JA:** Ms Tseng seeks leave under s 118 of the *District Court of Queensland Act 1967* (Qld) to appeal from a judgment of the District Court dismissing an appeal under s 222 of the *Justices Act 1886* (Qld) against a decision of a magistrate to convict Ms Tseng of 64 charges against the *Natural Assets Local Law 2003* (NALL).[1]

[3] Ms Tseng bought about 1.5 hectares of land from the Brisbane City Council. She applied to remove trees from the land. That application was necessary because there were native trees on the land and the land was in an area covered by a Council overlay showing significant native vegetation and waterway and wetland vegetation, as those terms are defined in the dictionary Schedule 4 to the NALL. Native trees growing on her land were protected vegetation within the meaning of NALL, see Schedule 3. Section 7(3) of the NALL made it an offence to "interfere with, or cause or permit interference with" a protected tree without the Council's permission.

[4] The applicant knew that she required permission to remove the trees. She had become frustrated because, despite renewing her efforts with the Council, no permission had been granted to her. She therefore engaged someone she refused to name to use a bulldozer or similar machine to uproot and thus kill 62 separate trees. Each of those trees was the subject of a separate charge before the magistrate.

[5] As well, there were two charges before the magistrate of failing to comply with a compliance notice given under the NALL. After the Council discovered the destruction of the trees described above, it issued a compliance notice to the applicant requiring her to take specified action to remedy the contravention it alleged (the destruction of 62 trees) – see s 35(3)(b) of the NALL. By s 35(7) of the

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[1] Subordinate legislation made by the Brisbane City Council under the *City of Brisbane Act 2010* (Qld).

NALL it is provided that a person issued with a compliance notice must comply with it; a penalty applies for not doing so.

[6] The applicant pleaded not guilty to all charges before the magistrate and represented herself at the hearing. The magistrate found her guilty on all 64 charges. She was fined an amount of $35,000 in respect of the destruction of the 62 trees and $5,000 in relation to not complying with the s 35 compliance notices. As well, pursuant to s 39 of the NALL, the magistrate ordered that the applicant undertake the rehabilitation specified in the compliance notices.

[7] Judge Sheridan dismissed an appeal from the magistrate's decision. The applicant appeared for herself before Judge Sheridan. In this Court she applies for leave to appeal against the orders of Judge Sheridan. Again she appeared for herself. There were seven grounds of appeal and I deal with each in turn.

A. Duplicity

[8] The applicant seeks leave to advance the appeal ground that the charges against her in relation to the 62 individual trees were bad for duplicity. The argument was rejected both by the magistrate and by Judge Sheridan. It is not meritorious.

[9] Section 7(3) of the NALL says, "A person must not … interfere with, or cause or permit interference with …" a protected tree. That is, it creates two possible bases for liability: (a) interference with a tree, or (b) causing or permitting interference with a tree. In a case upon which the applicant relies – *Cohen v Macefield Pty Ltd*,[2] this Court found that charges that a person "did damage, or caused to be damaged" protected vegetation were duplicitous. This case is distinct. While each of the charges was in terms of the section – that the applicant "did cause or permit a protected tree to be interfered with" – the particulars of the complaint in each charge said, "The defendant did cause tree [number] to be felled, in that [she] engaged someone to remove the tree on [her] behalf". There was no uncertainty or ambiguity in what was alleged. There was no duplicity in the charges. Leave should not be granted to advance this ground of appeal.

B. Lack of legislative basis for rehabilitation cost order

[10] Section 35(3)(b) allowed the Council to require a person who had contravened the NALL to "take specified action, within a time or times specified in the notice, to remedy the contravention". The contravention notice here required the applicant to plant either 823 native trees and shrubs of tube stock size, or 549 trees or shrubs of 45 litre stock size on the land, with the proviso that trees were planted at spacings of one per $5m^2$, and shrubs at spacings of one per $3m^2$. None of the planting was to be within three metres of the property boundary. These plantings were to be tended by the applicant for five years.

[11] The final numbered paragraph of the compliance notice catered (not unrealistically one might think) for a situation where all the replacement planting could not be accommodated on the subject land. It contemplated that in such a case the Council could issue the applicant with what it called a private works order "to recover the associated financial value for the replacement planting that cannot be

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2 [2010] QCA 95, [31].

accommodated". This paragraph of the compliance order said, "The monetary value contained in the [private works order] is based on Council's OS21 Tree Removal and Replacement Procedure and amounts to $143,282.00".

[12] The applicant submits:

> "[15] *Brisbane City Council's 0S21 Tree Removal and Replacement Procedures* did not have legislative basis in Australia for it was not legislated by the Parliament of Queensland, and also not legislated in the *Natural Asset Local Law 2003*.
>
> [16] No statutory law supports the cost calculation of the vegetation rehabilitation order to be based on *Brisbane City Council's 0S21 Tree Removal and Replacement Procedures*."

[13] The Council had power under s 35(3)(b) to require the applicant to remedy the contravention. They did so by issue of a compliance notice – s 35(1). Before the magistrate a Council officer gave evidence as to how he had used OS21 to calculate the number of trees which he considered should be planted in order to remedy the contravention. He also gave evidence that the monetary amount placed on the private works order was calculated according to a Council policy.

[14] There may perhaps have been room for the applicant to challenge the contravention notice on administrative law grounds. The number of trees required to be replanted seems extraordinarily high given the area of the applicant's land; such a dense planting may have rendered the land unusable. OS21 does not expressly deal with calculation of replanting when there has been a contravention. More broadly it, and the calculation of the monetary amount, appear to be Council policies which were arguably applied by Council without any consideration as to whether or not they produced a rational or just outcome in the circumstances of the applicant's contravention and land. However, the applicant never advanced an administrative law challenge to the contravention notice, and there was no material before this Court which allows us to do more than speculate about these matters.

[15] As a matter of law, the Council had a right to make a contravention order and did so. The applicant did not have it set aside, and did not comply with it. The offence which was before the magistrate was failing to comply with the order, and with a second order in the same terms, but allowing the applicant a longer time for compliance. It was that offence of which the applicant was convicted. An exploration of the type of matters considered at [14] above could not assist her in appealing that conviction. Leave should not be granted so as to allow the applicant to advance this ground on appeal.

C. Inadmissibility of Council overlays

[16] The scheme of the NALL is to define vegetation which will be the subject of protection under the local law. It is possible that a specific protection order is made in respect of a specific tree, or area of vegetation. However, more general protections are in place. The term protected vegetation is defined as meaning (relevantly) "any or all of the following as set out in Column 2 of the Table in Schedule 3 … (b) significant native vegetation; … (d) waterway and wetland vegetation …".

[17] The NALL defines the term significant native vegetation as "native vegetation with characteristics predominantly reflecting or promoting the objects stated in section 2(1)(a) and (b)" and, relevantly here, growing "in an area designated the SNV layer on Council's geographic information system as amended from time to time". Similarly, the term waterway and wetland vegetation "means vegetation with characteristics predominantly reflecting or promoting the objects stated in section 2(1)(a) and (b)" and, relevantly here, growing "in an area designated as a waterway corridor or wetland layer on Council's geographic information system as amended from time to time".

[18] Section 7(1) and (2) of the NALL deal with trees growing on land owned by the Council. Section 7(3) then provides:

> "(3) A person must not, unless strictly in accordance with a permit issued by Council, interfere with, or cause or permit interference with –
>
> (a) any other protected tree;
>
> Maximum penalty where the replacement value of the tree, or the cost of rectifying any damage, is $4000.00 or less – 50 penalty units.
>
> Otherwise –
>
> Maximum penalty where the offender is an individual – 500 penalty units.
>
> Maximum penalty where the offender is a corporation – 850 penalty units.
>
> (b) any protected vegetation other than trees.
>
> Maximum penalty where the cost of rectifying any damage is $4000.00 or less – 50 penalty units.
>
> Otherwise –
>
> Maximum penalty where the offender is an individual – 500 penalty units.
>
> Maximum penalty where the offender is a corporation – 850 penalty units."

[19] There is no definition of the term protected tree, but in the scheme set out above it appears reasonably clear that a protected tree is a tree which falls within the definition of protected vegetation discussed above.

[20] To make its case against the applicant, Council needed to prove that the trees felled by her were within either its overlay for significant native vegetation, or its overlay for waterway and wetland vegetation. It did this by tendering a certificate pursuant to s 95 of the *Evidence Act 1977* (Qld). The person making the certificate certified that the significant native vegetation and the waterway and wetland vegetation overlays applied to the applicant's property.

[21] The effect of s 95(1) is that the certificate was admissible as evidence of those facts. Section 95(6) provides that if a party to a proceeding intends to challenge a matter stated in the certificate they must give written notice at least three business days before the hearing. The applicant did not challenge the certificate. The magistrate was therefore right to rely upon it and it is irrelevant that the maker of the certificate did not attend the hearing, or that there had been no audit of the areas said to be subject to the relevant overlays, or the applicant's land.

[22] The other point agitated by the applicant was that the overlays were created in 2014 and 2016 and there was no evidence that her property was inspected either at the time the overlays were created or at the time of her prosecution for a "variance analysis". This mistakes the statutory purpose of the overlays. For the Council to prove its case it was sufficient that the applicant's land lay within either or both of the relevant overlays. There is no merit in this point.

D. Identification, and value of, trees destroyed

[23] This point is closely related to that dealt with at B above. The applicant challenges the evidence of a Council witness who measured the diameter of the fallen trees as not being sufficiently scientific. In my view, the evidence of the Council officer, together with photographs he took, provided a sound evidentiary basis upon which the magistrate was correct to act.

[24] The diameter of the trees felled was relevant to the Council officer's calculation of the destroyed area of canopy. The calculation of canopy area in turn fed into his calculation of what was necessary to rehabilitate the area, according to the criteria in OS21. The applicant submitted that there was no legislative basis for this policy or its application. The comments I have made at section B above apply equally here.

[25] There is no merit in this proposed ground of appeal.

E. Insufficient evidence to connect the applicant to the offending

[26] The applicant voluntarily gave an interview to a Council officer who attended the property after the trees had been felled. In this interview the applicant admitted having a friend (who she would not name) fell the trees. She wishes to appeal on the ground that the magistrate should not have acted on this admission because it was not on oath; because she did not have a lawyer with her at the time she made it, and because the Council officer did not warn her about the legal consequences of making what she calls "unprofessional comments" on the felled vegetation. She also wishes to argue on appeal that during the interview comments she made were at cross-purposes to questions asked by the Council officer.

[27] Variations of this argument were made to the magistrate, and to Judge Sheridan. Both rejected them. The magistrate saw and heard the witnesses and listened to the tape-recorded admission which the Council relied upon as containing admissions. The magistrate thought that admissions were clearly made on interview, and looking at the parts of the interview which have been relied upon below, I think that is clear. I also think it is clear that the interview was given voluntarily after the applicant was warned of her right to silence and told that any information which she provided might be used as evidence in court. The magistrate was right to rely upon the

admissions made, and Judge Sheridan was right to reject the appeal before her on this ground.

[28] Lastly as to this point, the applicant says (as is the case) that during the interview she and the Council officer did not walk around the entire property and discuss every felled tree. She was not asked, in relation to every felled tree, whether or not she was responsible for its destruction. The Council officer's evidence was that he attended the property soon after the felling of the trees and he explained how he identified those which were the subject of charges. In my view there was sufficient evidence before the magistrate as to the applicant's responsibility for all 62 fellings. The Council officer was professionally qualified, which qualifications no doubt assisted him in this task.

[29] There is no merit in these points.

F. Statements in permits

[30] The applicant relies upon the fact that her permit applications to remove trees were prepared by her alone without any professional assistance. The submission seems to be directed at the fact that the information she put in these applications should not be used as some sort of admission that there were native trees on her land. She links this to arguments advanced in support of ground C above, that Council had not inspected her land and concluded that it did contain native vegetation before including her land in the areas covered by the overlays.

[31] These matters are beside the point. Council relied upon the evidence of its officers in identifying native trees felled after the event. There is no merit in the point and no reason for it to be advanced on an appeal.

G. Mango trees

[32] In her tape-recorded interview with Council officers the applicant explained that she wished to clear vegetation on the land so that she could plant mango trees for commercial purposes. She submits that, at the hearing before the magistrate, there was no proof of her growing mango trees on the land. Again the point could not advantage the applicant on an appeal as it was irrelevant to the evidence relied upon by the Council to prove its case before the magistrate, and irrelevant to the magistrate's reasons.

[33] Because none of the proposed grounds of appeal are meritorious, I would dismiss the application for leave to appeal with costs.

[34] **BODDICE J:** Subject to expressing no opinion in respect of the matters raised in paragraph [14] of the judgment of Dalton JA, I agree, for the reasons otherwise expressed by Dalton JA, there is no merit in any of the proposed grounds of appeal.

[35] Accordingly, I agree the application for leave to appeal be dismissed with costs.