DISTRICT COURT OF QUEENSLAND

CITATION:	*Ferguson v Wienert* [2019] QDC 1
PARTIES:	**Bruce James Ferguson** (Appellant) **v** **Graham Wienert** (Respondent)
FILE NO:	10 of 2018
DIVISION:	Appellate
PROCEEDING:	Appeal
ORIGINATING COURT:	Magistrates Court, Mareeba
DELIVERED ON:	17 January 2019
DELIVERED AT:	Cairns
HEARING DATE:	15 August 2018
JUDGE:	Fantin DCJ
ORDER:	**1. Application for extension of time to appeal against conviction granted.** **2. Appeal against conviction allowed.** **3. Conviction set aside and verdict of not guilty entered.** **4. No order as to costs.**
CATCHWORDS:	APPEAL – APPEAL AGAINST CONVICTION – LOCAL LAW – application to extend time for filing an appeal – appeal pursuant to s 222 of the *Justices Act 1886 (Qld)* – where the appellant was convicted of an offence contrary to s 14(3) of the *Tablelands Regional Council Local Law No. 2 (Animal Management)* 2011 for failing to ensure his cattle were not wandering at large – whether the appellant established a defence under s 14(4)(a) of the Local Law that he maintained a proper enclosure for his cattle and could not, by the exercise of reasonable diligence, have prevented their escape – whether the exercise of reasonable diligence extended to preventing the ingress of rogue beasts **Legislation** *Justices Act 1886* (Qld) ss 222, 223, 224

Local Government (De-amalgamation Implementation) Regulation 2013 reg 45
Tablelands Regional Council Local Law No. 2 (Animal Management) 2011 ss 2, 8, 14, Schedule Dictionary s 3
Tablelands Regional Council Subordinate Local Law No. 2 (Animal Management) 2011 ss 4, 12, 18, schedule 7

Cases
Allesch v Maunz (2000) 203 CLR 172
Carey v Commissioner for Consumer Protection [2013] WASCA 195
Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194
Commissioner of Police v Al Shakarji [2013] QCA 319
Fox v Percy (2003) 214 CLR 118
Hutton v RLX Operating Company Pty Ltd & Ors [2016] QSC 248
McDonald v Queensland Police [2018] 2 Qd R 612
Morris v R (1987) 163 CLR 454
R v DAQ [2008] QCA 75
R v Tait [1999] 2 Qd R 667
Robinson Helicopter Company Inc v McDermott (2016) 90 ALJR 679
Rowe v Kemper [2008] QCA 175; [2009] 1 Qd R 247
Searle v Wallbank [1947] AC 341
Shambayati v Commissioner of Police [2013] QCA 57
Smith v Williams & Ors [2006] QCA 439
State Government Insurance Commission v Trigwell (1979) 142 CLR 617
Walker v Davlyn Homes Pty Ltd [2003] QCA 565
Whitehorn v The Queen (1983) 152 CLR 657

COUNSEL:	J Sheridan for the Appellant M Dalton for the Respondent
SOLICITORS:	McDermid Law for the Appellant Preston Law for the Respondent

[1] The appellant is a 68 year old man living on rural acreage near Koah. He owned two docile Friesian cross cows, which he kept in a paddock with a molasses trough. One night, feral cattle broke through the fence and entered the paddock. When he approached them, they escaped through the broken fence and his cows followed. One of his cows wandered onto the Kennedy Highway, where it was hit by a car and killed.

[2] Mareeba Shire Council, through its proper officer, prosecuted the appellant for failing to ensure that his cattle were not wandering at large, contrary to s 14(3) of *Tablelands Regional Council Local Law No. 2 (Animal Management)* 2011 ("the Local Law").

[3] Following a summary trial in the Mareeba Magistrates Court, the appellant was convicted, fined $500 and ordered to pay costs of $2,342.90. No conviction was recorded.

[4] The appellant appeals against the conviction. There was no dispute that the appellant owned the cattle or that they were wandering at large. The issue was whether he had established a defence under s 14(4)(a) of the Local Law that he maintained a proper enclosure for the animals and could not, by the exercise of reasonable diligence, have prevented their escape.

[5] This raises the question, was the appellant required to maintain a fence that not only kept his two cows in, but also kept rogue beasts out?

Application for extension of time to appeal

[6] The appeal is pursuant to s 222 of the *Justices Act* 1886 (Qld). It was filed approximately six weeks out of time.[1] The applicant/appellant seeks an extension of time within which to appeal. The court has power to extend the time for filing a notice of appeal: s 224(1)(a).

[7] In considering whether to exercise its discretion to extend time, the court must consider whether there is good reason for the applicant having delayed in filing the notice of appeal, and whether it would be in the interests of justice to grant the extension of time sought.[2] The appeal's prospects of success are relevant to the second consideration. Other relevant factors may include prejudice to the respondent and the length of the delay.[3]

[8] An applicant for an extension of time who has failed to observe statutory time limits because of ignorance or inadvertence or even incompetence, and who is obliged, because of a short period of unintentional delay, to seek an extension of time to start an appeal, can expect to be given the benefit of an extension where there is even an arguable case that an appeal may succeed.[4]

Delay

[9] The delay of approximately six weeks included the Christmas holiday period. In those circumstances, it is not particularly lengthy.

[10] The respondent submits that there is insufficient material before the court to properly assess the explanation for the delay.[5] I do not accept that submission.

[11] The Notice of Application for extension of time states that the applicant did not receive advice to appeal until after the expiration of the appeal period.

[12] The applicant's solicitor provided an affidavit explaining that the delay was attributable to him and not to any default by the applicant personally.

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[1] The appeal was required to be filed by 10 December 2017. It was filed on 23 January 2018.
[2] R v Tait [1999] 2 Qd R 667 at 668; [1998] QCA 304
[3] Ibid.
[4] R v DAQ [2008] QCA 75 at [10]
[5] Extension of Time Submissions for the Respondent [8]-[11]

[13] The Acting Magistrate delivered his decision on 10 November 2017. The applicant's solicitor mentioned "casually" to the applicant the prospect of appealing but did not give the applicant any advice about the appeal process or timeframe.[6] The solicitor then travelled overseas from 17 to 26 November 2017.[7] Upon his return, he was seriously ill and not fit to practise.[8] The applicant attempted to contact his solicitor and left messages on his voicemail about an appeal.[9] The solicitor accessed his messages on 11 December 2017. The next day he emailed counsel, who provided a draft Notice of Appeal and Notice of Application for extension of time, which required further instructions.[10] The solicitor did not settle the draft documents before Christmas. In early January the solicitor was hospitalised for two weeks. He was discharged on 19 January 2018.[11] He immediately settled the draft documents and filed them on 23 January 2018.

[14] The affidavit of the applicant's solicitor provides an adequate explanation for the delay. The applicant should not be penalised for the conduct, or illness, of his solicitor.

[15] I now turn to consider whether it is in the interests of justice to grant the extension of time, which turns upon the viability of the appeal.

Interests of justice

[16] The Notice of Appeal relies upon two grounds of appeal: that the Magistrate erred in his construction of s 14(3) of the Local Law, and that the decision made was not supported by the facts.

[17] For the reasons explained below, I have formed the view that the Magistrate erred in his construction of s 14(4)(a) of the Local Law. Therefore the appeal has merit.

Conclusion

[18] There is an adequate explanation for the delay in filing the appeal. There is an arguable case that the appeal will succeed. The respondent does not point to any prejudice. The application for an extension of time should be granted.

Nature of the appeal

[19] The appeal is by way of rehearing on the record, since neither side sought to adduce new evidence: s 223.

[20] It is necessary for this court to conduct a real review of the evidence before it, and make up its own mind about the case, respecting the advantage that the Magistrate had in seeing and hearing the witnesses give evidence, and in being conscious of the atmosphere of the trial generally.[12]

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[6] Affidavit Stewart Cameron McDermid [7]
[7] Ibid [8]
[8] Ibid [10]
[9] Ibid [13]-[15]
[10] Ibid [16]-[18]
[11] Ibid [21]
[12] Fox v Percy (2003) 214 CLR 118 at [22] – [25]; Rowe v Kemper [2008] QCA 175; [2009] 1 Qd R 247 at [3] – [5]; Commissioner of Police v Al Shakarji [2013] QCA 319 at [7]; Robinson Helicopter Company Inc v McDermott (2016) 90 ALJR 679 at [43], [57]; McDonald v Queensland Police Service [2017] QCA 255; [2018] 2 Qd R 612 at [47].

[21] The onus is on the appellant to show that there was some error in the decision.[13]

[22] A verdict may be disturbed if the appellant shows that the Magistrate acting reasonably ought to have had a sufficient doubt to entitle the appellant to an acquittal.[14] This necessitates my independent examination of the evidence, including credit of witnesses subject to what I said above, and to make my own assessment of both the sufficiency and quality of the evidence.[15]

The statutory framework

[23] The Local Law was made pursuant to the *Local Government Act* 2009 (Qld) by the Tablelands Regional Council in 2011. Subsequent de-amalgamation of the local governments re-established the Mareeba Shire Council. No party raised any issue about the application of the Local Law to the offence in question.[16] I proceed on the basis that the Local Law applied to the offence.

[24] The purpose of the Local Law is to regulate and manage the keeping and control of animals in the local government's area: section 2(1).

[25] That purpose is to be achieved by providing for, relevantly, the prescription of minimum standards for keeping animals (section 2(1)(b)) and the proper control of animals in public places (section 2(1)(c)).

[26] The local government may, by subordinate local law, specify minimum standards for the keeping of animals or a particular species or breed of animal: section 8.

[27] The appellant was convicted of an offence against s 14(3) of the Local Law, contained in *Part 3 Control of Animals, Division 2 Restraint of Animals*. The section states, relevantly:

"14 Duty to provide proper enclosure and prevent animal from wandering

(1) A person who keeps an animal must maintain a proper enclosure to prevent the animal from wandering or escaping from the person's land.[13]

Maximum penalty for subsection (1)— 20 penalty units.

(2) The local government may, by subordinate local law, prescribe requirements for a proper enclosure for an animal or species or breed of animal.

(3) The owner of the animal must ensure that it is not wandering at large.

Maximum penalty for subsection (3)— 20 penalty units.

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[13] Allesch v Maunz (2000) 203 CLR 172 at [23]; Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission (2000) 203 CLR 194 at [16]; Walker v Davlyn Homes Pty Ltd [2003] QCA 565 at [9]; Shambayati v Commissioner of Police [2013] QCA 57 at [23]

[14] Whitehorn v The Queen (1983) 152 CLR 657, 687.

[15] Morris v R (1987) 163 CLR 454, 463-4, 466, 473, 477-9

[16] The Appeal Submissions for the Respondent [10] footnote 7: pursuant to regulation 45 of the Local Government (De-amalgamation Implementation) Regulation 2013 the Tablelands Local Laws are taken to be the local laws of the Mareeba Shire Council from the changeover day, which was 1 January 2014 (see s 5).

(4) It is a defence to a prosecution for an offence against subsection (3) for the defendant to prove that—

(a) the defendant maintained a proper enclosure for the animal and could not, by the exercise of reasonable diligence, have prevented the escape of the animal; or

(b) the animal was wandering at large in circumstances authorised by the conditions of an approval granted under a local law.' [emphasis added]

[28] The parties accepted that the defendant/appellant bore the onus, on the balance of probabilities, of proving a defence under s 14(4)(a).

[29] In the Schedule Dictionary, section 3, the following terms were defined:

animal includes a mammal … but does not include an animal of a species excluded by subordinate local law from the application of this local law.

owner, of an animal, means

(a) its registered owner;

(b) a person who owns the animal, in the sense of it being the person's personal property;

(c) a person who usually keeps the animal, including through an agent, employee or anyone else;

…

wandering at large means:

(a) the animal is not under the effective control of someone; and

(b) the animal is in either—

(i) a public place; or

(ii) a private place without the consent of the occupier.

[30] A ***proper enclosure*** for the purposes of the defence under section 14(4)(a) must be read in the context of the section as a whole, including section 14(2), which permits the council by subordinate local law to prescribe the requirements for a proper enclosure.

[31] The requirements for a ***proper enclosure*** are prescribed in the *Tablelands Regional Council Subordinate Local Law No. 2 (Animal Management)* 2011 ("the Subordinate Local Law"), section 12 of which states:

"For section 14(2) of the authorising local law, column 2 of schedule 7 sets out the requirements for proper enclosures for an animal of the species or breed mentioned in column 1 of schedule 7."

[32] Schedule 7 states:

Schedule 7 Requirements for proper enclosures for animals

Section 12

Column 1 Species or breed of animal	Column 2 Requirements for proper enclosures
All Animals	1 The size of area to be suitably fenced is to be appropriate to the species and breed of the animal to be enclosed, so as to effectively enclose the animal within the property at all times. 2 ***Suitably fenced*** means a fence which is constructed of strong and firm materials and designed in such a way as to prevent the animal from attacking a person or escaping over, under or through the fence. 3 In any case, a part of a building or structure that does not have openings through which an animal can escape may form part of the enclosure in lieu of fencing. 4 The enclosed area must contain adequate shelter. 5 Where gates form part of the enclosure, they must be kept closed and latched except when in actual immediate use.

[33] For the purposes of the definition of ***animal*** in the schedule to the Local Law, animals other than birds, cats, dogs and stock are excluded from the application of the Local Law: s 18 Subordinate Local Law. ***Stock*** is defined to include cattle: section 4(2) Subordinate Local Law.

[34] Therefore, the prosecution was required to prove beyond reasonable doubt the following relevant elements of the offence under s 14(3):

1. The animal was not an excluded animal;

2. The appellant owned the animal;

3. The animal was wandering at large, that is:

    (a) it was not under the effective control of someone; and

    (b) the animal was in a public place.

[35] These matters were not in issue at the trial. The appellant conceded each of them in evidence.

[36] To establish a defence under s 14(4)(a), the appellant had to prove, on the balance of probabilities, that he maintained a proper enclosure for the animal *and* could not, by the exercise of reasonable diligence, have prevented the escape of the animal.

[37] In considering whether he maintained a proper enclosure, the court would take into account:

1. Whether the size of the area to be suitably fenced was appropriate for the species and breed of animal to be enclosed, so as to effectively enclose it within the property at all times;

2. Whether the fence was constructed of strong and firm materials and designed in such a way as to prevent the animal from escaping over, under or through the fence; and

3. Where gates forming part of the enclosure were kept closed and latched except when in actual immediate use.

Evidence at trial

[38] At the trial on 31 August 2017 the prosecution called two witnesses: Graham Wienert and Robert D'Addona. Both gave evidence in chief and were cross examined. The appellant elected to give evidence and was cross examined.

[39] The evidence is summarised below.

Graham Wienert

[40] Mr Wienert was a Local Laws Officer for the council with responsibility for animal control.

[41] At about 9:30pm on 12 May 2016 he received a call advising that a cow had been hit by a car near Koah Road. He went to the scene but could not see any emergency services. He placed signs out advising people that cattle were on the road.[17] At about 10:45am the next day he returned and patrolled the area looking for stray cattle. He located a dead cow just off the road. Photographs of the cow were tendered. Mr Wienert saw a utility in a driveway about 100 metres away. He entered the driveway and spoke to a man, who identified himself as the appellant. The appellant told Mr Wienert that stray cows had come into his paddock and taken his cow with them and that the cow that was hit by the car was his.[18]

[42] About six weeks later, on 1 July 2016, Mr Wienert and another council officer, Mr D'Addona, went to the appellant's property to do "an enclosure inspection". He gave evidence about the location of the dead cow and the property from an aerial photograph printed from council's mapping system. He inspected the appellant's cattle enclosure with Mr D'Addona and the appellant.

[43] He gave evidence that there was a three or four strand barbed wire fence running parallel to the Kennedy Highway, in a westerly direction. He said that the fence was "adequate", and the posts were "satisfactory".[19] He inspected the section of the fence line running in a southerly direction and said that area "didn't appear to be maintained. There was vegetation growing up along the fence and in the fence, and several branches laying over the fence and the wire was rusted".[20] He said the section of the fence running in a south easterly direction was rusted and "trees or scrub were growing up in between the fence – or along the fence".[21] He said that in the enclosure

[17] TS of Hearing 31 August 2017; 1-6 lines 5 – 22.
[18] TS of Hearing 31 August 2017; 1-7 lines 15 – 35.
[19] TS of Hearing 31 August 2017; 1-11 lines 30 – 44.
[20] TS of Hearing 31 August 2017; 1-12 lines 15-19.
[21] TS of Hearing 31 August 2017; 1-13 lines 45 – 47, 1-14 lines 1-7.

the appellant pointed out a repair in the fence and told him that was where the stray cattle had pushed through and broken the fence.[22] He saw that the fence had been repaired and that there was a molasses feed trough in the corner.[23]

[44] In cross-examination, Mr Wienert conceded that at the time of the inspection he did not take any notes or photographs of the fences nor any audio recordings of any conversations.[24] He prepared an affidavit several months after the inspection which was based on his best recollection.[25] He was shown a cadastral map on which it was said the appellant had marked in red the actual enclosure in which the two cattle were kept. He could not comment on that area.[26]

[45] He could not remember specific details of the fencing material. He was shown two designs of barbed wire – high tensile and bull wire. Samples of both were tendered at the hearing. He accepted that the barbed wire fence was not rusted through and was still structurally intact.[27] He was shown a series of photographs of a section of fence line at the appellant's property, which were also tendered. He accepted they showed a four strand, barbed wire fence with spreaders in between the posts or star pickets, to keep the fence taut and tight.[28] He was shown a photo of the repaired area of the fence that the appellant had pointed out to him, which showed two large posts and a four strand barbed wire fence with star pickets.[29] He could not recall whether there was a chain and lock on the gate at the time of his inspection but accepted that it was possible. He accepted that the section of fence he had described in his evidence in chief as falling down or dilapidated was in fact inside the boundary fence and was not actually in use because the appellant was using the separate boundary fence to enclose the cattle.[30]

[46] In re-examination, Mr Wienert said that not all sections of the fence were in the same condition as that running parallel to the highway.[31]

Robert D'Addona

[47] Mr D'Addona, an Environmental Health Officer employed by council, went with Mr Wienert to the appellant's property on 1 July 2016 to inspect the fencing. He said the appellant told them that other cattle had taken his cattle out of his enclosure or his property.[32]

[48] Describing the section of fencing parallel to the highway, he said it "was rusted, there was star pickets as well as hardwood timber posts. Some were not in line with each other, so some were bent over. Some were wavy. This particular fence line did have four strands of rusted barbed wire on it … we also noticed trees that had fallen upon the top of the fence line in two locations."[33] Of the section running southerly, he said

[22] TS of Hearing 31 August 2017; 1-14 lines 5-10.
[23] TS of Hearing 31 August 2017; 1-14 lines 5-10.
[24] TS of Hearing 31 August 2017; 1-14 lines 5-10.
[25] TS of Hearing 31 August 2017; 1-17 lines 1-17
[26] TS of Hearing 31 August 2017; 1-17 lines 40-45
[27] TS of Hearing 31 August 2017; 1-19 and 1-20
[28] TS of Hearing 31 August 2017; 1-23
[29] TS of Hearing 31 August 2017; 1-23 – 1-24
[30] TS of Hearing 31 August 2017; 1-26
[31] TS of Hearing 31 August 2017; 1-30
[32] TS of Hearing 31 August 2017; 1-32
[33] TS of Hearing 31 August 2017; 1-34

the fence was "quite loose" in areas.[34] He inspected the area where the appellant indicated that the "rogue cattle" had broken into his property.[35] He said it appeared deteriorated and some strands were missing. In some parts of the fence, the posts were bent, and the wire was loose and rusty.[36] He said there was evidence of some repair being done. After the inspection he drafted an email to his supervisor with his observations.

[49] In cross-examination, Mr D'Addona agreed that he had provided a statement in April or May 2017 about what he saw on 1 July 2016, (noting the event in question occurred in May 2016). He did not take any notes or photographs at the time of the inspection but made some notes upon return to the office.[37] He did not agree with the suggestion that it was a four-wire fence, saying he could only recall three wires in some areas. He accepted there was a four strand fence parallel to the highway and in other locations, but did not agree that that was representative of the fence line.[38] He was challenged about the accurateness of his memory of the state of the fence. He accepted that in about 1.5 kilometres of fence line, he had seen only two branches on the fence that caused sagging of the wire by about 30 centimetres.[39] When shown the photograph of the enclosure with the gate he said he could not recall whether it was locked. He said he did not know the exact type of fencing used, could not recall the exact type of wire used on the fence and did not conduct any investigation on it to see if it was rusted through.[40] He accepted that the fence included spreaders between the strands and that the use of spreaders was a symbol of good fence construction.[41] He did not see any electric fence.

Appellant

[50] The appellant gave evidence that he had lived at the property for 32 years, that it was 160 acres in size but that the relevant lot was 18 acres. He said that he had always owned cattle, he had erected fences for cattle and maintained them and had never had any trouble. He said the enclosure in question was adequate. He had marked in red on an aerial map the enclosure where he kept stock. He said that on the relevant date he had only two Friesian cross cattle. When asked to describe their temperament, he said they were "big sooks" and "pets" who would eat out of a bucket of molasses. He described them as "very docile".[42]

[51] He described in detail how the fence was constructed and its materials. The fence that ran parallel to the highway was constructed of four strand barbed wire with a star picket every five metres and a wooden, concrete or steel stiffener every 24 metres.[43]

[52] He said that the cattle had never escaped from the property before. He became aware that "something had happened" after receiving a telephone call from his neighbour around 5:30pm on 12 May 2016. His neighbour said there was cattle on the road. When he went to investigate he saw four cattle in his paddock. He approached them

[34] TS of Hearing 31 August 2017; 1-35
[35] TS of Hearing 31 August 2017; 1-35
[36] TS of Hearing 31 August 2017; 1-35, 1-36, 1-37.
[37] TS of Hearing 31 August 2017; 1-42
[38] TS of Hearing 31 August 2017; 1-44
[39] TS of Hearing 31 August 2017; 1-47
[40] TS of Hearing 31 August 2017; 1-48 – 1-49
[41] TS of Hearing 31 August 2017; 1-30
[42] TS of Hearing 31 August 2017; 1-55 lines 1 – 37.
[43] TS of Hearing 31 August 2017; 1-56

and they ran through the wire fencing and damaged it. He said he had fed his cattle an hour before and at that time the fence was "all right". He said stray cattle had never broken down his fence before, but had "been in and out of the paddock … quite often".[44] When asked why stray cattle would be inside the fence line, he responded: "chasing molasses". He went looking for his cattle but needed to return to the shed to retrieve a key to open the locked gate. When he continued looking, one cow had been killed on the road.

[53] He agreed that two departmental officers attended the property in July 2016 and conducted an inspection. He said that at the time of the incident in May 2016, he had adequate fencing to contain the cattle.

[54] In cross-examination, he accepted that his cow had been on the highway and had been hit by a car. He clarified that stray cows had never before broken into the paddock where the cows were kept, although they had come onto other parts of his property which adjoined State Forest.[45] He was cross examined about the age of the fence around the enclosure where the cows were kept. He said some of it was 10 years old, and some was probably 20 or 25 years old. A photograph tendered showed the enclosure with a wire gate and a tractor tyre used for molasses feed.

[55] In cross-examination the appellant accepted that regrowth of vegetation occurred and that trees along the fence line could result in branches falling on the fence. He disagreed that branches being on the fence created a risk of his cows escaping but accepted that it could create a risk of something coming in, including rogue cattle. He rejected the suggestion that in July 2016 parts of his fence were more rundown than appeared in the photographs in exhibit 6.[46]

[56] He said that on the night of 12 May 2016 when he came out to the enclosure, he saw wild cattle eating the molasses.[47] The molasses was in the spot where the gate was knocked down.[48] He said part of the area in which the cattle were kept had an electric fence on the right hand side and it prevented his cows exiting.

[57] He rejected the suggestion that the photographs tendered showed the best parts of his fencing, and said that apart from a bit of regrowth in a couple of places, the fencing was "pretty well" the same, right around the property boundary.[49] He rejected the suggestion that parts of his fence line on the property had loose wires and branches resting on the wires and that about 50 metres from the gate to the enclosure there were top wires broken.[50]

[58] It was suggested to the appellant that he was not maintaining his fences frequently due to his age. He accepted it was becoming more difficult to do so but said that he definitely did maintain the fences.[51]

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[44] TS of Hearing 31 August 2017; 1-65 lines 4 – 9.
[45] TS of Hearing 31 August 2017; 1-69
[46] TS of Hearing 31 August 2017; 1-75
[47] TS of Hearing 31 August 2017; 1-76
[48] TS of Hearing 31 August 2017; 1-76
[49] TS of Hearing 31 August 2017; 1-84
[50] TS of Hearing 31 August 2017; 1-87
[51] TS of Hearing 31 August 2017; 1-85

[59] He accepted that he knew that stray cattle were likely to go to the area where the feed was.[52] However they had never broken through the fence before.

Submissions made to the Acting Magistrate

[60] Both parties made detailed closing addresses.

[61] The defendant/appellant's counsel submitted that the prosecution had failed to adduce any evidence of what was required to constitute a proper enclosure for cattle[53] and that the prosecution was required to prove how the cattle escaped and wandered from the land.[54]

[62] Those submissions were misconceived. The defendant was not prosecuted under s 14(1) for failing to maintain a proper enclosure. He was prosecuted under s 14(3) for failing to ensure his animal was not wandering at large. The elements of that offence were that the animal was not an excluded animal, that the appellant owned the animal and that the animal was wandering at large (as defined). Those facts were not in issue at trial because the defendant/appellant conceded them. It was for the *defendant* to prove, on the balance of probabilities, that he maintained a proper enclosure for his cows, as he sought to raise a defence under s 14(4)(a).

[63] Defence counsel may have been led to make these submissions because the prosecution had provided particulars that included (incorrectly) the assertion that the defendant failed to maintain a proper enclosure when this was not an element of the offence.[55] That was repeated in the Respondent's written submissions on appeal, which referred to the duty to maintain a proper enclosure in section 14(1).[56] Section 14(1) was not in issue in the case.

[64] Prosecution counsel correctly identified the relevant elements of the offence to be proved by the prosecution and the elements of the defence to be proved by the defendant/appellant.[57] He accepted that it was open to infer that the fence had been knocked over by the feral cattle entering the enclosure. He submitted that the requirements of a proper enclosure in schedule 7 of the Subordinate Local Law extended to keeping feral beasts out. For reasons explained below, I do not accept that construction.

Acting Magistrate's decision

[65] The Magistrate delivered his decision on 10 November 2017. He gave detailed reasons comprising 11 pages. He initially listed the elements of the offence in a way which was not entirely correct,[58] but nothing turns upon that. He correctly identified the offence provision and the defence. He summarised the evidence of each of the witnesses, including their accounts of the inspection on 1 July 2016. He described each exhibit in detail.

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[52] TS of Hearing 31 August 2017; 1-87-1-88
[53] TS of Hearing 31 August 2017; 1-88 and 1-90
[54] TS of Hearing 31 August 2017; 1-89
[55] Applicant's Outline of Submissions [8]; TS of Hearing 31 August 2017; 1-89 and TS of Decision 10 November 2017 p 2
[56] Appeal Submissions for the Respondent [12]
[57] TS of Hearing 31 August 2017; 1-93 – 1-94
[58] TS of Decision 10 November 2017 p 2

[66] Twice, when discussing the offence, the Acting Magistrate said that the Local Law imposed a duty to provide a proper enclosure.[59] While that is strictly correct, as I have already noted, a duty to provide a proper enclosure was *not* an element of the offence under s 14(3). The issue of whether the defendant "maintained a proper enclosure" only arose as part of the first limb of the defence under s 14(4)(a). Those references to a duty may have contributed to the Magistrate erring in his construction of s 14(4)(a), which I discuss below.

[67] The Magistrate later identified the elements of the offence correctly and applied the evidence to the elements. His Honour concluded: "Prima facie, therefore, from these facts, all three elements of the offence have been proved and the defendant has failed to comply with the duty to provide proper enclosure and prevent animals from – an animal from wandering."[60] He repeated the incorrect reference to the duty to provide a proper enclosure.

[68] He went on to consider the evidence relevant to whether the defendant maintained a proper enclosure (as defined in schedule 7 of the Subordinate Local Law) for the purposes of the defence under s 14(4)(a). He preferred the evidence of Mr Wienert and the defendant/appellant (which he said corroborated each other) over Mr D'Addona. He considered the evidence about the fencing in detail.

[69] He concluded that: "on the most part, the fence does fulfil the requirements for a proper enclosure suitably fenced according to the schedule 7 definition."[61]

[70] However he also found that the part of the gate at the corner of the paddock where the stray cattle broke through did not meet the requirements for a proper enclosure. He based this finding on a photograph of the gate in exhibit 6. He said the gate had no strainers, the top three strands sagged appreciably and there were no star pickets or spreaders to keep it upright or predominantly taut. He accepted that the gate was chained and padlocked when not in use. He concluded:

> "…therefore, I find on the evidence, the defendant has failed to make out the defence under section 14(4)(a). On the balance of probabilities, I cannot be satisfied that the defendant exercised reasonable diligence to maintain a proper enclosure for his cattle to prevent their escape with suitable fencing, and I find the Prosecution case is proved to the required standard, beyond a reasonable doubt, and the defendant is guilty as found."[62]

[71] The Magistrate proceeded to sentence and heard submissions from both legal representatives. The appellant had no relevant history and no other material was tendered at sentence.

Discussion

[72] The terms of section 14(4)(a) of the Local Law are conjunctive. In order to establish a defence, the appellant must prove two separate matters. First, that he "maintained a proper enclosure for the animal" (by reference to Schedule 7 of the Subordinate Local

[59] TS of Decision 10 November 2017 pp 2, 8
[60] TS of Decision 10 November 2017; p 9
[61] TS of Decision 10 November 2017; p 11
[62] TS of Decision 10 November 2017; p 11.

Law). Second, that he "could not, by the exercise of reasonable diligence, have prevented the escape of the animal".

[73] The expression in the second limb, that the defendant "could not, by the exercise of reasonable diligence, have prevented" the escape of the animal, is not defined in the Local Law, nor was it the subject of submissions by the parties at trial or on appeal.

[74] I did not locate any Queensland decisions considering this expression either in the Local Law or in the context of a defence to a criminal offence.[63]

[75] The expression 'reasonable diligence' in a similar context was considered by the Court of Appeal of Western Australia in *Carey v Commissioner for Consumer Protection* [2013] WASCA 195. Section 81 of the *Fair Trading Act* 1987 (WA) provided a defence to an offence under that Act for the relevant person to prove, relevantly, "(b) that he was not in a position to influence the conduct of that corporation or body or, being in such a position, could not by the exercise of reasonable diligence have prevented the commission of the offence." Chief Justice Martin, with whom the other members of the court agreed, said that the expression was directed to the capacity of the accused - namely, whether he or she has established that by the exercise of reasonable diligence the commission of the offence *could* have been prevented:

"32 So, when a defendant relies upon the defence provided by s 81 of the Act, it is necessary for him or her to establish, on the balance of probabilities, that by the exercise of reasonable diligence he or she could not have prevented the commission of the offence. That is a question which is materially different to the question which arose in the cases relied upon by the appellant, which was whether the accused had in fact taken reasonable precautions and exercised due diligence to prevent the offence. Under s 81 of the Act, the focus of inquiry is upon the capacity of the accused, whereas in the cases upon which reliance was placed by the appellant, the focus of inquiry was upon the actions of the accused. Under s 81 of the Act, the question to be determined is whether the accused has established that there is nothing that could have been done, falling within the range of actions properly taken in the exercise of reasonable diligence, which would have prevented the commission of the offence.

33 This is not to say that the actions of the accused are irrelevant to the defence created by s 81 of the Act. If the offence was committed notwithstanding the exercise of reasonable diligence by the accused, it might be readily inferred that the accused could not have prevented the commission of the offence by the exercise of reasonable diligence. However, it is the capacity of the accused which is the focus of inquiry. So, an accused who has done nothing at all to prevent the commission of the offence might nevertheless establish a defence under the section if he or she establishes that there was nothing he or she could have done, in the exercise of reasonable diligence, which would have prevented the commission of the offence."

[76] I respectfully adopt a similar approach to construction of the expression "could not, by the exercise of reasonable diligence, have prevented" in this context.

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[63] A similar provision is referred to, but not considered in detail, in Hutton v RLX Operating Company Pty Ltd & Ors [2016] QSC 248

[77] In his address to the Acting Magistrate, defence counsel addressed the two limbs of the defence, including what the defendant could have done to prevent the escape, and submitted that the court would be satisfied from the appellant's evidence of both requirements of the defence.[64] With respect to the second limb of the defence, prosecution counsel focussed on whether the defendant had *in fact* exercised reasonable diligence, rather than what he *could* have done, by the exercise of reasonable diligence, to prevent the escape of his animals.[65]

[78] In considering s 14(4)(a) and the wire gate, the Acting Magistrate said:

> "There are no star pickets or spreaders keeping it upright and predominately taut as demonstrated by the components of construction employed for the rest of the fence line apart from the one star picket chained to the right post; therefore, I find on the evidence, the defendant has failed to make out the defence under section 14(4)(a). On the balance of probabilities, I cannot be satisfied that the defendant **exercised reasonable diligence to maintain a proper enclosure for his cattle to prevent their escape with suitable fencing**, and I find the Prosecution case is proved to the required standard, beyond a reasonable doubt, and the defendant is guilty as found.[66] [emphasis added]

[79] In my respectful submission, the Acting Magistrate erred in law in construing section 14(4)(a) in a number of ways. First, he did not consider separately the second limb of the defence: whether the defendant had proved he "could not, by the exercise of reasonable diligence, have prevented the escape of the animal". There is no reference to this in his decision. Second, he conflated the two requirements of s 14(4)(a), importing the notion of reasonable diligence into the first requirement. Third, he focussed on the actions of the appellant and what he *in fact* had done with respect to the enclosure, but he did not consider the *capacity* of the appellant to prevent the animals escaping, in circumstances where the Magistrate had found that the animals were docile pets and that feral cattle had broken the fence down. He referred to the prosecution's submission that a proper enclosure in schedule 7 had to prevent animals from getting in,[67] not just the defendant's animals getting out. In my view, that submission was incorrect and may have led the Magistrate into error.

[80] Having found that the Acting Magistrate erred in law, his decision must be set aside. I must independently examine the evidence, make my own assessment of both the sufficiency and quality of it and reach a verdict.

Whether the appellant maintained a proper enclosure for the animal

[81] The respondent submitted that the correct approach when considering whether the appellant's enclosure was a proper enclosure was to consider "that the type of animal to be enclosed were cattle, to the exclusion of the individual characteristics of the particular cattle to be enclosed".[68]

[82] This submission overlooks two things.

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[64] TS of Hearing 31 August 2017; 1-91
[65] TS of Hearing 31 August 2017; 1-97
[66] TS of Decision 10 November 2017; p 11 lines 37 – 45.
[67] TS of Decision 10 November 2017 p11 lines 20-24
[68] Appeal submissions for the Respondent [20]

[83] First, the requirements of a proper enclosure in schedule 7 of the Subordinate Local Law are not generic requirements to be applied for any or all animals. The express words of schedule 7 direct attention *to the particular animal to be enclosed*, including its species and breed. For example, section 1 requires "The size of area to be suitably fenced is to be appropriate to the species and breed of the animal to be enclosed" [emphasis added]. Section 2 requires that the fence be "constructed of strong and firm materials and designed in such a way as to prevent the animal from attacking a person or escaping over, under or through the fence" [emphasis added].

[84] What constitutes a proper enclosure will obviously vary depending upon the species and breed of the animal sought to be enclosed.

[85] Second, it is trite that there are many different breeds of cattle, that disposition or temperament is a trait that can vary widely from breed to breed, and that Friesian is mainly a dairy breed. The requirements for a proper enclosure to contain a cattle breed that is quiet or docile may well differ from those required to contain a breed known for flightiness or aggression. For example, a different form or standard of fencing may be required, with extra strands of wire and additional reinforcing posts.

[86] In assessing whether the appellant maintained a proper enclosure for the purposes of schedule 7 of the Subordinate Local Law, the animal's breed (including disposition) is relevant.

[87] There was evidence that "the animals" were two Friesian cross cows. They were described as "very docile", "big sooks", and "pets" that would "eat out of a bucket of molasses".

[88] It is unnecessary to determine this issue for the purposes of this appeal, but in my view there may be circumstances where the disposition or temperament of the individual animal to be enclosed could be relevant to construction of this provision. For example, if the owner had actual knowledge that a particular beast had a tendency to flightiness or aggression.[69]

[89] There was a vast amount of evidence about the fencing of large sections of the property. However the only part of the fencing that is directly relevant is the enclosure or paddock in which the two cows were kept and from which they escaped (marked by the appellant on an exhibit). I accept that the condition of other fencing on the property, its construction and maintenance, can be used to draw an inference about the section of the enclosure from which the cows escaped. In any event, the effect of the appellant's evidence and the photographs tendered was that the standard of

[69] By way of analogy, I refer to the common law immunity in Searle v Wallbank, which still applies in Queensland. Under that immunity, owners or occupiers of land adjoining a highway are prima facie under no legal obligation to fence or to maintain their fences along the highway so as to prevent their animals from straying onto the highway, nor are they under a duty as between themselves and users of the highway to take reasonable care to prevent any of their animals, not known to be dangerous, from straying on to the highway: Searle v Wallbank [1947] AC 341, affirmed in State Government Insurance Commission v Trigwell (1979) 142 CLR 617 at 631, applied in Queensland in Smith v Williams & Ors [2006] QCA 439. One of the qualifications to that common law immunity is where the owner or occupier knows that an animal has a "special vicious or mischievous propensity" against which there is a duty to guard; a mere proclivity towards straying is not enough. In that case, knowledge pertaining to the individual beast is essential. See also Hutton v RLX Operating Company Pty Ltd & Ors [2016] QSC 248.

fencing around the property was generally consistent, with some minor variations. I accept that evidence.

[90] The only evidence of the state of the actual enclosure on the date of the offence is from the appellant. He went to the enclosure twice on the relevant day, once to feed the cows and once after he received the phone call. His evidence was that the feral cattle had broken through at the gate. The prosecution witnesses did not inspect the property until six weeks after the offence. They did not take any photographs or make notes during the inspection. They were not able to give detailed evidence about the specific state of the enclosure. Mr Wienert's evidence broadly corroborates the appellant's. To the extent they differ, I prefer his and the appellant's evidence to Mr D'Addona's.

[91] The effect of the defendant's oral evidence and the photographs showing the enclosure is this. The appellant had owned the property for 32 years and kept cattle on it. He was experienced in maintaining fences. He had a lot of experience erecting and maintaining cattle fences. The paddock in which the cows were kept was enclosed by a four strand barbed wire fence with timber posts and star pickets at regular intervals, and strainers. He maintained the fences in that paddock. He inspected the fence every couple of days. The paddock contained only two Friesian cross cows. They were very docile. He fed them molasses daily. Before this incident, the appellant's cows had never escaped from that paddock and feral cattle had never broken into that paddock. On the night in question, feral cattle broke in to the enclosure through the wire gate, which was secured with a padlock.

[92] The only part of the enclosure which the Acting Magistrate considered inadequate was the wire gate. I have considered all the evidence including the photograph of the wire gate. It is no different from the wire gates used in countless grazing properties across Queensland. While it is true that it does not have strainers or spreaders, the distance spanned by it is not particularly wide, it was upright and it was securely chained with a padlock to a sturdy gate post.

[93] The respondent submitted that the reasonable inference to be drawn from the fact that two stray cattle were able to enter the appellant's paddock is that the wire gate was inadequate to prevent the appellant's cows escaping.[70] I do not accept that submission. I find that the appellant's cows would not have escaped but for the feral cattle breaking through the fence.

[94] I am satisfied on the evidence that:

1. The size of the area fenced was appropriate for the species and breed of animal to be enclosed (in this case, two Friesian cross cows), so as to effectively enclose them within the property at all times;

2. The fence of the enclosure was constructed of strong and firm materials and designed in such a way as to prevent the appellant's two cows from escaping over, under or through the fence; and

3. The gate forming part of the enclosure was kept closed and latched except when in actual use.

[70] Appeal Submissions for the Respondent [42]

[95] Absent intervention by a third party or an event, in my view, the enclosure including the gate was adequate to prevent the appellant's animals escaping.

Whether the appellant could not, by the exercise of reasonable diligence, have prevented the escape of the animal

[96] The question is what the appellant *could* have done to prevent the escape of his animals by the exercise of reasonable diligence. That question must be assessed in the context in which the offence was committed.

[97] "Reasonable diligence" is what an ordinarily prudent person in the position of the appellant would do having regard to all the circumstances. It does not require or impose standards of perfection, but reasonable and practicable steps. Relevant considerations will include the extent to which escape was foreseeable, and the cost and burden of the measures which might be taken to reduce the risk of escape.

[98] Here, there was evidence that the cows were quiet and docile. There is no evidence they had escaped before or were a flight risk. In this context "reasonable diligence" would include checking on the cows and fence regularly, ensuring they had adequate feed and water and that there were no obvious risks present. The appellant did those things.

[99] The effect of the respondent's submissions was that schedule 7 of the Subordinate Local Law required the appellant to maintain a fence that not only kept his cattle in but also kept other cattle out. That submission cannot be accepted.

[100] The Local Law does not contain any express requirement that the enclosure not only prevent the escape of the animals to be enclosed within it but also prevent the entry of other beasts, let alone feral or rogue beasts. To construe it in that way would require an additional, more onerous, requirement to be implied into the plain words of the provision. There is no basis for doing so.

[101] The "exercise of reasonable diligence" in this context did not, in my view, extend to maintaining an enclosure that prevented the ingress of rogue beasts.

[102] I find that the appellant in fact exercised reasonable diligence to prevent the escape of his animals.

[103] I find that notwithstanding the appellant's exercise of reasonable diligence, the animals escaped and were wandering at large.

[104] I find that feral cattle broke down the fence and entered the animals' enclosure, probably to access the molasses trough. When the appellant approached them, the feral cattle left through the fence, and his two cows followed, escaping from the enclosure.

[105] I find that the appellant's animals escaped not because he failed to maintain a proper enclosure for them but because feral cattle broke down the enclosure.

[106] In those circumstances, there is nothing that could have been done, falling within the range of actions properly taken in the exercise of reasonable diligence, which would have prevented the commission of the offence. I readily infer that the appellant could not have prevented the escape of his cows by the exercise of reasonable diligence.

Conclusion

[107] I have considered all of the evidence and the parties' submissions.

[108] I am satisfied that the prosecution has proved beyond reasonable doubt each of the elements of the offence under s 14(3).

[109] I am also satisfied that the appellant has established a defence under s 14(4)(a). That is, there is sufficient evidence to be satisfied on the balance of probabilities that he maintained a proper enclosure for his two cows and could not, by the exercise of reasonable diligence, have prevented their escape.

[110] The appeal is allowed. The appellant's conviction is set aside.

[111] The appellant sought its costs of the appeal. Certain submissions made at first instance by the defence and by the prosecution, and incorrect particulars provided by the prosecution, may have contributed to the Acting Magistrate falling into error in his construction of the relevant provision. In the circumstances, I consider that the appropriate order is that there be no order as to the costs of the appeal.