

# DISTRICT COURT OF QUEENSLAND

CITATION: *Mitchell v Binns* [2019] QDC 274

PARTIES: **ANGUS MITCHELL (GENERAL MANAGER) MARITIME SAFETY QUEENSLAND** (applicant)

v

**REBECCA MARREE BINNS** (respondent)

FILE NO/S: D162/19

DIVISION: Civil

PROCEEDING: Originating application

COURT: Maroochydore District Court

DELIVERED ON: 16 October 2019 (ex-tempore)

DELIVERED AT: Maroochydore

HEARING DATE: 16 October 2019

JUDGE: Long SC DCJ

ORDER:

1. **The respondent is to:**
  - (a) **Remove, on or before 16 November 2019, the ship ‘SV Ocean’ from Queensland waters, as required by the notice issued to the respondent under s 91 of the *Transport Operations (Marine Safety) Act 1994* (“the Marine Safety Act”) by a Harbour Master, under the Marine Safety Act, dated 15 April 2019, from its sunken position in the Mooloolah River, Mooloolaba, in the following way:**
    - i) **submit to the Brisbane Regional Harbour Master, a salvage removal plan for the ship within two weeks of this order; and**
    - ii) **carry out the removal in accordance with the salvage removal plan as approved by the Brisbane Regional Harbour Master; and**
  - (b) **Remove as directed by a shipping inspector appointed under the Marine Safety Act, any debris from the ship that remains in the Mooloolah River no later than seven days after its removal.**
2. **If the respondent does not remove the ship and/or any remaining debris from Queensland waters in accordance with paragraph (1) of this order, the applicant may:**
  - (a) **cause the ship to be removed from Queensland waters;**
  - (b) **in doing so, cause the ship to be broken up, and sell or dispose of those parts as the applicant reasonably sees fit; and/or**
  - (c) **remove any debris from the ship that remains in the**

**Mooloolah River;**

as the applicant determines is the most inexpensive way of removing the ship and/or remaining debris, from Queensland waters because of the effect of the orders made by the Court.

3. **If the applicant removes the ship under paragraph (2)(a), the ship is to be stored pending the following:**
  - (a) **the applicant is to determine whether the ship has saleable value, in whole or in part, and advise the respondent of that determination and the costs of the removal of the ship and any debris and of the storage of the ship, within 7 days of the removal of the ship and any remaining debris; and**
  - (b) **the applicant is to release the ship to the respondent upon her payment to the applicant of the costs incurred on behalf of the applicant for removal of the ship and any debris from it left in the Mooloolah River and any storing of the ship;**
  - (c) **if, within two months of the notification required by paragraph (3)(a) of this order, the respondent does not pay the applicant the costs incurred by the applicant, as described in paragraph (3)(b) and take possession of the ship, the ship is to be taken as abandoned by the respondent and may be sold or disposed of, as the applicant reasonably sees fit.**
4. **Any money realised from the sale or disposal of the ship, or part of the ship, is to be first applied against the costs incurred by the applicant described in paragraph (3)(b) and any remaining proceeds in excess of those costs, paid to the respondent.**
5. **The respondent is to pay the applicant's costs of this proceeding, as agreed or assessed on the standard basis.**
6. **The parties have liberty to apply on two clear days notice.**

**CATCHWORDS:**

SHIPPING AND NAVIGATION – WRECKS – REMOVAL OF WRECKS IMPEDING NAVIGATION – MARITIME SAFETY – ENFORCEMENT ORDER – power to make various current and prospective enforcement orders in respect of semi-submerged and severely damaged ship – where ship creates an obstruction to navigation – where the respondent failed, as registered owner of the ship, to comply with directions of the Harbour Master to remove the ship from the waterway – where the respondent has no reasonable excuse for non-compliance with directions – where the respondent does not object to the making of appropriate orders

**LEGISLATION:**

*Transport Operations (Marine Safety) Act* 1994 ss 91, 183B, 183C, 183E(1)(c), (2)(b), 183GA

**COUNSEL:**

G Sammon for the applicant

No appearance for the respondent (self represented)

SOLICITORS: Crown Law for the applicant

HIS HONOUR: By originating application filed on the 23<sup>rd</sup> of September 2019, the applicant seeks enforcement orders pursuant to section 183C and 183E(1)(c) of the *Transport Operations (Marine Safety) Act 1994* (“*Marine Safety Act*”).

5 Such an order is sought in relation to the circumstances of the ship *SV Ocean* which remains in a partly submerged situation in the Mooloolah River, at or near Mooloolaba. That ship was observed to be in such a state by a shipping inspector on 11 March 2019 and, on 21 March 2019, observed to be in what is described as circumstances where it is semi-submerged and apparently severely damaged.

10 The respondent is identified as the registered owner of the ship and the shipping inspector has communicated with her in respect of the circumstances of the ship and the obstruction to navigation which it presents, on many past occasions. Despite various indications of intention to re-float the ship and various indications of  
15 personal impediments in doing so, including, at times, the lack of financial resources to do so, but having regard to the delay in effecting the removal of the ship, on 15 April 2019, the Regional Harbour Master, Brisbane, issued a written direction for the removal by 13 May 2019, of the obstruction constituted by the partly submerged ship, pursuant to section 91 of the *Marine Safety Act*.

20 It is to be noted that this was brought to the respondent’s attention by the shipping inspector on 16 April 2019 and a copy forwarded to an email address which she had provided and also posted to her. On 3 May 2019, the respondent confirmed receipt of the copy, by email. And she confirmed that she had sought advice from a solicitor  
25 about the direction, was aware it was an offence not to comply and was awaiting funds to enable salvage of the ship. She was advised to contact the shipping inspector as soon as possible if there were any problems with compliance. However and since then, the ship has not been removed and it is not in dispute that it remains partly submerged in the Mooloolah River, or that it relevantly represents an  
30 obstruction or, in fact, a hazard to navigation in that position.

Written communications between the respondent and the shipping inspector, between the 16<sup>th</sup> of April 2019 and 4 September 2019, reveal a variety of assertions from the respondent including that:

- 35 (a) she had sought some legal advice;  
(b) she had engaged someone to salvage the ship; and  
(c) she disputed the authority of Marine Safety Queensland to touch her boat or remove it from its position.

40 However, it is also to be noted that she did not respond to repeated requests to provide further information as to who she was dealing with or as to what was proposed.

45 When this application first came before the Court on 11 October 2019, the respondent appeared without legal representation and sought an adjournment to take legal advice. Notwithstanding her unsatisfactory explanation as to her attempts to do so previously and in circumstances where it was apparent that she was then ill-prepared to deal with the matter, including in respect of some material, for instance

the applicant's outline of submissions which had been given to her that morning or soon before the hearing, the matter was adjourned to today, with the respondent being advised to take the availability to obtain such legal advice or representation as she desired, or was able to organise, and to prepare any material which she sought to rely on in response to the application. As it transpired, the respondent has appeared again today in a self-represented capacity.

Although she did indicate, at one point, an intention to press the Court with the various personal circumstances which have caused her difficulty in complying with the direction that has been mentioned, ultimately and in the context of understanding her ability to give evidence to the Court, if she desired, and in relation to the question as to whether or not she was able to resist the conclusion that she had failed to comply with the direction without reasonable excuse, she chose not to persist with her objection to the making of appropriate orders.

In that regard, it seems to me that the respondent's concession is an appropriate one when it is understood that there has been such a long delay in terms of her compliance with her obligations as the registered owner of the ship to have it removed from its current position. The absence of reasonable excuse is not to be equated with personal difficulty in doing so, particularly in circumstances where the legislation places the primary onus upon the owner of such a ship to have it removed from a situation where it creates an obstruction to navigation.

Accordingly, it may be accepted that there was an appropriate basis for the direction issued by the harbour master pursuant to section 91 of the *Marine Safety Act*. And it is to be noted that the evidence before the Court provides an ample basis to conclude that there has been a failure to comply with that direction without reasonable excuse. Not only is there the time that has gone past and despite what is said to be particular difficulties encountered by the respondent, there is also evidence before the Court which indicates the reality of the respondent's situation, in that the boat is assessed as being aged, in poor condition, and in an increasingly dilapidated state because of its remaining in a partly submerged condition. There is evidence before the Court that would tend to indicate that the prospect of retrieving and repairing the ship will be an expensive exercise which is likely to exceed, by a large margin, what might be expected to be the ongoing value of such a ship. As well as that, there is evidence to suggest that there is likely to be limited salvage value in the ship as well. However, those things may remain to be determined. And the Court is prepared to make orders that appropriately preserves the prospect of the respondent's property and interest in the ship, particularly should it be able to be salvaged as a ship.

The matter comes before the Court on an application by a prescribed applicant in accordance with section 183B. The requirements of section 183C, as I have explained, are satisfied. And the only remaining issue, in circumstances where the respondent accepts that the ship should be removed and presents to the Court an intention to do so herself in accordance with the enforcement order that would be made, is as to the efficacy and practicalities of any situation that may arise in the eventuality that the enforcement order made by the Court is not complied with or, perhaps, that the applicant is unable to comply with that order. Obviously, there

would then be a need for the ship to be removed and to be removed by or at the direction of the applicant. And it is to be noted that such orders may readily be made as further orders, in such circumstances, pursuant to section 183GA of the *Marine Safety Act*.

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There is a good deal of sense in the application that such order should be made now and prospectively in such an eventuality. It can be noted that it will be a matter of clarity as to whether or not the enforcement order made by the Court is complied with or not. And the power given to the Court pursuant to section 183E(2)(b) of the *Marine Safety Act* appears to me to be broad enough to allow the Court to consider the appropriateness of making such orders in a prospective sense. That is, on the basis that the primary enforcement order is simply not complied with within the parameters of the order.

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However, in doing so, it is accepted that there is a need to seek to recognise the prospective interest that the respondent may yet assert in relation to taking possession of the ship, should it be able to be salvaged and she decide to do so. That should be allowed, in my view, in the recognition that the legislation otherwise recognises that the costs incurred by the applicant, should such costs be incurred in removing the boat and/or storing it for a period of time, is able to be recovered from the respondent as a debt.

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In short, there is a good deal of common sense and practicality involved in putting in place orders now, which allow for the realisation of the applicant's position and the recovery of the debt that arises should there be the failure to comply with the enforcement order. That also has the benefit that there will be the distinct possibility that there is no need to bring the matter back before this Court and to incur further costs in seeking additional orders, at some later point in time. The respondent's position in that regard may be further protected by the inclusion of a liberty to apply provision in accordance with the draft orders.

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Mr Sammon, has that dealt with all of the issues?

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MR SAMMON: Yes, it does, your Honour.

HIS HONOUR: All right. Well, those are the reasons for making the orders which will be in accordance with the draft. All right?

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MR SAMMON: Yes, thank you, your Honour.

HIS HONOUR: Nothing else?

MR SAMMON: No, nothing else from me, your Honour.

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HIS HONOUR: All right. Adjourn. Thank you.

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