DISTRICT COURT OF QUEENSLAND

CITATION:	*Mathews v Ipswich City Council* [2023] QDC 21
PARTIES:	**MATHEWS, Russell Gordan Haig** (Appellant) **v** **Ipswich City Council** (Respondent)
FILE NO/S:	Appeal No. 15 of 2021
DIVISION:	Appellate Jurisdiction
PROCEEDING:	S 222 Appeal
ORIGINATING COURT:	Magistrates Court at Ipswich
DELIVERED ON:	21 February 2023
DELIVERED AT:	Brisbane
HEARING DATE:	23 March 2022
JUDGE:	Devereaux SC CJDC
ORDER:	**Application for extension of time refused.** **Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – APPEAL– appeal pursuant to s 222 *Justices Act 1886* (Qld) – where appellant convicted of charges of contravening an enforcement notice under the *Planning Act 2016* (Qld) – whether the laws regulating signs erected outside the appellant's house infringed the appellant's implied right of freedom of political expression
LEGISLATION:	*Justices Act 1886* (Qld) *Planning Act 2016* (Qld) *Ipswich City Council Local Law No 1 (Administration) 2013* *Local Government Act 2009* (Qld) *Building Act 1975* (Qld) *Building Regulation 2006*
CASES:	*Gold Coast City Council v Lear* [2016] QDC 215

Guy v McLoughlin & Anor [2006] QDC 17

Atkin v Commissioner of Police [2015] QDC 224

Harvey v Commission of Police [2019] QDC 106

Logan City Council v Brookes [2020] QDC 24

Re Finlayson, Ex parte Finlayson (1997) 72 ALJR 73

COUNSEL: J. Underwood for the respondent.

Appellant was self-represented.

SOLICITORS: Ipswich City Council Legal Unit for the respondent.

Appellant was self-represented.

Introduction

[1] The appellant was convicted of three charges in the Magistrates Court at Ipswich on 7 January 2021. The appellant was convicted in his absence.

[2] The charges were two counts (charges one and three) of contravention of an enforcement notice, under s 168(5) of the *Planning Act 2016* (Qld), with the offences occurring 28 June 2019 and 3 January 2020. The second charge was using insulting, offensive, or threatening language in relation to an authorised officer, contravening s.36(a) of the *Ipswich City Council Local Law No 1 (Administration) 2013*, which occurred 4 November 2019.

[3] The appellant was fined $10,000 for the first offence, $500 for the second offence and $20,000 for the third offence. Convictions were recorded.

[4] The appeal is against conviction pursuant to s 222 of the *Justices Act 1886* (Qld).

Circumstances of the appeal

[5] While it was before the Magistrates Court, the appellant's case was, on 21 July 2021, listed for hearing on 7 January 2022. The day prior to that hearing, on 6 January 2022, the appellant provided his outline of argument.[1] On the day of the hearing, the appellant emailed the Court notification he was unwell and unable to attend the hearing.[2] He did not request an adjournment. He was convicted in his absence, pursuant to s 142A(4)(a) of the *Justices Act 1886* (Qld).

[6] This course of action is open to "simple offences" where the complaint is made by a "public officer". Such a situation was presented here, as the offences are punishable summarily,[3] and the complaint was made by a public officer.

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[1] Exhibit 1.
[2] Transcript.
[3] *Justices Act 1886* (Qld) s 4 definition of "simple offence".

[7] Subsection 142A(4)(b) provides that, for the procedure to apply, it must be that "the defendant is required to appear at a time and place fixed for the hearing of the complaint" and has been provided notice. The actions of the appellant indicate there had been a notice of the hearing date.

[8] Upon my review of the record, I am satisfied that the learned Magistrate correctly observed the procedure set out 142A(4)(a) *Justices Act 1886* (Qld), and it was open to proceed in the appellant's absence.

[9] Therefore, to challenge the merits of the conviction it was required that the appellant avail himself of the statutory procedure set out in s 142A(12) of the *Justices Act 1886* (Qld), namely, to apply for a rehearing within 2 months after the determination, which the Court may grant. This is the course of action McGill SC DC espoused in *Guy v McLoughlin & Anor* [2006] QDC 17 at [11]:

> A person who is convicted on an offence under section 142A and who wishes to challenge the merits of that conviction is required to follow the statutory procedure in subsection (12) and apply for a rehearing. If a rehearing is granted, there will be an ordinary summary trial with evidence and findings of fact can be made and a decision reached by the magistrate, which can then be subject to appeal under section 222. If the application for rehearing is refused, there can be an appeal against that decision under section 222. In my opinion, in the absence of an application under subsection (12) for a rehearing, it is not open by an appeal under section 222 against a conviction pursuant to section 142A to raise issues which were not raised before the magistrate as to whether the appellant was really guilty of the offences charged. That follows from the structure of section 142A, and is in any event consistent with the general rule in relation to appeals that factual issues cannot be raised for the first time on appeal.

[10] This does not necessarily preclude an appeal under s 222 of the *Justices Act 1886* (Qld) being brought in relation to the hearing. In *Atkin v Commissioner of Police* [2015] QDC 224 at [9], Richards DCJ referred to McGill SC DCJ's decision in *Guy* and said that the decision:

> …is not authority for the fact that there can be no appeal, merely that new matters throwing doubt on a conviction cannot be raised on the appeal. The appellant in this case has appealed on the basis that the magistrate's discretion has miscarried. This does not require, in my opinion, a prior application under s 142A(12) to have occurred. If the discretion to proceed under s 142A miscarried then the provisions of the Act have not been complied with and an appeal lies on that basis.

[11] I have previously agreed with this line of reasoning in *Harvey v Commission of Police* [2019] QDC 106 and continue to do so for the purposes of this decision.

[12] Here the appellant did not apply for such a rehearing. This would have been the appropriate course of action given the appellant does not assert that the procedure taken by the learned Magistrate was erroneous, but rather appeals the conviction itself.

[13] On this basis it would be open to dismiss the appeal. Nevertheless, I have considered the record as would be required in a rehearing under s. 222 of the *Justice Act*.

[14] The appellant filed a notice of appeal on 2 March 2020. The notice of appeal was filed out of time, although it included an application for an extension time on the basis of incarceration limiting his ability to lodge the application. As the respondent appropriately concedes, the failure to file in time is explained and there is no particular prejudice to the respondent. Subject to there being any merit in the grounds of appeal, I would allow the extension of time.

The charges

First and third charges

[15] For the purposes of the first and third charges, s 168(5) of the *Planning Act 2016* (Qld) states "a person must not contravene an enforcement notice". Contravention of this provision attracts a maximum penalty of 4,500 penalty units. As Everson DCJ said in *Gold Coast City Council v Lear* [2016] QDC 215 at [14], the elements which must be proved to satisfy the charge are that "a person was given an enforcement notice and that person failed to comply with it."[4]

[16] An "enforcement notice" requires a person to do either or both of, refraining from committing a development offence, and remedying the effect of a development offence in a stated way.[5] An enforcement notice may be provided by an "enforcement authority".[6] The purpose of this offence is to prevent an individual from carrying out assessable development without obtaining all necessary development permits.[7]

[17] The precursor to an enforcement notice is the provision of a "show cause notice". A show cause notice may be provided to an individual if the enforcement agency "reasonably believes a person has committed, or is committing, a development offence".[8] Among other requirements, a show cause notice must state that the person may make representations to the enforcement authority and how those representations may be made.[9] After considering any representations made by the individual, the enforcement agency may give an enforcement notice if it considers it appropriate to do so.

Second charge

[18] Section 36(a) of the *Ipswich City Council Local Law No 1 (Administration) 2013* states an individual must not, in relation to an authorised person under the *Local Government*

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[4] *Gold Coast City Council v Lear* [2016] QDC 215 at [14].
[5] *Planning Act 2016* (Qld) s 168(2).
[6] *Planning Act 2016* (Qld) sch 2 def of "enforcement authority".
[7] *Planning Act 2016* (Qld) s 163(1).
[8] *Planning Act 2016* (Qld) s 167(1)(a).
[9] *Planning Act 2016* (Qld) s 167(2)(c)-(d).

Act 2009 (Qld), "use language that is insulting, offensive or threatening, or behave in an insulting, offensive or threatening manner."

[19] The local law is enforceable by virtue of s 28 of the *Local Government Act 2009* (Qld).

The charges were proved

It is unnecessary to set out in full detail the proof of the offences because the grounds of appeal do not attack the convictions on the basis that the charges were not made out on the evidence.

First charge

[20] In *Gold Coast City Council v Lear* [2016] QDC 215 at [25], Everson DCJ concluded that an enforcement notice is deemed to be valid on its face. This interpretation is assisted by the operation of s 251 of the *Local Government Act 2009* (Qld).

[21] In relation to the first charge, the enforcement notice related to large signs which the appellant had erected in front of his house. Without first obtaining approval, the appellant erected the signs during the period of 24 December 2018 to 17 January 2019.[10] I am satisfied the signage was "assessable development" for which an approval was required.[11] It was building work and was not 'accepted development' as it did not meet the criteria to be 'prescribed by regulation'.[12] An enforcement notice was therefore appropriate, all other requirements being satisfied.

[22] The appellant was delivered the enforcement notice on 17 April 2019 by the respondent. The appellant neither appealed nor complied with this notice.

[23] The respondent delivered the enforcement notice after having discharged the obligation under the *Planning Act 2016* (Qld) s 167(1)(a) to provide a show cause notice to the appellant on 19 February 2019. While there was a response from the appellant to that notice, the respondent considered it did not provide a lawful basis for the maintenance of the signage. The response asserted, in effect, that the show cause notice was void ab initio, 'as though it consists of blank sheets of paper"[13], because it infringed the freedom of political communication implied in the constitution.

[24] It was open to the learned Magistrate to conclude on the evidence, and upon my own review of the record I also conclude, that the charge was proved beyond reasonable doubt.

Second charge

[25] When the respondent became aware of shipping containers in the appellant's backyard, it applied for a warrant under s 130 of the *Local Government Act 2009* (Qld)

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[10] Exhibits 2 and 4.
[11] *Planning Act 2016* (Qld) s 44(3).
[12] *Building Act 1975* (Qld) ss 20, 21 (version as at December / January 2019); *Building Regulation 2006* s 6.
[13] Exhibit 6

to enter the appellant's land to measure for compliance. This warrant was granted 31 October 2019.

[26] Mr Bartley entered the appellant's land pursuant to the warrant on 4 November 2019. At this time the appellant verbally abused Mr Bartley over the course of 40 minutes.

[27] There is no need to set out the abusive language. I am satisfied beyond reasonable doubt that the language the appellant used was insulting, offensive and threatening, and he behaved in a manner which was insulting, offensive or threatening to Mr Bartley.

Third charge

[28] The third charge relates again to signs, which had been re-erected, and multiple shipping containers repurposed for habitation. Repurposing in this way requires development approval.[14]

[29] In relation to these structures and containers, the appellant was hand delivered an enforcement notice 16 December 2019. The appellant neither appealed nor complied with this notice.

[30] As in the first charge, this occurred after the provision of a show cause notice delivered by the respondent, which was provided to the appellant in relation to these structures on 11 November 2019. The appellant did not respond to this notice.

[31] In relation to this charge, I am satisfied the learned Magistrate was able to conclude, based on the evidence before the Court, and upon my own review of the record I also conclude, that the charge was proved beyond reasonable doubt.

Grounds of appeal

[32] The appellant outlines the following grounds in his notice of appeal:

> "1. ALL NOTICES of ICC [Ipswich City Council]; ICC application for [a] Warrant of Entry; that WARRANT & ALL ICC ENFORCEMENT NOTICES are *ULTRA VIRES* as CONTRAVENE sec 36 *LOCAL GOVERNMENT ACT* 2009 AND CONSTITUTIONAL "FREEDOM OF POLITICAL COMMUNICATION" BY JUDICIAL NOTICE (Common Knowledge in Locality) that signs are POLTICAL Communication
>
> 2. By sec 78B *Judiciary Act 1903* (Cth) Mag [sic] Hall was UNDER DUTY NOT TO PROCED UNTIL ALL Attorneys General had been advised of a CONSTITUTIONAL MATTER."

[33] Further, the appellant's outline of argument appears to state:

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[14] *Logan City Council v Brookes* [2020] QDC 24 at [40]

> "I rely upon the Constitutional "FREEDOM OF POLITICAL COMMUNICATION" & Sec 36 of the LOCAL GOVERNMENT ACT 2009 (Qld) re Election Advertising as defined in that section in particular "Placement of Election Advertising". Sec 36 – "Local Laws that cannot be made" & including the final subsection of Sec 36 that if any local law for the impart [sic] "contrary to this Section" it shall be to no effect.
>
> Hence, all action by ICC, against my "election advertising" is legislative power Ultra vires. Every document by ICC fully OR PARTLY about my Election Advertising Signs is THUS VOID AB INITIO. Hence enforcement NOTICES, application for warrant of entry, & the warrant and Justices Act application are all VOID AB INITIO.
>
> That my signs are POLITICAL COMMUNICATION & ELECTION ADVERSITING is COMMON KNOWLEDGE in the locality and thus before the Court by Judicial Notice."

[34] These grounds and contentions could not apply to the second charge, as the abusive statements which constituted the offence were merely abusive, not political.

[35] The appellant's argument appears to be that his conduct is lawful because, as he puts it, it is "political communication & election advertising"; therefore, any and all charges against him infringe upon his freedom of political communication, which is implied as part of the Australian *Constitution*.

[36] In line with this overarching argument, the appellant relies on s 36(5) of the *Local Government Act 2009* (Qld) which states a local law contrary to s 36 of the *Local Government Act 2009* (Qld) is ineffective. Section 36 provides that a local government must not make a local law that prohibits or regulates the distribution of how-to-vote cards or prohibits the placement of election signs or posters.

[37] The appellant contends this provision of the statute invalidates all action taken against him by the Ipswich City Council, as his signage is considered "election advertising". This argument is misconceived. Neither s 168(5) of the *Planning Act 2016* (Qld) nor s 36(a) of the *Ipswich City Council Local Law No 1 (Administration) 2013*, the statutes under which the appellant has been charged, contemplate a prohibition on the placement of election signs or posters. The laws do not impose on the appellant's liberty of political expression. They are not invalidated by the operation of s 36(5) of the *Local Government Act 2009* (Qld).

[38] In any case, as set out above, the laws governing the signs are not local, but State, law. The relevant provisions – the *Planning Act* 2016, the *Building Act* 1975 and the *Building Regulation* 2006, are State laws.

[39] And, in any case, although it is unnecessary to decide, having looked at the exhibits I do not accept the appellant's signage was an "election sign or poster" as contemplated

by the relevant provision. Section 36(3) of the *Local Government Act 2009* (Qld) defines "election sign or poster" as a sign or poster that is able, or is intended to:

> *(a) influence a person about voting at any government election; or*
> *(b) affect the result of any government election.*

[40] Finally, the appellant has advanced an argument that notice must be given to the Attorneys–General under s 78B of the *Judiciary Act 1903* (Cth). In *Re Finlayson, Ex parte Finlayson* (1997) 72 ALJR 73 at [74], Toohey J wrote:

> "In terms of s 78B, a cause does not "involve" a matter arising under the Constitution or involving its interpretation merely because someone asserts that it does…it must be established that the challenge does involve a matter arising under the Constitution."

[41] Although the appellant asserts this matter involves Constitutional issues, I am not satisfied he has established that his defence of the charges involves a matter arising under the Constitution.

[42] The appeal having no prospects of success, the application for an extension of time must be refused and the appeal dismissed.