PLANNING & ENVIRONMENT COURT OF QUEENSLAND

CITATION:	*Council of the Shire of Noosa v Cotton On Clothing Pty Ltd* [2008] QPEC 13
PARTIES:	**COUNCIL OF THE SHIRE OF NOOSA** *Applicant* **v** **COTTON ON CLOTHING PTY LTD** *Respondent*
FILE NO:	312 of 2007
DIVISION:	Planning and Environment
PROCEEDING:	Application
ORIGINATING COURT:	Planning and Environment Court
DELIVERED ON:	29 February 2008
DELIVERED AT:	Maroochydore
HEARING DATE:	1 February 2008
JUDGE:	Judge K S Dodds DCJ
ORDER:	**The respondent is fined $1000 and ordered to pay the applicant's costs including reserved costs on the indemnity basis**
CATCHWORDS:	PLANNING – PLANNING LAW – contempt – breach of restraining order *Integrated Planning Act 1997* (Qld) s 4.1.5 Cases cited: *Attorney-General for the State of Queensland v WIN Television Pty Ltd & Anor* [2003] QSC 157 *Battle Pty Ltd & Anor v Hoy* [2000] QDC 43 *Eveneo Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2001] 2 Qd R 118

COUNSEL: W G Everson for the applicant

S Keim SC appeared for the respondent

SOLICITORS: Wakefield Sykes appeared for the applicant

P&E Law appeared for the respondent

[1] The Council of the Shire of Noosa (Noosa) by originating application filed 21 December 2007 returnable before the court on 25 January 2008 sought orders the respondent, Cotton On Clothing Pty Ltd (Cotton) be punished for contempt of court pursuant to section 4.1.5 of *Integrated Planning Act 1997* (IPA) and pay Noosa's costs on the indemnity basis.

[2] On 25 January 2008 solicitors appeared for Cotton and sought an adjournment. They had been recently engaged and had not sufficient time to respond. I adjourned the application to 1 February 2008, reserving costs. In doing so I expressed a preliminary view based upon the material then before me which included a judgment of this court of 28 February 2001 giving a conditional development approval for shop (display area) in respect of an exclusive use area within the common property of a Community Titles Scheme and a restraining order of this court made by consent on 13 July 2007 the alleged breach of which was the basis for the application. I refer to what I said then and will not repeat it all.

[3] The order of this court made on 28 February 2001 was:

> "The application for material change of use of premises to shop (display area) in respect to the exclusive use area "C" within the common property for the Community Titles Scheme number 24607--- is approved---
>
> The development undertaken in accordance with this approval must generally comply with the approved plans of development--- to this end the area to be used for display purposes must not exceed 7 metres squared and landscaping is to be undertaken as detailed on the approved plan".

[4] The orders made by this court on 13 July 2007 were made in proceeding brought by Noosa. This court declared that "with respect to the exclusive use area "C" within the common property---

1. The area used for display purposes by respondent (Cotton) exceeds 7 metres squared

2. In using an area exceeding 7 metres squared for display purposes the respondent has committed a development offence by contravening a condition of the development approval---"

[5] The court ordered by consent that "3. The respondent be restrained from using an area of the property exceeding 7 metres squared for display purposes".

[6] Evidence before the court in the instant application showed that racks and tables displaying goods were being spread over much of the exclusive use area.

[7] At the adjourned hearing Senior Counsel appeared for the respondent. The respondent did not contest that as a matter of law it had been in breach of the order of 13 July 2007. It now agreed to place its display racks and tables in accordance with a new plan consistent with Noosa's interpretation of the condition (that is only over 7 metres squared of the exclusive use area) and the manager of the shop had been instructed accordingly. Submissions were made about penalty. It accepted liability to pay costs on the indemnity basis and submitted that should be taken into account in considering what if any penalty should be imposed.[1] In the circumstances such a costs order amounted to a sufficient penalty. The court had discretion not to impose any further punishment.[2]

[8] An affidavit by one Ashleigh Hardwick, the secretary of Cotton was filed by leave on the morning of the hearing. In it he deposed that Cotton was not the lessee of the premises at the time of the conditional approval on 28 February 2001. It commenced leasing the shop on or about 1 May 2002 but was not informed by the lessor until on or about 1 May 2005 of the material condition of the approval, that is, that the area of exclusive use area to be used for display purposes must not exceed 7 metres squared. He had always believed that the 7 metres squared referred to in the condition was the aggregate of the area of each rack and table of clothing placed in the common area rather than the area of the common area over which the racks and tables were placed as Noosa contended. He supported the assertion by deposing that the rent Cotton was paying on a square meterage basis when compared to market rentals in the area illustrated it was based upon full and unconditional use of the exclusive use area. This belief and the consequent use of the exclusive use area for display led to the proceedings by Noosa in this court which resulted in the restraining order of 13 July 2007. He engaged an architect/interior designer employed by Cotton to draw up a plan which he believed complied with the condition and the order of the court of 13 July 2007 and took steps to have the shop manager place the plan on the shop wall and direct staff to place display tables and racks in accordance with the plan and not deviate therefrom (this plan was not exhibited to his affidavit and apparently, despite requests to Mr Hardwick by Noosa in July 2007 to be supplied with a copy of the plan, was never supplied to Noosa). He was advised this was done. A new fixture layout was implemented in July 2007, some racks being withdrawn from the exclusive use area. Since, sales have reduced and Cotton has decided to cease operations at the premises. Exhibited was a new plan and photographs showing racks and tables in accordance with the order of 13 July 2007 which was to be adhered to until the shop closed.

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[1] *Eveneo Pty Ltd v Australian Building Construction Employees and Builders Labourers Federation (Qld Branch)* [2001] 2 Qd R 118 at 127.

[2] *Attorney-General for the State of Queensland v WIN Television Pty Ltd & Anor* [2003] QSC 157 at paragraph 11. *Battle Pty Ltd & Anor v Hoy* [2000] QDC 43 at 7.

[9] Noosa filed an affidavit by one Mitchell Birks, a solicitor employed by it. Exhibited to Mr Birks' affidavit (amongst other things) was an email sent 15 January 2008 from Mr Hardwick which referred to a letter of 21 December 2007 he'd apparently received from Noosa regarding racks of clothes in front of the shop. It continued

> "as a result of last year's hearing we withdrew approximately 12 racks from the exclusive use thereby reducing our use of same to the agreed 7 square metres. We had the fixtures and the exclusive use area surveyed by an architect who has detailed the required conditions in the attachment. This attachment is displayed clearly in the store for all staff and management to adhere to and reflects accurately the photos that you have provided.
>
> We have gone to considerable expense and suffering as a result of the offence against us and are now perplexed that you have re-introduced litigation without even contacting us. We are abiding by the enforcement against us (as is proven by both the attachment and the photos that you yourself had provided) and we will be strenuously defending any further action that you take against us---"

[10] Noosa replied by letter dated 18 January 2008

> "Thankyou for your email of 15 January 2008.
>
> The seven metres squared represents an area in which the entirety of the racks must be contained. In this regard in my email to you of 12 July 2007 I said 'the seven metres squared is on the ground rather than table size. Spaces to walk through have to be part of the 7 metres squared'.
>
> In my letter to you of 20 July 2007 I said 'I understand that you are in the process of preparing a diagram that outlines an area of 7 square metres that could be used for display purposes. Please forward a copy of this diagram direct to me as soon as it has been finalised and I will obtain instructions'.
>
> On 24 July I again wrote to you in these terms 'I am instructed that the diagram of the area needs to show the area of 7 metres squared on a scaled drawing with the area shown on the ground. Once I receive this diagram I will obtain instructions. In the meantime if you have any questions please do not hesitate to contact me'.
>
> I have not received any reply to my letters of 20 July 2007 or 24 July 2007".

[11] Counsel for Noosa submitted regarding penalty that Noosa had asked on 20 and 24 July 2007 to be provided with a copy of a scaled drawing outlining an area of 7 metres squared to be used for display purposes. It had never been provided by Cotton. He submitted that Cotton had cynically continued to use the area

contrary to the condition and the restraining order for their commercial advantage purportedly justifying the use by a conveniently strained interpretation of the condition and the restraining order.

[12] Despite the failure by Cotton to provide Noosa with its scaled drawing subsequent to Noosa's letters of July 2007, it seems on the material that any inspection of what was occurring on the ground would have readily revealed that Cotton was locating their display stands and tables over most if not all of the exclusive use area. Noosa could have moved before the present time to take appropriate action.

[13] What has been occurring has now ceased. Cotton's assertion about its belief about the meaning of the condition and more particularly the restraining order strains credulity. Its failure to respond to Noosa's request for a copy of the scaled drawing is consistent with a desire to avoid a confrontation if possible, or for as long as possible.

[14] Cotton has committed a contempt of the order of the court made on 13 July 2007. Maintaining the authority of the court's orders is a matter of importance.

[15] Cotton will be ordered to pay Noosa's costs for this proceeding including reserved costs on the indemnity basis. It will also be obliged to pay the costs of its own representation. Taking that into account and taking into account Cotton's undertaking by Mr Hardwick in his affidavit to abide by the order, an appropriate penalty is a fine of $1000.

[16] I fine Cotton On Clothing Pty Ltd $1000 to be paid on or before 12 March 2008. I order Cotton On Clothing Pty Ltd pay the applicant, Council of the Shire of Noosa's costs of this proceeding including reserved costs to be assessed on the indemnity basis.