CITATION: *Bonsell & Bonsell v The Development Consent Authority* [2002] NTMC 034

PARTIES:	JENNIFER BETTY BONSELL AND PETER WALTER BONSELL v THE DEVELOPMENT CONSENT AUTHORITY
TITLE OF COURT:	COURT OF SUMMARY JURISDICTION
JURISDICTION:	JUSTICES ACT
FILE NO(s):	20207079, 20207087
DELIVERED ON:	9 SEPTEMBER 2002
DELIVERED AT:	DARWIN
HEARING DATE(s):	22 AUGUST 2002
JUDGMENT OF:	Mr Wallace SM

CATCHWORDS:

Justices – Complaint – Failure of defendants to appear at hearing of complaint – Complaint heard ex parte and defendants convicted – Whether conviction and/or penalty should be set aside.

Justices Act (NT) s 63A.

REPRESENTATION:

Counsel:

Applicants:	In person
Respondent:	M.J. Grove

Solicitors:

Applicants:	-
Respondent:	Ward Keller

Judgment category classification:	C
Judgment ID number:	[2002] NTMC 034
Number of paragraphs:	35

IN THE COURT OF SUMMARY JURISDICTION
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20207079, 20207089

[2002] NTMC 034

BETWEEN:

JENNNIFER BETTY BONSELL AND PETER WALTER BONSELL
Applicants/Defendants

AND:

THE DEVELOPMENT CONSENT AUTHORITY
Respondent/Complainant

REASONS FOR JUDGMENT

(Delivered 9 September 2002)

Mr Wallace SM:

BACKGROUND

1 These are Applications brought pursuant to s 63A of the *Justices Act*, which provides (relevantly):

> "63A.**Certain decisions of Court may be set aside on application by defendant or complainant**
>
> (1) Where the Court has –
>
> (a) proceeded ex parte, under section 62(b) or 62A(b), to hear and adjudicate on a complaint and has found the defendant guilty of the offence or made an order against the defendant to which the complaint relates; or
>
> (b) dismissed under section 63(1) a complaint,
>
> the defendant or complainant may, not later than one month after –

(c) in the case of that defendant – the finding of guilt or order referred to in paragraph (a) coming to that defendant's notice; and

(d) in the case of that complainant – the dismissal referred to in paragraph (b) coming to that complainant's notice,

(e) serve on the clerk of the Court by which that finding of guilt or order or dismissal was made, a written application to the Court to set aside that finding of guilt or order, or dismissal, as the case may be, and of the grounds of the application.

(2) Where a clerk is served an application referred to in subsection (1), he shall appoint a time and place for the hearing by the Court of the application and shall give written notice to the defendant or complainant making that application of the time and place so appointed. …

(7) At the time and place appointed under subsection (2) for the hearing of an application referred to in subsection (1), the Court shall, unless the applicant to which the application relates was a defendant who was, under subsection (3), granted bail in accordance with the *Bail Act* and who fails to appear in accordance with his bail undertaking, proceed to hear and determine that application -

(a) by refusing that application; or

(b) by adjourning the hearing of that application to a time and place appointed by the Court, and giving to the other party written notice -

(i) of that time and place; and

(ii) that that other party may, if he thinks fit, at that time and place appear to oppose that application,

and the Court shall then and there set aside the finding of guilt or order, or dismissal, as the case may be, to which that application relates, on such terms and conditions as the Court thinks fit, or the Court may refuse to set aside that finding of guilt or order, or dismissal.

(8) The Court may, in making a determination under subsection (7), make such order as to costs as it thinks fit.'

2 The Applicants, Mr and Mrs Bonsell, were defendants named in complaints laid by the Development Consent Authority. On Wednesday 31/7/02 this court (Mr Loadman SM) proceeded ex parte to convict Mrs Bonsell of three offences contrary to the *Planning Act*, and Mr Bonsell of four. He fined her $3,000.00 and him $5,000.00. (Mr Loadman appears to have ordered one victim's levy too few against each applicant.) The offences related to non-permitted clearing of, and use of land; and also, in Mr Bonsell's case, an offence of failing to plant a buffer of native trees in accordance with the provisions of a permit. Mr Loadman further made orders pursuant to s 80 of the Planning Act against each applicant, to the effect that they plant vegetation in accordance with the provisions of that permit.

3 On the following Friday, 2/8/02, the s. 63A applications were filed.

MRS BONSELL'S APPLICATION

4 The applications are handwritten by what looks to me to be the same hand. The applications are in identical terms – they both contain the same spelling error, "revegitation". Mr Bonsell's application bears what looks like a signature – I presume his. Mrs Bonsell's application bears what does not look like a signature "J. BONSell". Both his signature and her mark are slightly misplaced, being under, rather than over, the line on the form reciting "Signature of defendant or his solicitor." Nobody in the proceedings before me has taken exception to what appears to be a likely procedural irregularity, that Mr Bonsell (who is not, as far as I know, a solicitor) has probably not only filled in the form, but also "signed" on behalf of his wife. Indeed, I noticed the irregularity for the first time when preparing these reasons.

5 As is well known, the law in relation to the lodging of complaints under the *Justices Act* is highly technical and quite inflexible. My guess would be that the law would be equally technical and inflexible in relation to the signing of

a s 63A application. The section itself, as has been seen, contemplates that the defendant – in this case Mrs Bonsell – will file and serve the application.

6 On the other hand, no form is prescribed in the *Justices Regulations* in respect of a s 63A application. The forms filled in by, I think, Mr Bonsell, appear to have been dreamed up in the Court's registry once long ago (long enough ago to say "Defendant or his solicitor"), and it could be argued therefore that a s 63A application need not be signed at all. In the circumstances of these applications, where Mrs Bonsell has appeared in person to pursue her application, whoever signed it (and I am far from knowing that she did not), my opinion is that I should treat it as a valid application until someone persuades me that as a matter of fact and law it is not.

THE GROUNDS

7 Each of the applications recites that:

> "The conviction or order came to the notice of the defendant on 1/8/02 and the defendant applies to the court to set aside the conviction or order on the following grounds: That could not appear because of illness." [The underlined portions are written by the applicant, the rest is from the form.]

8 Upon receipt of the applications on 2/8/02 the clerk did his or her duty pursuant to s 63A(2) and appointed 8/8/02 as the date for mention in court. On 8/8/02 the matters were mentioned before me. The applicants appeared in person. Mr McDuff appeared for the respondent. I adjourned the matter, pursuant to s 63A(7)(b), to 22/8/02. The Court of Summary Jurisdiction is not possessed of many useful interlocutory powers. On 8/8/02 I advised the applicants to bring on 22/8/02 evidence and/or medical reports relevant to their non-attendance at court, and requested them to be in a position to advise the court on 22/8/02 whether their applications were directed at the finding of guilt, or any of them; or whether they were directed at the penalties imposed.

Mr Bonsell seemed to indicate on 8/8/02 that he (and his wife) sought relief against all the findings of guilt, and also against penalty. That was still the case on 22/8/02 when I heard the applications. On that occasion the applicants again appeared in person, and Mr Grove, who had been counsel for the complainant before Mr Loadman, and on earlier mentions, resumed appearing for the respondent/complainant.

PRINCIPLES TO BE APPLIED

9 As far as I know there are no reported cases in the Northern Territory dealing with the discretion created by s 63A(7)(b) of the *Justices Act.* Section 76(a) of the *Justices Act* of South Australia used to be fairly similar to our s 63A. It is set out in the judgment of Cox J in *Maider v Dancis* (1985) 39 SASR 136 at p 141. (In South Australia, s 76(a) of the old *Justices Act* has been transformed into s 76A of the *Summary Procedure Act*, and the change has greatly widened the scope of the section.) In Western Australia it seems that s 136A of that State's *Justices Act* is (or was until at least 1994) also comparable; although I have not read the section itself, Mr Grove referred me to three cases from which I draw the inference of its similarity. It seems that none of these cases is reported. The first is a judgment of the Full Court of the Supreme Court of Western Australia (Jackson CJ, Wallace and Jones JJ), *Stewart v Millar*, Appeal No.11 of 1976, delivered on 21 May 1976. Mr Grove provided me with a vile but legible copy of that decision. Then there are two cases from 1994: *Lucas v Davies*, (1121 of 1993), judgment of Anderson J on 17 January 1994; and *Stuart v Shire of Swan* (1015 of 1994), judgment of Wallwork J on 28 October 1994.

10 The South Australian line of authority actually began before s 76(a) was inserted into their *Justices Act.* In *Aston v Hincks*, v*ice Fitzgerald* [1950] SASR 182, the defendant Aston appealed against his being found guilty ex parte, asserting (a) that he had a good defence to the complaint, and (b) that he had a good excuse for not appearing in court on the day, being stranded on

the wayside many miles from the Renmark Court. Paine AJ held that s 177(2) of the *Justices Act* (SA) (which was in the same or similar terms to the same section in the Northern Territory Act) permitted him to allow the appeal and remit the case for hearing. At p 185, Paine AJ said:

> "I am of opinion, therefore, that this court has the power to look into the point now raised, and if it is satisfied that the appellant was not to blame for his non-attendance at the hearing, and that some ground of defence upon the merits is disclosed in the case for the defence, to order a new hearing before a competent court …"

11 The two requirements there put forward have their analogues in civil procedure – applications to set aside judgment entered after a party fails to do this or that – and also, less obviously, in the exercise of discretions to allow adjournment of criminal trials. There being, however, so pertinent a body of law relating precisely to the discretion to set aside orders made ex parte, there seems little reason to draw on these more distantly analogous authorities.

12 In *Van Ryswyck v Hicks* (1974) 8 SASR 376, Hogarth ACJ was not dealing with an appellant (the Justices Appeal procedure was still being used) whose failure to appear had been not his own fault. Such had been the case in *Aston v Hincks*, *vice Fitzgerald* which Hogarth ACJ had cited just before saying on pp 378-379:

> "I applied this case in *Foggo v Berry*, where a farmer was prevented from being present at court owing to a breakdown of the truck in which he was travelling.
>
> In these two cases the appellant was not in any way to blame for his non-attendance at the proper time in the court below. The cases are not authority for the proposition that an appellant is entitled to relief when his non-attendance in the court below was due to his own default. The topic appears not to have been argued before *Mitchell J* in the present appellant's previous appeal, but the result of that appeal gives some support to the view that in exceptional circumstances this court may relieve even an appellant whose failure to attend the court below at the proper time was due to his own carelessness. If this is so I think that this Court must have regard to

> both the degree of carelessness, and the strength of the case which the appellant wishes to assert. It should not quash a conviction brought about by the appellant's own carelessness unless justice clearly calls for this to be done; as, in the case of a grossly careless appellant, if the facts before this Court show clearly that, although careless, he was nevertheless innocent. In such a case, it would not be enough that he should say in general terms merely that he wanted to defend the charge, or that he is not guilty of the charge. Justice must be done to both parties, and a complainant respondent is not to be put to the expense and trouble of a further hearing in the court below in the case of such an appellant, unless he makes it clearly appear that he will suffer injustice if the conviction is not quashed."

13 That the appellant who was blameless for his non-appearance continued to be in a strong position to win a rehearing is apparent from the judgment of Walters J in *Hird v Keech* (1979) 21 SASR 273. This case too was a Justices Appeal. Walters J does not refer to *Aston* or *Van Ryswyck*, and may have been unaware of their devising a remedy through s 177(a) of the *Justices Act.* For present purposes I am only interested in the principles for the exercise of the discretion, not the jurisdictional source of the remedy. Walters J said at p 238 – and this quotation includes the essential facts:

> "I have no reason to reject his story about the breakdown of the vehicle, some two days before the complaints were set for hearing, in an isolated area in which there were no facilities to enable him to get in touch with the Clerk of the Court.
>
> It seems to me that there is an inherent jurisdiction in this Court to set aside a conviction on the ground of misadventure which has led to a party being unable to be present at court and to put his case before it. Unless there are compelling reasons to suspect manoeuvring, or deliberate dilatoriness or inaction, I think that in the case of proven misadventure, this Court should ordinarily lean towards the exercise of its jurisdiction.
>
> There can be no suggestion of any error on the part of the Special Justice, but in the circumstances to which the appellant has deposed in evidence, I think that I should exercise the inherent jurisdiction of the Court in order to remedy a situation arising from the misadventure, arising by reason of the matters of which he has spoken in evidence. I am persuaded all the more to take this course since the appellant initially attended at the Court in answer to the

charges and pleaded not guilty. It would seem likely that, because of his plea, the hearing did not then proceed."

14 In *Rough v Rix* (1982) 30 SASR 301 Bollen J reviewed the authorities. He said (p.308-310):

> "In *Hughes v Conn* the appellant was, in the view of Williams A.J. (as he then was), guilty of gross carelessness in not attending the lower Court. Applying *Van Ryswyk v Hicks* Williams A.J. asked himself – "has the appellant discharged the onus of establishing at least a probability that he will suffer injustice if the conviction is allowed to stand?" In response to this rhetorical question his Honour said:
>
> 'Apart from a failure to attend the first hearing the appellant has constantly maintained his innocence from the time he received his summons. But nevertheless I am unable to say that the appellant has established at least a probability that he will suffer injustice if the conviction is not quashed. In my view, he has done no more than establish a possibility of injustice if the conviction is allowed to stand. I do not think that the appellant has established any exceptional circumstances justifying the setting aside of the conviction and the appeal is therefore dismissed.'
>
> The appellant was denied a second chance to defend a charge. He had vigorously protested his innocence. *Hughes v Conn* was followed and applied recently by Matheson J. In *Pittaway v Wormald* the appellant did not attend court because she had misplaced her summons. She was charged with a parking offence. She said she had three witnesses. Matheson J., having quoted both from *Van Ryswyk v Hicks* and *Hughes v Conn* said: 'The appellant's belated assertion that she has three witnesses to prove the sworn evidence of the parking inspector was wrong does not enable me to say in all the circumstances of this case that the appellant will probably suffer an injustice if the conviction is not quashed.' Yet in *Marinis v Clyne* Jacobs J seems to have adopted a less stringent test. The appellant was a taxi driver. He was charged with disobeying traffic lights. He had limited command of English. He had really no excuse for his non-attendance. The owner of the taxi was called before Jacobs J. Of that evidence his Honour said:
>
> 'His records establish that indeed the appellant was not the driver of the taxi on this particular occasion, and that the mistake occurred because the records inspected by the police in an attempt to identify the driver were, by mistake, records of a different day'.

> His Honour said that the appellant ought not to be given a second chance 'unless there are cogent reasons for his failure to attend, and a real likelihood of a miscarriage of justice if this Court does not intervene'. I think that the phrase 'a real likelihood of a miscarriage of justice' at least at first blush connotes a less stringent test than does the phrase 'that the appellant will probably suffer an injustice'. But I think that all Judges in the three cases which I have mentioned must have had the same idea in mind. I think it would be wrong to take up words used, examine them minutely, and conclude that there was some divergency of judicial thought. At bottom of the three cases to which I have most recently referred must lie the proposition that it is sometimes no injustice to be denied a second chance to put forward a defence, even if that defence can be perceived to be a potentially strong one. But if the defence appears to be potentially very powerful then it is, at least sometimes, possible and permissible to say that injustice would be suffered if the appellant were not given a second chance to defend. The taxi proprietor's records in *Marinis v Clyne* were potentially almost an irresistible defence.
>
> If then the failure to attend is due to genuine misadventure, the Supreme Court will ordinarily order a re-hearing without inquiry into the nature and strength of the appellant's answer to the charge. (*Hird v Keech).* If the failure to attend were due to carelessness then the Supreme Court will not intervene unless there is shown to be a probability of injustice if the appellant cannot have another hearing or unless there are exceptional circumstances about the case (*Van Ryswyk v Hicks; Hughes v Conn; Pittaway v Wormald; Marinis v Clyne).*"

15 By the time *Maider v Dancis* (1985) 39 SASR 136, s 76(a) of the *Justices Act (SA)* was in force, and the appeal in that case was against the decision of a magistrate refusing the appellants' application to set aside, pursuant to s 76(a), convictions that had been recorded against them. (The magistrate was willing to set aside the penalties that had then been imposed.) Counsel, it is apparent, sought to argue that the principles developed in relation to the remedy via s 171(2) could be applied to the new remedy created by s 76(a). Cox J did not commit himself wholly to this line. On pp 141-142 he said:

> "Mr Barrett, who appeared for the first time in this Court, relied particularly on *Hird v Keech* and *Rough v Rix*. He argued that the failure of the appellants to attend or be represented at Christies Beach on 16th November was due to "genuine misadventure", so that

they are entitled to a re-hearing without inquiry into the nature and strength of their answer to the charges made against them. The difficulty about the proposed pleas of guilty is thus avoided. Mr Brooks, for the Crown, countered with *Van Ryswyck v Hicks*. The failure of the appellants to be represented at the hearing was due to the carelessness of their solicitor, and it is necessary for them to show a probability of injustice if they cannot have another hearing or, at the least, that there are exceptional circumstances about the case. See the review of the authorities made by Bollen J in *Rough v Rix*. at pages 308-310.

In my opinion, there cannot be any hard and fast rules in this area. The court that hears an application under s 76a will properly have regard to the attitudes expressed in the cases that have been decided under s 163, but those cases do not establish inflexible categories that will determine the success or failure of these applications. Where a discretion is given by Parliament in unqualified terms, a pattern will often emerge after a time from the reported decisions, and this may give guidance in future cases. Discretions are not to be exercised capriciously, and it will often be useful to see what attitude was taken in earlier cases having some resemblance to the matter in hand. However, there are obviously limits to the deductions that may be drawn from such cases. Dicta from *ad hoc* decisions, however useful they may be, are not to be applied like the words of a statute. Certainly, convictions and orders are not to be set aside on grounds that are unmeritorious or otherwise inadequate. The rights and interests of the respondent are to be considered, not only those of the applicant. There will be times when it will be appropriate to have regard to the substantial merits of a proposed defence, and times when it will not. There may be other useful ways of probing the merits of an application. But in the end, as it seems to me, it will be a matter of doing what the justice of the case in hand requires. The relief given by s 76a is discretionary, and any review of a special magistrate's decision on appeal will be dealt with in the manner appropriate to discretionary orders. As long as he applied the correct principles, and took all relevant matters and only such matters into account, his decision will not ordinarily be assailable."

16 The principles established by the foregoing, and other cases, are systematically laid out by Debelle J in *Grant v Irrgang* (1991) 160 SA LSJS 334 between pages 337 and 339 of that report. I was also referred to *Meverley v Commane* (1987) 47 SASR 163, in which Legoe J followed the fairly strict line established by some of the above cases.

17 The cases from the Supreme Court of Western Australia seem to establish a more liberal regime for defendants: the judges of that court appear more readily to overrule the exercise of the magistrates' discretion; are less critical of the faults of defendants who have failed to appear to answer the charges against them. The following remarks of Wallwork J in *Stuart v Shire of Swan* appear to be fairly representative (from p 8 of the internet report):

> 'In Stewart v Millar, unreported, FCt SCt of WA; Library No 1748.2; 21 May 1976, Jackson CJ, when discussing s 136A of the Justices Act, said '…but where the facts point clearly to a continuing intention of a defendant to oppose the complainant's case, and where he has deposed to circumstances in which, if established, he clearly would have a defence, it seems to me that it is wrong to conclude that the application has no merit, even if there has been some carelessness on the applicant's part…The practice in this Court when orders have been made in the absence of a party is very clearly to give that party an opportunity of coming in to be heard, and setting aside the order made ex parte in his absence if that can be done without injustice. I think the same principle should be applied to applications under s 136A.'
>
> The facts in Stewart v Millar were that the applicant had put a notice of the trial date in his pocket and forgotten all about it. The notice somehow got lost. He had said it was at all times his intention to defend the case.
>
> In Petrov v Carter, unreported; SCt of WA; Library No 940282; 8 June 1994, the appellant had failed to appear in court because the matter had slipped his mind. In the decision in that case the dicta of Anderson J in Lucas v Davis, unreported; SCt of WA; Library No 940018; 17 January 1994 is referred to; also Jones v Little, unreported; SCt of WA; Library No 5181; 16 November 1993 and Matthews v Dyball, unreported; SCt of WA: Library No 6585; 30 January 1987. In that last mentioned decision Mr Justice Wallace said: "I am simply saying that he has not been heard and the learned Magistrate has not had the benefit of his side of the argument. It seems to me that the discretion with which the Court is clothed in exercising the provisions of s 136A of the Justices Act is wide indeed and suggests to me it is available to meet the sort of situation presently before the court."

18 And it is hard to believe that the appellant in *Lucas v Davis* would have received in South Australia what he was afforded in Western Australia by Anderson J, who said (pp 4-5 of the internet report):

> "It seems to me to be a case in which a driver does have a defence to the charge, that defence being one of honest and reasonable mistake as to the particular circumstances going to the question of whether he had been required to stop. I think that there is an arguable case that he made an honest and reasonable mistake as to whether or not he had been required to stop. It is not just his word that he is relying upon. That was also the impression of his passenger and it was in conversation between them that they both decided that he had not been required to stop.
>
> It does not seem to me to be right that merely because he had decided in the end, on the basis of a misapprehension about the severity of the penalty that might be imposed upon him leading him to believe that it was not worth defending the case, that he should now be denied a rehearing in light of the penalty actually imposed and in light of the existence of facts which arguably give him a defence to the charge. It was unwise of him not to appear. It tells heavily against the exercise of a discretion in his favour that he consciously decided not to appear, but weighing it all up and taking a very broad view of it and having regard to the width of the discretion conferred by s 136A, I think his Worship took too restricted a view of the circumstances under which that discretion ought to be exercised.
>
> His Worship seems to have been very much influenced by the fact that there was a conscious decision not to appear and seems to have been of the view that whatever merit there might be in the case itself, once there had been a conscious decision not to appear and not to defend, that really ought to be the end of the matter.
>
> I do not think that is a correct application of the section, nor a correct view of the discretion conferred by the section."

THE DEFENDANTS' NON-APPEARANCE

19 The complaints in these matters were laid on 30 April 2002 and served personally in 7 May 2002 (affidavits of service of MJ McKenna, sworn on 14/5/02 on file), together with a summons to attend the Darwin Court of Summary Jurisdiction on 22 May at 10 o'clock.

20 On that day the matters were listed before Mr Cavenagh SM, who adjourned the cases for plea or mention to 10 a.m. on 12 June. I am informed by paragraph 3 of an affidavit sworn 22 August 2002 by Mr Grove, that Mr Bonsell appeared in person on 22 May, and Mrs Bonsell did not appear. Mr Cavenagh's notations are consistent with this. Mr Grove's affidavit goes on to say:

> "4. At that mention, Mr Peter Bonsell advised the Court that he had an appointment with the Legal Aid Commission on 23 May 2002 and that Mrs Jennifer Bonsell was unable to appear because of a disability, which was unspecified.
>
> 5. On or about 30 May 2002, the Defendants were served with a letter each from Ward Keller, dated 22 May 2002, advising them that the proceeding had been adjourned to 12 June 2002 and seeking details of the disability referred to in paragraph 4 herein. Annexed hereto and marked with the letter "A" are true and accurate copies of the said letters.
>
> 6. On or about 3 June 2002, I received by way of facsimile a letter from Mr Peter Bonsell attaching notices from Centrelink. Annexed hereto and marked with the letter "B" are true and accurate copies of the said facsimile and its attachments.
>
> 7. On or about 3 June 2002, I caused to be forwarded by ordinary post to Mr Peter Bonsell a letter dated 3 June 2002 seeking information regarding Mrs Bonsell's alleged disability. Annexed hereto and marked with the letter "C" is a true and accurate copy of the said letter.
>
> 8. On 12 June 2002, the proceeding was again called on for mention. There was no appearance from either of the Defendants. There was a letter or facsimile on the Court file from Mr Bonsell although I verily believe that the document did not advise of the nature of Mrs Bonsell's alleged disability.
>
> 9. On 19 June 2002, the proceeding was again called on for mention. There was no appearance from either of the Defendants. There was a letter or facsimile on the Court file from Mr Bonsell although I verily believe that that document did not advise of the nature of Mrs Bonsell's alleged disability. I advised the Court that I had been unable to effect service a letter I had drafted dated

13 June 2002 advising the Defendants of the proceeding being adjourned to 19 June 2002.

10. On or about 20 June 2002 I caused to be forwarded to the Defendants a letter advising that the proceeding had been adjourned to 20 June 2002 and again seeking details of Mrs Jennifer Bonsell's alleged disability. Annexed hereto and marked with the letter "D" is a true and accurate copy of the said letter served in the following manners:

    a. By registered post to PO Box 551, Palmerston, being the address of the Bonsells disclosed on their Application for a development permit and detailed in Mr Bonsell's business listing in the Yellow Pages;

    b. By facsimile to Mr Bonsell's business address, disclosed in the previous correspondence from Mr Bonsell to this Court and detailed in Mr Bonsell's business listing in the Yellow Pages (a true and accurate copy of the facsimile transmission sheet is annexed hereto and marked with the letter "E");

    c. By instructing Michael James McKenna, Process Server, to deliver the said letter contained in an envelope to the physical address of the Bonsells, disclosed in the Application for a development permit and detailed in the Bonsells' residential listing in the White Pages. I am advised by the said Michael James McKenna that he was unable to deliver that letter.

11. On or about 27 June 2002, I received a facsimile from Mr Peter Bonsell with medical reports. Annexed hereto and marked with the letter "F" are true and accurate copies of the said facsimile and its attachments.

12. On or about 28 June 2002, I caused to be forwarded a letter to the Defendants with an attached precis. Annexed hereto and marked with the letter "G" are true and accurate copies of the said letter and the precis attached thereto.

13. On or about 2 July 2002, I caused to be forwarded a facsimile to the Defendants seeking their correspondence with the Legal Aid Commission. Annexed hereto and marked with the letter "H" are true and accurate copies of the said facsimile and the facsimile transmission sheet.

14. On 3 July 2002, the proceeding was again called for mention. There was no appearance from either of the Defendants. I do not

believe that there was any further letter or facsimile on the Court file from either of the Defendants explaining their absence.

15. On or about 4 July 2002, I caused to be forwarded to Mr Peter and Mrs Jennifer Bonsell a letter dated 4 July 2002, a true and accurate copy of which is annexed hereto and marked with the letter "I", in the following manners:

    a. By registered post to 12 Forrest Drive, Humpty Doo, being the address of the Bonsells disclosed in their listing in the White Pages;

    b. By facsimile to Mr Bonsell's business address, disclosed in the previous correspondence from Mr Bonsell to this Court by facsimile and detailed in Mr Bonsell's business listing in the Yellow Pages (a true and accurate copy of the facsimile transmission sheet is annexed hereto and marked with the letter "J");

    c. By instructing Michael James McKenna, Process Server, to deliver the said letter contained in a plain envelope to the physical address of the Bonsells, disclosed in the Application for a development permit and detailed in the Bonsells' residential listing in the White Pages.

16. On or about 4 July 2002, I received the registered post item referred to in sub-paragraph 10a herein marked "return to sender" and "refused" and notification from Australia Post. Annexed hereto and marked with the letter "K" is a true and accurate copy of the said notification.

17. On or about 24 July 2002, I received the registered post item referred to in sub-paragraph 15a herein marked "return to sender" and "refused" and notification from Australia Post. Annexed hereto and marked with the letter "L" is a true and accurate copy of the said notification.

18. On or about 18 July 2002, I received an Affidavit of Service from Michael James McKenna sworn 16 July 2002. Annexed hereto and marked with the letter "M" is a true and accurate copy of that Affidavit.

19. Annexed hereto and marked with the letter "N" are true and accurate copies of the Yellow and White Pages entries referred to herein.

20. Annexed hereto and marked with the letter "O" is a true and accurate copy of a search conducted of the Defendants at the Land Titles Office."

21 The court files accord with Mr Grove's affidavit as to the non-appearance of both Mr and Mrs Bonsell upon the various mentions of the matters: before Mr Cavenagh again on 12 and 19 June, before Mr Trigg SM on 3 July, and finally before Mr Loadman SM on 31 July.

22 The communication from Mr Bonsell mentioned by Mr Gove in paragraph 8 seems to have been neither a letter nor a facsimile, but rather a telephone call. There is on Mrs Bonsell's file a notice written by that conscientious clerk Ms Cardona timed at 12.50 on 11/6/02: she has recorded the message as:

> "The defendant's husband, Peter Bonsell, called on behalf of his wife. He advised me that he is the carer for his disabled wife (the defendant) and seeks an adjournment as they are both ill and need to go to the doctor's tomorrow."

23 The communication mentioned by Mr Grove in paragraph 9 was apparently a facsimile from both defendants. It too is placed on Mrs Bonsell's file. It was received in the court's office at 0920 on 19/6/02, and reads:

> "To the Court Clerk
>
> My wife and I apparently are due to appear in court today at 10.00 a.m., although we have not been officially informed of this.
>
> My wife is disabled and I am her official carer.
>
> And due to illness we are both unable to attend this morning.
>
> We also are awaiting the results of an appeal for legal aid.
>
> Yours thankfully
>
> [signed ……..]"

24 The medical reports spoken of by Mr Grove in paragraph 11 are from a Dr Pauline Wilson, both dated 29/5/02. They read:

(i) " Re Jennifer Bonsell

This is to confirm that it would not be in the interest of Jennifer's health to attend court. She suffers from severe rheumatoid arthritis and anxiety attacks. She is currently being treated by a psychiatrist and is on medication for both conditions."

(ii) Re Mr Peter Bonsell

In the interest of his health Peter needs legal representation for his physical problem. He suffers from psoriasis and some anxiety attacks which prevent him from speaking in a group where tension exists. He can write well and speak one to one but would be totally unable to cope with defending himself in court."

25 The letter from Mr Groves to Mr and Mrs Bonsell, and spoken of in paragraph 15 of the affidavit of 22/8/02, said:

"I advise that I attended on behalf of the Development Consent Authority on 3 July 2002 before the Court of Summary Jurisdiction.

You did not appear.

I advise that I provided the Court with your letter by facsimile to me dated 27 June 2002 and its attachments.

I advise that the Court has adjourned the matter to 31 July 2002 at 10.00 am on *ex parte* for one hour. [sic]

The Court has requested that I advise both of you, that if you do not attend personally or by a solicitor on that occasion, the hearing will proceed in your absence.

On that occasion, the development Consent Authority will be seeking that the Court find the charges proven, that you be convicted and that there be a fine imposed.

In addition, the Court has ordered that the Warrant to Arrest issued by Mr Cavenagh SM on 19 June 2002 against Mr Bonsell continue to lie until 31 July 2002.

> The Court has also ordered that a warrant be issued against Mrs Bonsell and that that Warrant lie until 31 July 2002."

26 An earlier affidavit, of 31/7/02, by Mr Grove detailing, among other things, the efforts to serve that letter, is on the file and was, I assume, filed by Mr Grove and read by Mr Loadman before proceeding ex parte that day.

27 There was received in the court office that morning a facsimile transmission from Mr Bonsell, signed by Mr and Mrs Bonsell. It begins:

> "To the Court Clerk.
>
> Could you please inform the court that my wife and I are unable to attend due to illness and extend our apologies. Our absense should in no way be construed as an admission of guilt in fact we deny guilt in any of the allegations laid against us. We believe the authority is guilty of impropriety in the handling of our case and application of the planning Act.
>
> We have therefore made official complaints to the Ombudsman, the Minister for the Environment, the Minister for Justice (acknowledgements attached).
>
> We have not been granted legal aid (see attachment) and cannot afford reprisentation equal to that of the authority.
>
> We therefore request an indefinate adjournment until the result of our complaints are known as they will have a significant affect on our defence."

It goes on to say:

> "My wife is disabled and in the last year I have had to give up full time work and become her carer we both receive pensions and have no savings, our property is our only asset in regard to our future financial security. My wife has chronic Rheumatoid arthritis is not fully mobile until lunch time most days if at all takes copious amounts of medication with varying side affects Nausea ect. This is when I am providing the most care helping her out of bed getting her dressed and ready and providing physiotherapy until her mobility improves. We both also have long standing mental conditions requiring medication and due to this case we are both now receiving specialist treatment.

We have provided medical evidence to the authorities lawyers."

28 Mr Bonsell attached a number of documents, including a letter from the Northern Territory Legal Aid Commission dated 2/7/02, informing him that the Review Committee on review, affirmed the decision to refuse legal aid. This decision was taken in the light of medical reports from Dr Wilson and Dr McLaren, psychiatrist, specifically directed to Mr Bonsell's capacity to appear in her own defence. It is unclear whether that material, having been faxed so late, was placed on the file before Mr Loadman heard the matters. I think it probably was not. I proceed on the assumption that Mr Loadman never saw it.

29 These reports, as well as the two reports by Dr Wilson of 29/5/02 reproduced above and other material, formed a bundle tendered by Mr and Mrs Bonsell by consent on the hearing of their applications before me on 22/8/02. The bundle became Exhibit 1. Its first page is a list written in Mr Bonsell's hand, of 12 medicaments currently taken by him, his wife, or both of them. Some of them are known to me to be psycho-active. Others are known to me to be analgesic or anti-inflammatory. Others are not known to me at all. There are two reports from Dr McLaren, dated 13/8/02:

(i) "To Whom it May Concern:

Re: Peter BONSELL DOB: 26.10.52, 12 Forest Drive, HUMPTY DOO NT 0836

This man was first referred to me on 18th June this year by his general practitioner. He presented with symptoms of a long-standing anxiety state with social phobia and a mild, fluctuating, reactive type of depressive state.

He was commenced on specific treatment for anxiety symptoms but despite this; felt he was unable to attend court without further treatment. This is now being attended to and it is likely the he will be able to attend a public hearing before too long.

I accept that his complaints of inability to speak in public are genuine and would be grateful if this information could be taken into account. If further information is required please contact me at the above address."

(ii) "To Whom It May Concern:

Re: Jennifer BONSELL DOB: 29.01.54 12 Forrest Drive, HUMPTY DOO NT 0836

This woman was first referred to me on 23rd May this year by her general practitioner. She has a history of rheumatoid arthritis and, on examination, was also found to have a long-term anxiety state. When she first presented, she mentioned one of her specific fears was public speaking. There was quite a strong sense of persecution which did not amount to an overt paranoid state, but this nonetheless controlled her behaviour to some extent.

With treatment, there has been some improvement and she will require continuing treatment for some time.

I understand that her recent case is being reconsidered. I would be grateful if this information could be taken into account. If you require further information, please contact me at the above address."

30 There were, further, two reports, one from this year and one from the year 2000, from a Dr J. Zurauskas, rheumatologist, speaking of Mrs Bonsell's rheumatoid arthritis. I accept these reports and I am persuaded of the genuineness of that condition. Mrs Bonsell moved slowly in court and seemed to be somewhat stiff. Exhibit 1 also contained material from Centrelink. I accept that Mrs Bonsell has no income apart from Commonwealth benefits and that Mr Bonsell's income is the Commonwealth carer payment, plus supplements. This financial information is relevant in two ways. First, it provides an explanation as to why the Bonsells did not instruct private lawyers to appear for them in the matter; viz, they had no money to do so. Secondly, the financial details are relevant to my consideration whether an injustice may have occurred in relation to the penalties imposed by Mr Loadman.

31 Mr Bonsell also tendered a medical certificate from Dr Wilson giving the opinion that he would be unfit for work or a court appearance from 12/6/02 to 3/7/02. That certificate became Exhibit 2. It seems fairly irrelevant to my consideration of the proceedings on 31/7/02.

FINDINGS

32 It is evident from a study of all this material that the Bonsells have been aware, one way or another, of all the court dates, and have chosen not to come to court on any of them, apart from Mr Bonsell's appearance on the first. I am entirely unpersuaded by Mr Bonsell's argument that, as his wife's carer, he could not leave her and that, she being so immobile in the mornings, she could not attend herself. The contrast between his non-attendance on four occasions in a row, on the one hand, and his instant appearance in the registry on 2/8/02 to file the applications, is striking. Accepting that Mrs Bonsell might well be less mobile in the mornings, I am not persuaded that she was so immobilised as to be unable to move at all. The telephone message of 11/6/02 was to the effect that they were unable to attend on 12/6/02 not through immobility, but because they had to go to the doctor's – mobile then, but elsewhere. I have heard Mr Bonsell speak in court on two occasions, on 8 August and 22 August. I would place him, in my experience, in the top 10% of self-represented persons in respect of his confidence and apparent ease in court. He spoke well and to the point. Mrs Bonsell was less voluble, but seemed less overawed than the average private citizen appearing in the Magistrates Court. My observations leave me in no doubt that the medical predictions, that the Bonsells would be unable adequately to represent themselves, are wrong. Unlike Dr McLaren, I do not accept that Mr Bonsell's complaint of inability to speak in public was ever genuine. I have not made sufficient observations to consider Mrs Bonsell's genuineness in that regard. I have seen and heard enough to conclude that she, in relation to her appearance or non-appearance, has chosen to follow the advice or example of her husband.

33 There is nothing before me to suggest there is any real likelihood of injustice in Mr Loadman's findings of guilt. The only matter put forward by Mr Bonsell is that he would like to put the prosecution to proof as to the date of the clearing. This is a long way from an assertion of innocence and some distance from the demonstration of an arguable defence.

34 In respect of the penalties the case is otherwise. Given that Mr and Mrs Bonsell are both pensioners, a fact which may not have been known to Mr Loadman, and that they have no other income, a fact probably not known to Mr Loadman, it is quite likely that he or she or they may have something to put before the court that might affect the penalty to be imposed. (On the other hand, they being proprietors of the block, perhaps not.) The fines imposed are considerable, and it seems to me that, on the material before me, there is a probability of injustice in that respect. Notwithstanding the flagrant nature of the applicants' failure to appear, and notwithstanding the complainant's interests, for which I have the regard suggested by the cases, it seems to me that I ought to allow the application so far as it relates to the penalties imposed, which might as well include the order for revegetation, and refuse it in respect of the findings of guilt. I also allow the application on the question whether convictions ought be recorded.

35 I publish these reasons to the parties, and I have recorded my orders on the files. I will not publish my reasons more widely until the matters have been before Mr Loadman again, in order to avoid any appearance that his rehearing might be influenced by any indication of my opinion of Mr Bonsell in particular, which may be evident herein. I will also reserve the question of costs until after the rehearing, because there may be some argument that the outcome before Mr Loadman may affect any order for costs.

Dated this 9th day of September 2002.

R J Wallace
STIPENDIARY MAGISTRATE