

CITATION: *Development Consent Authority v Peter Walter Bonsell and Jennifer Betty Bonsell* [2004] NTMC 031

PARTIES: DEVELOPMENT CONSENT AUTHORITY

v

PETER WALTER BONSELL & JENNIFER  
BETTY BONSELL

TITLE OF COURT: Court of Summary Jurisdiction

JURISDICTION: Criminal

FILE NO(s): 20207087; 20207079

DELIVERED ON: 13 April 2004

DELIVERED AT: Darwin

HEARING DATE(s): 11, 12, 13 June 2003; 17, 18 November 2003;  
23, 24 February 2004; 12 March 2004

JUDGMENT OF: Jenny Blokland SM

**CATCHWORDS:**

Prosecution – Planning Act (NT) s 75(3)(a), s 53, s 54; six month limitation period for laying complaint – Validity of Permit – Project Blue Sky Inc and Others v Australian Broadcasting Authority [1998] HCA 28; The Minister for Immigration and Multicultural and Indigenous Affairs; ex parte Palme [2003] HCA

**REPRESENTATION:**

*Counsel:*

Complainant: Mr Groves  
Defendants: Self Represented

*Solicitors:*

Complainant: Ward Keller  
Defendants: Self Represented

Judgment category classification: B  
Judgment ID number: 031  
Number of paragraphs: 39

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

No. 20207087; 20207079

BETWEEN:

**DEVELOPMENT CONSENT  
AUTHORITY**  
Complainant

AND:

**PETER WALTER BONSELL  
&  
JENNIFER BETTY BONSELL**  
Defendants

REASONS FOR DECISION

(Delivered 13 April 2004)

Ms BLOKLAND SM:

**Introduction**

1. These proceedings concern alleged breaches by the defendants of the *Planning Act (NT)*. The matters have a lengthy history that I mention simply for the completeness. The defendants were charged with 20 counts against the *Planning Act (NT)*. On 31 July 2002 Mr Loadman SM proceeded *ex parte* to convict both defendants of certain counts and they were each fined. Both defendants filed applications under the *Justices Act* to have those convictions set aside. On 9 September 2002 Mr Wallace SM ruled the convictions should not be set aside.
2. Both defendants appealed to the Supreme Court and the record indicates that His Honour the former Chief Justice set aside the convictions and penalties on 15 January 2003 and remitted the matter to this court for rehearing. I do

not have a copy of His Honour's reasons – although I was advised at this hearing by Mr Bonsell that His Honour indicated that first it needed to be established that the offences did in fact occur within the six months prior to the laying of the complaint as required by the *Justices Act*. The complaint was laid on 1 May 2002. I have not held a separate voir dire on that point, but rather have heard all of the evidence, the prosecutor being on notice that it must prove beyond reasonable doubt that the acts complained of did in fact occur during the relevant time frame. To hold a separate hearing on the time frame alone could have necessitated two hearings, something not ideal in the circumstances.

3. This proceeding heard by me is the re hearing as ordered by his Honour. On the second day of the hearing before me, after argument, I allowed the prosecution to amend counts 10, 11 and 12 of the complaints. The counts before me are more particular than the original counts but I was not of the view that they changed the substance of the allegations. The prosecutor informed me that he would not be proceeding on the other counts before me. Counts 10, 11 and 12 charged against each defendant (but heard together) now read as follows:
4. “10. AND FURTHER the defendant did, between 1 November 2001 and 23 March 2002, develop land (being section 3617 Hundred of Strangways in the Northern Territory of Australia) in a manner that is not permitted in accordance with a development permit, contrary to section 75(3)(a) of the Planning Act.

#### PARTICULARS

The Defendant cleared vegetation on the land contrary to the provisions of clause 1 of the permit DP01/0149 in that the Defendant failed to selectively clear the land to facilitate drainage works contrary to the provisions of clause 1 of the permit DP01/0149.

11. AND FURTHER the Defendant did, between 1 November 2001 and 23 March 2002, develop land (being section 3617 Hundred of Strangways in the Northern Territory of Australia) in a manner that is not permitted in accordance with a development permit, contrary to section 75(3)(a) of the Planning Act

#### PARTICULARS

The Defendant failed to retain and maintain vegetation on the land contrary to provisions of clause 2 of the permit DP01/0149.

12. AND FURTHER the Defendant did, between 1 November 2001 and 23 March 2002, develop land (being section 3617 Hundred of Strangways in the Northern Territory of Australia) in a manner that is not permitted in accordance with a development permit, contrary to section 75(3)(a) of the Planning Act.

#### PARTICULARS

The Defendant cleared vegetation on the land contrary to the provisions of clause 3 of the permit DP01/0149 in that the Defendant did not selectively clear the remaining area and liaise with the Natural Resources Division of the Department of Lands Planning and Environment.

5. It is common ground that the defendants are owners of land at Section 3627, Hundred of Strangways, more commonly known as 12 Forest Drive Humpty Doo. It is common ground the Defendants needed to make an application under the *Litchfield Area Plan* if they wanted to clear more than 50% of their block.

## Summary of Prosecution Evidence

### Ms Sarah Stocks

6. Ms Sarah Stocks gave evidence in these proceedings for the prosecution that she previously lived at lot 3616, 100 of Strangways, in Vale Court, Humpty Doo; that the top of her block was on Forest Drive; that block 3617 was occupied by the defendants; that the defendants' block bounded the west side of her block; that she believed the defendants had been in their block for some three to four years (from around 1998 to 1999); that they were still residing there when she left her block in April 2003.
7. Ms Stocks told the court she became aware that the defendants wanted to obtain permission to clear more than 50% of their block as a pink sign appeared on the block to that effect from the Planning Authority. She says she believed the sign was erected in April 2001. She says she had a clear view of the Bonsells' property from her property; she said that in April 2001 half of their block had already been cleared and that they (the Bonsells) were planting mango trees; that the back half of their block was heavily wooded with Black Wattles, Grevilleas and other native trees. Ms Stocks indicated a portion of the defendants' property (see *Exhibit P2*) had been cleared and mangoes planted before the permit was applied for; she indicated there was a house on the defendants' block; that during the relevant period she would see the defendants every couple of days because they were working regularly on their property; that the area Ms Stocks indicated on *exhibit P2* was planted with mangoes from the driveway to the drainage easement on the western boundary.
8. Ms Stocks said that during April 2001 she drove regularly along Forest Drive to go to work and to the shops; that along the Forest Road aspect the defendants' property was fenced with one metre and a half cyclone mesh; that logs that had been cleared were stacked along the bottom part of the fence and there were small flowering shrubs. She said the house was very

clearly visible from the road as there was no vegetation at the front of the block other than little mango trees. She said the eastern side of her own block was left virgin – dense with the Cypress Pine; the west side had been planted up with palms and other shrubs; the back of the block had been selectively cleared as a horse paddock. She said her involvement with the defendant's permit to clear their block was that she wrote a letter to the Chairman of the Planning Authority in which she aired her concerns; she said she was concerned that if the defendants cleared their block it would become flooded and water logged.

9. Ms Stocks said that the back half of the defendant's block in April 2001 was heavily wooded with various native plants; she said that once the back block was cleared she could see through their block to a neighbour's block and could see the highway; Ms Stocks said that this part of the block began to be cleared at about April 2001 and was cleared by hand so she didn't notice the clearing until a large part of it had in fact been cleared. She said Mr Bonsell used a chainsaw and axe and Mrs Bonsell was using a mattock digging out lots of suckers and planting them along the fence line. She said there was no selective clearing; every single tree was cleared on that property. In May 2001 she said the clearing was done *ad hoc*; she said the first thing to go was large trees; she said about 50 or so large trees were cut down; she said the back section of the block was totally cleared by the beginning of 2002; she said most of the wood that they had cleared would have been burnt prior to the wet in 2001, so November or December 2001 when the defendants had a fire permit; she said they were still pulling out stumps and re-stacking the windrow as they had another permit for 23 March 2002. She said they were still stacking up and pulling out suckers until that time and until she left her block. She said that of wet season clearing the defendants started clearing the back part of the block about December 2001, although she said most of the vegetation had gone by that stage; she said it was in August or September that she could clearly see through to the neighbour's block; that

in September or October she could see the occasional truck on the Stuart Highway; she said after that she could see anything that went down the Stuart Highway; she said the south western corner of the property started to have been cleared in October or November; she then said it was slowly being selectively cleared over the whole wet; by March 2002 anything left standing was cleared; she said she first saw the clearing in the south-western corner at the end of 2001; that the south western corner was more dense than the rest of the southern part of the block; that the first fire was large in December consisting of cleared vegetation but this was followed by a further fire on the defendant's property in March 2002 when the vegetation cleared from December to March from the south-western corner of the block was being burnt. She said that after March there were only a few pine trees left on the block; on the southern part of the property the vegetation was sparse; she said there was only *a little bit left* on the south-western corner.

10. In cross examination Ms Stocks was asked about whether there was animosity between her and the defendants; she said there was none until the defendants were disregarding the permit about clearing. In cross examination (over objection), Mr Bonsell asked Ms Stocks if she had arranged or participated in damaging or knocking down trees on their block. After warning her about not needing to answer incriminating questions, Ms Stocks essentially denied the allegations saying there were no trees to knock down and that she didn't know what Mr Bonsell was talking about. At one point she refused to answer on the basis of relevance; I explained she could only refuse on the grounds of self-incrimination and the matter was not pursued further in cross examination.
11. An extract from a letter written by Ms Stocks to a Mr Christopher Humphries of the Development Consent Authority was put to her where she stated *The whole entire block was cleared by September 2001.* Ms Stocks said *originally that letter was written because Christopher Humphries asked me fore some – a witness letter. Then it was after that that he asked for some*

*more information, than I had – then I actually stopped and thought about it all and that’s when I could relate certain clearings to events that was happening currently in my life;* she told the court she had amended her original letter; she denied having a communication with the relevant Department asking her to think of a date further down the line. Ms Stocks was queried in cross examination on whether she could see the back fence – she said she could; she disagreed that there were any rises that would block her view; she confirmed her estimate of fifty trees although she conceded it was an estimate – she disagreed she was unable to see the trees.

12. When cross examined by Mrs Bonsell, Ms Stocks said she wrote two letters for Mr Chris Humphries. She said the letters were requested by him; she said she received two letters from Mr Humphries requesting the letters; she agreed she had received telephone calls from the authority and that she had made calls to the authority.

**Ms Sally Jacka**

13. Ms Sally Jacka gave evidence that she currently works for the Litchfield Shire Council and at the relevant time was a consultant to the Litchfield Shire. She was essentially engaged as a vegetation management officer, a position that required her to advise people about native vegetation; she also represented the Council on the Clearing Committee and looked at clearing applications. Ms Jacka agreed she saw the application submitted by the defendants. She said she had a meeting with Mrs Bonsell on 6 April 2001; Mrs Bonsell explained the reason for wanting to clear; – Ms Jacka said she told her the main reason was because of the existence of a lot of mounds of dirt amongst the bush; that Mrs Bonsell expressed a belief that by clearing the mounds they could alleviate water problems in the wet season; she said she explained to Mrs Bonsell that clearing would probably make the problem worse; that she went for a walk around the property and she talked to Mrs Bonsell about selective clearing and that keeping a buffer at the back



of the property was necessary; she said she believed that keeping the existing vegetation at the southern boundary would alleviate drainage problems; she said she also discussed that a vegetation buffer at the front half of the property that had been cleared should be re-planted; she said that Mrs Bonsell agreed to this plan of keeping buffers, leaving the native vegetation at the back of the block and some selective clearing elsewhere.

14. As at April 2001 Ms Jacka said about 50% of the northern part of the property was cleared and mangoes planted; she said the southern half of the block was mainly native vegetation; there were already some stumps around the back of the house; she said it was reasonably healthy vegetation, neither thick nor thin. She said the species were *eucalyptus miniarta*, Darwin woolly buds and also *grevillea* and *pandanus* indicating the property could get very wet. She said there were a lot of trees and bushes, middle and upper storey. She said she drives past the property fairly regularly as it's the easiest route home if she has gone south bound. She said she drove past the property on or about 15 January 2002 and she said she was *horrified* as it looked as though the southern 50% of the property was cleared; she said she had not noticed clearing there in early December; she says she knew she had driven there on 6 December and it hadn't been cleared; she said she looked at the property every time she drove past since April 2001 as she was wondering when the clearing would take place; she said she saw native bush on the block in December; she said the bush may have been a little bit thinner in December compared with the first time she saw it in April but that did not concern her; she said in January 2002 she suspected the clearing was 100% but the house was blocking part of her view and she couldn't be certain; she viewed it again from a nearby service road but there was some obscuring there also. She gave further evidence saying that she visited the Bonsells in her capacity as a wild life rescuer; that the Bonsells had called in June 2002 as they had a possum and she was asked by Wild Life rescue to pick the possum up; she spoke to the Bonsells and picked up the possum on

the back verandah; she said she was on the verandah and could see the southern portion of the block; that it was pretty well cleared apart from some stumps and Cypress pines; there was no bush and no tall grass, although she said she wouldn't expect to see tall grass at that time of the year.

15. In cross examination she said she wasn't initially too concerned about the initial clearing because Mrs Bonsell had said there would be selective clearing by hand; she said her understanding of selective clearing meant leaving virtually all large trees; she said she had advised on the conditions but did not draft the permit; that she had advised the need of a buffer zone because of mango growing and the possible use of sprays and its affect on neighbours. In cross examination Mrs Bonsell put the contents of an email from Ms Jacka to a Departmental Officer, (Mr Lancaster), being *I cannot be absolutely certain – certain looking for the road* Ms Jacka told the court she meant by this that she couldn't be absolutely certain of what percentage of the block had been cleared and that she believed she said it appeared to be in breach of the permit; she also said she went back a few days later, got out of her car and looked at the property and confirmed her fears; she said in later communications she confirmed there had be more than 80% cleared; she said she also looked at it from another angle being a nearby service road and saw the south western corner had been cleared; she agreed in cross examination that recently there had been some regrowth; she said it would take another 100 years to get it back to the state that it was; it was suggested that the trees four inches high may have been original plants that were not selectively cleared; to that suggestion Ms Jacka said they could have been, but that result did not accord with her discussions with Ms Bonsell on the meaning of selective clearing. Ms Jacka was asked whether she thought it was likely that clearing would take place in December – January during the wet season; she explained she didn't expect it to be that wet at the beginning of the wet season and a lot of contractors clear at that time because the

ground is softer – early wet season, she said, was not a sensible time to clear but a lot of people did because they found it easier. Ms Bonsell queried Ms Jacka on an addition to an earlier statement where she added the date 6 December 2001 that was not mentioned in her earlier statement; Ms Jacka said she had not been asked about it on the first occasion. She made the addition when she was asked if she had seen anything particularly before 15 January 2002; she was asked if she had made the addition to place it back in the six month time frame the Authority wanted; she said she wasn't aware of the six month time period at the time she made the addition; she said she was asked by the prosecutor if she had seen the property before 6 December and that she then consulted her diary that indicated she had viewed it on 6 December and she says she would have contacted a departmental officer straight away. Ms Jacka disagreed with the suggestion that the clearing finished in September.

**Mr Ian Lancaster**

16. Ian Lancaster, a manager for advisory and regulatory services in the Natural Resource Management Division Of the Department of Infrastructure, Planning and Environment (DIPE) gave evidence that he was the coordinator of the Vegetation Clearing Committee (being an advisory committee to the Development Consent Authority). He gave evidence that he considered the application of the defendants in May of 2001 to clear in excess of 50% of their property; that he visited Mrs Bonsell with Ms Jacka and Mr Hollingsworth; he presumed Mr Bonsell was at work; he discussed the matter with Mrs Bonsell; he observed the northern part of the property had been cleared to 50% and mangos planted; he observed the rest of the property was still in its native bush state; he said there was a lot of rubbish left from years ago – steel, wire and other items of that nature which he agreed could be a danger; problems of ponding in the wet season were discussed; it was explained that the defendants wanted to selectively clear; that he agreed that selective clearing of undergrowth and shrubbery could be

selectively cleared to allow for smaller machinery to do minor earthworks to alleviate the problems. A buffer zone on the Stock's border was discussed as was the retention of a 200 square metre area of native bush. He identified the permit as being the one received from the defendants on 2 April 2001. He said as well as the main application, someone had written in a different pen, *mainly for planting mangos*. He said he did not know where that had come from, he did not recall it.

17. The procedure adopted for processing the permit was it would go to the Development Consent Authority with recommendations from the Vegetation Clearing Committee because all parties had agreed. On the first of May Mr Lancaster said he visited the Bonsells again and showed Mrs Bonsell all of the comments and conditions and she seemed helpful towards the process and happy with the result.
18. Mr Lancaster said it was reported to him in January of 2002 that the block had been completely cleared; he visited the property on about 14 January and from the road observed that the vegetation had been removed; he could see that the large trees were removed. He next visited the property with Mr Chris Humphries on February 20<sup>th</sup> to ask why the vegetation had been removed. Mr Lancaster explained that Mr Humphries is the Manager of Development Assessment services and was overseas at the time of the hearing; Mr Lancaster did not know where he was. He had a discussion with Mr and Mrs Bonsell on the property; he said most of the trees – all of the large trees had been cut down, if not removed. There were several remaining stumps, there were two to three Cypress Pines remaining; there was some regrowth on the stumps; there was a stockpile of trees, grasses and undergrowth that he presumed would be disposed of by burning. In May 2002 Mr Lancaster visited the property for an unrelated reason; he did not discuss this matter with the Bonsells but observed in the Southern part of the property that all of the native vegetation was removed including the stumps and the two or three native pines.

19. In cross examination Mr Bonsell suggested to Mr Lancaster that he had never been part of any agreement as the discussions occurred with Mrs Bonsell (when Mr Bonsell was not present); Mr Lancaster agreed he had not been a party to the discussions but he said he had positive agreement from Mrs Bonsell. Mr Lancaster disagreed that he said someone had told him the Bonsells would be planting mangoes; he said the discussion was more about the fact that the Bonsells were not going to do any more horticultural work on the block; he said in cross examination that the Bonsells stated their intentions as wanting to finish the clearing and plant mangos. Mr Lancaster was cross examined on the fact Mr Humphries had a camera with him; Mr Lancaster said he was not aware if there were any photographs available; it was suggested to Mr Lancaster that Mr Humphries had said *is it OK if I go and photograph?* Mr Bonsell agreed. Mr Lancaster said he was not aware of any photos relevant to this matter. He was asked about the reason for a buffer zone; Mr Lancaster explained certain issues concerning the drift of spray with mangos.
20. Mrs Bonsell questioned Mr Lancaster on whether or not there was any agreement about leaving big trees as part of selective clearing; Mr Lancaster said the idea was to leave as many of the big trees as possible; Mr Lancaster didn't think he needed to go to the extent of *flagging* trees as he thought the defendants were being cooperative and environmentally sound; Mr Lancaster agreed that a lot of the trees were growing out of fallen logs; he did not recall saying that the defendants would have four years to erect a buffer zone; he did not recall a suggestion that Mrs Bonsell expressed some concerns about the price. I allowed Mr Lancaster to be recalled as the defendants had some matters outstanding to put to him that they failed to put in cross examination. Some photos were put to Mr Lancaster showing two trees at the property; it was suggested to him this contradicted his evidence; he said the trees he was referring to were to the rear of the property in the area for which the permit had been sought; he said the trees in the photo

weren't in the original permit. On *selective clearing* he confirmed he had a discussion with Mrs Bonsell that it meant leaving the more important larger trees.

### **Mr Brett Easton**

21. Mr Brett Easton, manager of Native Vegetation Clearing also gave evidence. He was unable to state who it was that had added the words *mainly for planting mangoes* to the application for a permit. Mr Easton processed the application and visited the defendant's property. He observed the front part of the property had been cleared and there were juvenile mango trees planted; he said the house was located about two thirds of the way into the property; he noted pandanus and other native vegetation. From the back verandah he noted several species including grevilleas, melaleucas small paperbark shrubs and examples of native pine. He said there was a mixture of grasses including mission grass and spear grass as well as mid storey shrubs; there were several fairly mature melaleucas. He said he discussed the application with Mrs Bonsell; he said Mrs Bonsell was interested in planting mangos but they also wanted to clear in a style Mr Easton interpreted as the *parkland effect*. He gave evidence that he explained to Mrs Bonsell that mangos were not ideal on her block; that Mrs Bonsell mentioned termite damage in some of the vegetation; he did not see Mr Bonsell; he explained the process of the application to Mrs Bonsell; he estimated that the back half of the block would be 35% native vegetation. He said he has driven past the property numerous times, however not in 2001 (since the April visit). He drove past in early 2002 and considered that the block had been fully cleared. Mr Easton told the court he caused a copy of the permit to be forwarded to the Bonsells. In cross examination Mr Easton said he did not think of taking a photo when he saw the state of the property; he agreed there had been discussion about Mrs Bonsell wishing to keep Pandanus; he agreed it was possible she told him she wanted to plant 50 mangos; he agreed she said she wanted to selectively clear because of

drainage; he did not recall any comment concerning keeping the fire hazard down; he agreed he had viewed the property from the front and he would not have seen the whole property; he said he thought Mr Lancaster had shown the proposed conditions of the permit to the defendants; he said he was not and the department was not in the business of preventing people growing mangos although he thought it was bold to do so in the current environment; he was asked whether he had dealings with Sarah Stocks and said he did not have dealings with her; he said the normal process with selective clearing would be that the permit holders would liase with the department and certain trees would be flagged; Mr Easton said he believed that was covered in condition three of the permit; it was suggested to Mr Easton that a Mr Bob Keetch came to the property and said he couldn't advise them about selective clearing until they cleared as much as they could because he couldn't see enough – Mr Easton said he wasn't aware of that. I also allowed Mr Easton to give some evidence of the practice in relation to giving reasons under is 53(a) Planning Act. He disagreed the Authority had to give reasons for conditions. I am aware this is a matter of law at the end of the day for the court.

### **Mr Brett Brogan**

22. Mr Brett Brogan also gave evidence in the proceedings as the senior planner with the Rural Development Assessment Team. He gave evidence on the processing of applications for development. He said that in this case a recommendation was put to the Authority Chairman, Mr Fred Finch, because there was agreement between the applicant and the Vegetation Clearing Committee. Mr Brogan said the relevant file indicated the Bonsells had not contacted the Department although the Department had contacted them. He said his section received a complaint of excessive clearing six months after the application was received; he confirmed the permit was sent to the Bonsells. In cross examination he said the complaint was received on 16 January 2002 from Sally Jacka.

### **Mr Keetch**

23. Mr Keetch, a soil conservation officer gave evidence that in May 2001 he visited the defendants' property in answer to a phone call request to look at a wet block for drainage purposes; he spoke to Ms Bonsell; he observed some of the problems with the block and observed a windrow; he noted the water lying around; he saw 25-30 metres was cleared at the back; he suggested doing a survey of the block to see what could be done for drainage; he said the back 50% of the block was timbered; he walked down to the drain and saw the southern part of the block that was timbered; he returned a few days later with another officer to do a survey of the front of the block; he met Mr Bonsell on that occasion; he said it would be difficult to drain the front block; he didn't do anything in relation to the back part of the property other than to say to Mr Bonsell that if the grass could be removed it would make it easier; that he discussed other methods to make the drainage better; he said Mr Bonsell said he might have access to a bobcat; he also suggested that some back filling might help. In cross examination Mr Keetch agreed there was a lot of tall grass; he said in answer to a question on clause three of the permit that he didn't mention trees in discussion with Mr Bonsell.

### **Mr Christopher Humphries**

24. Mr Christopher Humphries, also a manager in the rural team of development assessment services went through various procedures in evidence concerning permits generally and made some references to the permit in this matter; he said that in early February he received a complaint concerning a breach and he visited the site on 7 February; he met both defendants; he noted there were very few trees remaining although there was some regeneration; there were just a few small Cyprus Pines on the site; there were only introduced shrubs; he was able to see the southern boundary from the back of the house; he was particularly concerned about the south west corner of the block; he said the defendants had no other authorisations in relation to clearing aside



from the permit. In cross examination Mr Humphries agreed that reason *three* on the permit appeared to have some text missing and was incomplete; he didn't agree with a proposition that this meant it was invalid; he said he had a camera with him on the day but does not recall taking photos; he said when he observed the site there was no point taking photos because clearly it was in breach; in hind sight he wished he had taken a photo. He was also asked about the letters and communications to Sarah Stocks; he denied asking her to change her mind about dates; he said he simply asked her to be clear on dates and on issues that she had not addressed in the first statement she gave; he denied there was a missing letter. I allowed Mr Humphries to be recalled as Mr and Mrs Bonsell said there were matters they hadn't put to him – he was asked about another map that he said he recognised as part of the re-vegetation order in relation to a previous hearing; he was asked about various conversations concerning the background of that order and whether he knew of any involvement of Sarah Stocks in conversations; he said he did not; he said he didn't know who lived on the border of the buffer zone; he said the purpose of a re-vegetation order was to re-establish vegetation that had been cleared at some time, that in this instance could have been both in the south-western corner and elsewhere in the southern 50% of the boundary.

## **The Defence Case**

### **Evidence of Mr Peter Bonsell**

25. After submissions I found a prima facie case on all three counts. Mrs Bonsell chose not to give evidence. That is of course her choice, the prosecution must still prove its case beyond reasonable doubt against each defendant. Mr Bonsell gave evidence. His evidence was that there were poorly constructed drains on the block from prior to himself and Mrs Bonsell purchasing it; that there was a lot of rubbish on the block from construction and other activities in many years prior to them owning the

block; that the block had been severely cleared many times before; that he and Mrs Bonsell had cleared the block in 1999; that because of the drainage problems they cleared most of the front of the block; they applied for the permit as a way to address outstanding problems of drainage and rubbish; that he understood the permit was to allow him to clear in excess of 50% of the block and he could selectively choose what to clear; his understanding was that it was he who could make the selection.

26. He said he started to do the clearing after the permit was granted; he started as soon as he received the permit; he said he cleared trees and undergrowth and dead wood; he used a chain saw; he said the work was completed on 26 August 2001; he says he knows this because he used an opportunity to use up annual sick leave to do the work; he said he was working as a air-conditioning mechanic; he said the dry season was the best time for doing the work; he said he cleared what was necessary to do the work. He said he cleared all over the block and it was all completed on 26 August; he then left piles of everything to dry out and obtained a certificate for burning it; he wanted to burn it in October but no fire certificates were allowed until November; he obtained a fire certificate on 16 November; he said the piles stretched for 150 metres; he did the burning on 16 November but it then rained; he proceeded with it on 17 November; he said he burnt grasses and dead wood that he unearthed; he was then visited in February 2002 by Departmental Officers. He said there was a pile of dead wood there when Mr Humphries and Mr Lancaster visited in February in relation to the complaint; he said he hadn't burnt that pile; he said Mr Humphries had a camera, asked for permission to take photos which he gave. Mr Bonsell's evidence is that he selectively cleared and he was never told what to clear and what not to clear; he said he left young trees and took infirm trees out; he said the block was never completely cleared as has been stated by the prosecution witnesses; he says there are, some three years later, 3,000 trees.

27. Received into evidence in the defence case was the letter of Ms Stocks stating the whole block was cleared by September 1999; it also indicates she places the time frame as between the end of 1999 to September 2001. A number of times in evidence Mr Bonsell said he didn't want to give any more evidence, relying essentially, I think, on the alleged out-of-time issue. In any event, he stated he was given the impression that he was the one who was to make the decisions on selective clearing; he said Mrs Bonsell told him that it wasn't stipulated in discussions, it was a case of *you go ahead and clear what you have to clear*.
28. Mr Bonsell said that in relation to that part of the property that was to be maintained, he needed to remove damaged trees to be able to maintain it so that rubbish could be taken out and removed; he said he left young trees but not older ones because of termite damage; he said the very back part of the block had previously been a gravel pit and now nothing will grow in it. He said he did liase with Mr Keetch who said he would come back when Mr Bonsell had done his clearing.
29. In cross examination Mr Bonsell initially indicated he didn't believe the permit application could be regarded as his application any more because someone had written the comment about mangos on it; he said he wrote the words *in excess of 50%* but that it was now all out of context and it wasn't his work; he agreed he made the application because he wanted to clear part of the vegetation on the southern half of the block; he said he wanted to clear all of it; Mr Bonsell hesitated in agreeing that the permit that has been in evidence for most of the proceedings was in fact his permit; he told the court he believed he read the conditions; he initially agreed with a proposition that he started clearing the southern half of the property without understanding the permit but then qualified it by saying he cleared undergrowth to make it tidy to get access to the block; it didn't start as *clearing* he said; he said it was more tidying, dragging out rubbish and dead trees; he said he looked at the permit when he decided to cut down trees;

deciding which trees to cut down; he couldn't remember what dates; he then said he started cutting down vegetation six-eight weeks after the issue of the permit, but he then said he started clearing straight away; he said he believed clearing involves taking a tree out by the roots, it doesn't involve cutting a tree down. If it is cut down, he says it is not clearing; he then said he did no clearing, only cutting down trees; he said he was clearing rubbish and those sorts of things for six to eight weeks; he then said he wasn't sure when he started clearing – he was first taking rubbish out; he said he initially worked only on week ends until he started his business; he said he started his business after he finished clearing his block; he said that was noted in his diary that he hadn't brought to court; he said Mrs Bonsell was involved in some physical work, used the axe but he didn't want her to and that she dragged things away and piled them up; he said then that he finished on 26 August 2001.

30. Mr Bonsell disagreed that the southern part of the block was well timbered stating there were dead trees; Mr Bonsell said he was working full time on his block after 4 July 2001; he confirmed again that he started chopping down trees eight weeks after he obtained the permit; he spoke of removing the windrow and taking out some cedars on the fire break; he said what they had selected to leave was about 15 cedar pines; all that was left in the southern half was sucklings, small trees, stumps and regenerated stumps; lightning strikes took out several big trees he said. He said in relation to the south western part of the property he had only cleared out rock and grasses since 26 August 2001; he agreed there were still trees standing in the area; that he hadn't cut them down; when pressed further about the number of trees he said he needed to be more specific because he said *when do I count a tree that is a tree?* Then he qualified his answer and said there were 100's of plants. He said they were there through December 2001 and February 2002.

31. Mr Bonsell agreed he obtained certificates for sick leave from his doctor because he was unfit for work, this was the period 4 July to 24 August. He was unfit he said to do his usual work involving going up and down ladders and other physical work. He said his worker's compensation claim was accepted and he was reimbursed his sick leave. Mr Bonsell denied taking out almost every tree; he said he selectively cleared.

### **Comment on the Evidence**

32. As a general comment on the evidence I found the prosecution witnesses to be sincere and attempting to be helpful to the court. They were open and generous in the amount of information they provided to the court. The various departmental officers appeared to me to demonstrate appropriate impartiality and professionalism. They were patient in the face of sometimes serious allegations being made in relation to their credit. Having said that, I do detect animosity on the part of Ms Stock towards the defendants and have considered this matter in assessing whether any of the charges have been made out beyond reasonable doubt. I found Mr Bonsell's evidence to be lacking in reliability at numerous points. His explanation that he was of the belief that selective clearing was a matter for him to decide unilaterally lacks credibility; he has given evidence of essentially working full time on his block in heavy physical work while on sick leave in circumstances where his employer has been told he cannot work and he gave the extraordinary evidence that *clearing* did not including cutting trees down. These are but a few examples. It is clear to me that Mr Bonsell is an intelligent person and has vigorously and for the most part competently represented himself but he classically shifts position in evidence giving incredible explanations that although I of course take his evidence into account, I am not giving it the weight that he would want me to give it.

## **Out of Time Issue**

33. Before any analysis of the legal problems in this matter, there is a fundamental factual matter to be resolved. Naturally, regardless of what I have said of Mr Bonsell's credibility, the prosecution carry the high onus of proving each element beyond reasonable doubt. In relation to each count the prosecution must prove beyond reasonable doubt that the acts complained of comprising the physical elements of each count did take place within six months of the laying of the complaint. As mentioned above, the complaint was laid on May 1 2002. No matter whether the acts complained of did in fact take place, they can only form the subject of a charge on complaint if they are proven to take place in the preceding six months. The defendants allege the prosecution has contrived its evidence to fit within this time frame. I do not agree that that has taken place. I am aware that as is mentioned above in the summaries of evidence, Sarah Stocks has corrected an earlier statement where she had said all the clearing finished in September 2001. I believe her when she says she was asked to think more particularly of the dates and she concluded it was November or December of 2001 when the clearing was completed. I am aware also that Ms Jacka was asked at a later date to be specific of the dates and she was able to be specific in relation to her viewing of the property in December 2001 and comparing that to her observations in February 2002. As she said in cross examination, nobody had asked her specifically about that until she made her further statement and she was unaware of the time limitation on these prosecutions.
34. In relation to count 10, that count refers to a breach of clause one of the permit. Clause one refers to carrying out works in accordance with the drawing attached to the permit. Count 12 involves again a failure to selectively clear without liaison with the department and refers to clause three of the permit requiring *selective clearing*. Although I accept the prosecution evidence beyond a reasonable doubt that the land was cleared by

the defendants either individually or on the basis that they aided each other, I cannot be certain when it all occurred (save for and accepting that I have come to a different conclusion in relation to the south west portion). My reason for having doubts about counts ten and twelve is because these two counts cover a vast expanse of the block. The clearing was gradual and naturally was only noted by the various witnesses when it became obvious. The observations of the various witnesses are not particular enough for me to make an assessment beyond reasonable doubt that the vast majority of the clearing at least, took place before 1 November 2001. There is a distinct possibility that most of the activity in breach of the permit took place before this time. Even if some of the acts of clearing took place after this time, it would be wrong of me to convict on that basis. It would leave any conviction vague for uncertainty. It is impossible to know how many trees were cleared in each particular month. The witnesses have, I believe, tried to give the best indication they can on this but the fact is, there was no regular formal monitoring, sampling or photographs at various stages to prove that matter beyond reasonable doubt. It is clear there was much activity before November 2001. Although I have concluded the defendants have not complied with the permit, I cannot be satisfied it occurred after November 2001. On the question of whether or not the clearing was *selective*, in my view the complainant is correct in applying a dictionary definition such as *selecting, choice; being selected; what is selected ; select meaning chosen for excellence or suitability, choice, picked....* Although the evidence suggests Mr Bonsell had limited discussions over how to select, Mrs Bonsell was clearly told. Mr Bonsell applied the most basic unilateral test and I just can't believe he did not discuss the permit and its obligations with Mrs Bonsell. I also can't believe that he thought it was a purely self selecting process. The matters that he suggested in relation to his discussions with Mr Keetch could not have given him the impression he suggested. Mr Keetch indicated a fairly narrow agreement to remove grasses to allow a survey. In any event, given the findings on the timing of events,

it is unnecessary to make a formal finding on that matter. Notwithstanding in my view the prosecution can prove that the south west portion clearing did take place within the six months immediately preceding the laying of the complaint, and can prove that any clearing was not selective within the meaning of the permit, the prosecution cannot prove the overall clearing took place six months prior to the laying of the complaint.

35. In my view count 11 is quite different. That count is referable to clause two of the permit. Clause two reads: *An area of native vegetation 40m x 50m, is to be retained and maintained in the south-western portion of the land in accordance with drawing number PJB-001, to the satisfaction of the Chairman, Development Consent Authority.* That area is clearly marked on the permit. The evidence about the demise of this area is given particular attention by the witnesses, in particular Ms Jacka. The timing of the clearing of that area is certain. A number of witnesses testify it was densely forested with particular species as at April 2001. The clearing of that area, on the evidence clearly began around the beginning of December or late November. Both Ms Stocks and Ms Jacka are very firm on those dates with that portion. Other departmental officers give this part of the clearing more particularity in their observations. I am satisfied beyond reasonable doubt that the acts alleged occurred in the relevant time frame. All witnesses attention was drawn to this area that was especially protected. They appeared genuinely shocked at it being completely cleared at around the end of 2001 into 2002.
36. The evidence indicates this portion was cleared by both defendants, Mr Bonsell said as much in his evidence. There was also the observations of Ms Stocks and the agreement from Mr Bonsell that no-one else had performed any clearing duties. Further, I agree with the submission that *retained* ought to be given its natural meaning as in the *Concise Oxford Dictionary – retain – keep in place, hold, fixed and keep in possession of; not lose; continue to have.. allow to remain or prevail, not abolish or*



*discard or alter*. In my view count 11 has been proven beyond reasonable doubt.

### **Validity of the Permit**

37. The defendants have raised the issue of whether or not the permit itself is valid under *Planning Act s 54*. That section provides that as soon as practicable after the consent authority has determined an application under *s 53 Planning Act* it must serve a statement of its reasons on the applicant. As has been discussed often in the hearing, the *reasons* given in the permit are not complete. Reason number three states: *An area of native vegetation is to be retained in the south-*. The question is whether failure to give a reason invalidates the permit. Although *s 54* is expressed in the mandatory, that is not the end of the matter. After consulting *Project Blue Sky Inc and Others v Australian Broadcasting Authority [1998] HCA 28*, I am of the view that reasons under this part of the *Planning Act* are not a condition precedent to the validity of the permit. The failure to give reasons would certainly afford administrative law remedies but that doesn't invalidate the permit. At page 516 of *Project Blue Sky* a majority of the High Court stated *In our opinion, the Court of Appeal in New South Wales was correct in Tasker v Fullwood in criticising the continued use of the "elusive distinction between directory and mandatory requirements" and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial*

*compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to “the language of the relevant provision and the scope and object of the whole statute”.*

38. If I were to rule that the permit were invalid, it would effectively mean people could ignore the terms of a permit while waiting for reasons or ignore it if the reason were wanting in some respect. In terms of an Act that impacts on the environment, I doubt this was the intent. As pointed out by the complainant’s counsel, Mr Grove, there is a process of chronology between *section 53 and 54 Planning Act* where under *s 53* the application is determined and *s 54* requires the Authority to serve a statement of reasons after it makes the determination. I note also in *Re Minister For Immigration and Multicultural and Indigenous Affairs; ex parte Palme [2003] HCA*, the High Court rejected an argument concerning the *Migration Act* in circumstances where the Minister was required to give reasons under *s 501G(1)* of that Act. The decision was challenged, inter alia, on the failure to give reason. A majority held that the failure to comply does not invalidate the decision to cancel the visa. In my view the charge does not fail on any argument that the permit may be invalid.
39. I accept that by clearing that area of land the defendants have *developed* the land within the meaning of the *Planning Act. Section 75(3)(a)*, the section the defendants are charged under. That section requires that a person must not *use or develop land in a manner that is only permitted in accordance with a permit....* I note *development* in the interpretation section of the *Planning Act (s 3)* refers to *the carrying out of works on or in relation to land, including .....(c) (ii) the clearing of vegetation.*

40. In my view there is no excuse, justification or authorisation relevant. It is clear the defendants acted with knowledge and the requisite intent. I find count 11 proven; I dismiss counts 10 and 12 for the reasons stated. I will hear the parties on outstanding issues.

Dated this 13th day of April 2004.

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**Jenny Blokland**  
STIPENDIARY MAGISTRATE