CITATION: *Raymond v Marcon & Braun [2006]* NTMC 036

PARTIES:	CEDRIC MERVYN RAYMOND (COMPLAINANT) v MARK VINCENT MARCON (DEFENDANT) & PEGGY BRAUN (DEFENDANT)
TITLE OF COURT:	Court of Summary Jurisdiction
JURISDICTION:	Planning Act; Justices Act; Criminal Code
FILE NO(s):	20523547, 20523552
DELIVERED ON:	26th April 2006
DELIVERED AT:	Darwin
HEARING DATE(s):	03rd April 2006
JUDGMENT OF:	Jenny Blokland SM

CATCHWORDS:

CRIMINAL RESPONSIBILITY – STATUTORY OFFENCES – IMPOSSIBILITY
Planning Act (NT) s75 and s76
Criminal Code (NT) s1and s31
R v Chin [1985] 157 CLR 671
Finau v Department of Labour [1984] 2 NZLR 396
Paul Fairall and Stanley Yeo, *Criminal Defences in Australia*, (2005) Butterworths, fourth edition.

REPRESENTATION:

Counsel:

Complainant:	Mr Raymond
Defendant:	Mr Maley

Solicitors:

Complainant:	Northern Territory Development Consent Authority
Defendant:	Maleys Barristers and Solicitors

Judgment category classification:	B
Judgment ID number:	[2006] NTMC 036
Number of paragraphs:	11

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

No.

BETWEEN:

CEDRIC MERVYN RAYMOND
Plaintiff

AND:

MARK VINCENT MARCON

AND

PEGGY BRAUN
Defendant

REASONS FOR DECISION

(Delivered)

JENNY BLOKLAND SM:

Introduction

1. Each defendant is charged with one count against the *Planning Act (NT)* that on the 29th September 2005, at 4 Morgan Road

"being a person who failed to comply the Notice to Cease (sic) issued by the Development Consent Authority"

The charges were brought under *s76 (5) Planning Act NT*. By consent the two cases were heard together. The particulars alleged are as follows:

> "On the 10th day of August 2005, the Chairman of the Development Consent Authority served you with a Notice to Cease, pursuant to section 76(1) of the Planning Act. The Notice required you to cease the use of your land for industrial purposes, namely, the storage of goods, vehicles, plant machinery and equipment outdoors is not

consistent with the rural residential use of the land, namely the Litchfield Area Plan 2004."

Section 76(1) *Planning Act* provides:

(1) If –

(a) land is being used or developed in contravention of the planning scheme that applies to the land; and

(b) the development is not otherwise permitted by or under this Act,the consent authority in respect of the planning scheme may, by notice in writing, require –

(c) the owner or occupier of the land; or

(d) the person apparently using or developing the land in contravention of the planning scheme or interim development control order, to cease using or developing the land in contravention of the planning scheme.

Section 76(5) *Planning Act* provides:

A person specified in a notice under this section must not contravene, or fail to comply with, the notice.

2. The hearing proceeded before me primarily by way of agreed facts (Exhibit P1), photos and one of the defendants, Mr Marcon gave evidence in his own defence. The agreed facts read as follows:

Officers from the Department of Planning and Infrastructure received a complaint regarding the unauthorised use of a property situated at Lot 19 Hundred of Bagot.

The residential address for this property is 4 Morgan Road, Virginia.

The property is issued with a single certificate of title and the area under the title is 2 hectares 200 metres.

The Search Certificate for this property identifies the defendants Mark Vincent Marcon and Peggy Braun as joint owners of Lot 19 Hundred of Bagot.

Lot 19 Hundred of Bagot is within the boundaries of the Litchfield Shire.

Following the complaint, a site inspection was undertaken by Officers from the Department of Planning and Infrastructure.

The defendant Mark Marcon was present during this inspection.

The defendant Mark Marcon subsequently met with the Chairman of the Development Consent Authority and advised the Chairman that he was in the process of securing industrially zoned land in Palmerston. He also advised the Chairman that once the land is secured, the goods would then be transferred from the property at 4 Morgan Road to the land in Palmerston.

In August 2004, the defendant advised the Chairman of the Development Consent Authority that a property in the Yarrawonga Industrial Estate had been purchased and that a large shed was to be constructed.

In October 2004 the Defendant lodged a development application for the construction of a warehouse and workshop on this land at the Yarrawonga Industrial estate.

The plans were assessed and a development permit (Number DP05/0027) was subsequently issued to the Defendant Mark Marcon for the construction of a warehouse, showroom and workshop at 41 Toupein Road in the town of Palmerston.

Approximately 5 months later, the construction of a warehouse, consistent with Development Permit number DP05/0027 had not commenced. The storage of goods, vehicles and equipment remained at the property located at 4 Morgan Road, Virginia.

On Wednesday 10 August 2005- the Litchfield Division of the Development Consent Authority issued the defendants Mark Marcon and Peggy Braun with a notice to cease. The notice required the owners to cease the storage of goods and equipment outdoors not in association with the rural residential use of the land.

The three documents were served personally on the landowners on the same day.

On 25 August 2005, a preliminary site inspection was undertaken by officers from the Department of Planning and Infrastructure. The inspection recorded that a large quantity of goods and equipment were still on the property (Photographs 1).

On 29 September 2005, following the 28 period, a second site inspection was undertaken nothing significant had changed (Photographs 2)

A summons was subsequently issued to the defendants Mark Marcon and Peggy Braun on 1 December 2005.

3. There is no challenge to the Complainant's assertion that the storage of the particular goods, equipment and vehicles was contrary to the *Litchfield Area Plan*. The *Litchfield Area Plan* was also before the Court at the hearing. The range and quantity of the goods stored on the Defendant's property is extraordinary and immense. The machinery and equipment is depicted before the Court in a series of photographs. There is a range of heavy machinery, multiple vehicles, house-hold whitegoods, heavy equipment such as stacks of drainage pipes, hoses and fencing equipment. There is even a set of aircraft stairs. Most of the machinery requires maintenance or repair of some type. I believe most members of the community would be surprised to find such a collection in a non-industrial setting.

4. Mr Marcon gave reasonably detailed evidence before the Court. Mr Marcon said he had built up this collection over 25 years and used it for teaching and training himself or his children; he said the collection keeps him entertained, keeps him at home and he impressed on the Court that he did not "go to the pub". He was also hoping to use some of the equipment to improve his block and that aside from selling some of the equipment to "get rid of it", he was not making an income from it. He said he had been collecting all of his life.

5. He said that once the Notice to Cease, ("the Notice") was served on him he commenced to clean up his property by removing excess equipment; he said he worked for a minimum of 10-15 hours per week cleaning up; he hired trucks to take equipment away; he referred to receipts from truck hire companies from late 2005 through to March 2006. He said that since being served with the Notice in August 2005 he has consistently taken equipment to the dump and arranged the sale of five to six tonnes of it to NT Metal Recyclers. During evidence he painstakingly went through the photos that comprise Exhibit P2 and identified each of the items he had either "removed, relocated, or packed-up". The amount of property he has tried to remove is extensive. He said he thought he had removed or sold 35-40% of the equipment by the time of the hearing and had packed up or relocated another 50%. Certainly the photos tendered as Exhibit D5 taken on the morning of the hearing present a completely different picture to those taken at the time of the notice being served and those taken one month later. Mr Marcon told the Court he is still continuing the process and thinks it will take one year to complete.

6. In both examination in chief and in cross examination he accepted he had not done very much clearing in the first month after being served with the Notice, however, he said he had done some clearing in that first month. He reiterated that he had been spending significant time and resources on trying to clear the block. He said he used some of the equipment (eg a tractor with forks on the front), to move the larger items.

7. The Notice itself, the subject of the proceedings does not specify a time limit during which the equipment must be removed. During cross examination of Mr Marcon, there was some attempt to lead evidence about an alleged time limit in another document, but it appeared to me that the prosecution were splitting their case if I allowed Mr Marcon to be questioned on further material in cross examination that was not before the court in the prosecution's case: (*R v Chin (1985) 157 CLR 671).* None of the

documents tendered in evidence referred to a time limit. The agreed facts referred only to "*…following the 28 period, a second site inspection was undertaken nothing significant had changed*". There is nothing before the Court either in the agreed facts or other material to indicate that *"28 period"* was the time period specified by the Development Consent Authority. More importantly, and even if I am wrong on that ruling, there is nothing in the *Planning Act* to indicate that non-compliance within 28 days (or some other period) is the appropriate period to use as a standard to determine whether a person has failed to comply with a Notice such as this one. In short, the offence as defined is failure to comply with the Notice. The Notice does not specify a time limit, neither does the *Planning Act.* The agreed facts before the Court refer to a "28 period" that is not referrable to any specified time limit.

8. The flip side of that argument is whether the Defendants can be said to have "failed" to comply with the Notice as soon as it was served (or shortly after), in that they did not cause the equipment to be removed. There is no relevant defence of *"impossibility"* within the *Planning Act (NT)* or the *Criminal Code (NT).* On the evidence before me, largely unchallenged, it would appear the Defendants could not have fully complied with the Notice for some time, (possibly up to a year after being served is the only evidence on this). Fairall and Yeo refer to this problem in *Criminal Defences in Australia*, referring for example to *Finau v Department of Labour [1984] 2 NZLR 396* a case concerning an appellant being charged for overstaying her visa in New Zealand. It was physically impossible for her to leave New Zealand by commercial air service given she was pregnant and the carrier refused to take her. The appeal against conviction was allowed. The learned authors refer to that decision and others as reading words into the statute such as (at 116)*"when possible"*, or, *"to say that external circumstances of physical impossibility may suspend the operation of the statutory provision for the duration of the obstruction."* Even if the 28 day period obliquely

referred to were valid, I seriously doubt that the defendants could have complied within 28 days given the enormity of the task and their resources. The case was not argued on the basis of impossibility of compliance and it may be that the defendants are disentitled if it could be argued they brought the situation of impossibility about by their own actions, "*self induced impossibility"*: (Fairall and Yeo at 114). A contra indication of "self induced impossibility" is that they were not charged with an offence under s75 *Planning Act (NT)*, (development without a permit). Although I warm towards a conclusion of impossibility, I am not completely satisfied it would be correct in this circumstance. It has only been alluded to faintly in submissions.

9. It is not necessary to finally decide the point as the orthodox approach to rely on the general principles of criminal responsibility solves the problem. This offence is a *"Simple Offence"* (Criminal Code (NT) s3) and therefore attracts the full operation of criminal responsibility. It is not a regulatory offence. Even if the physical elements (*act, omission or event)* are proven, the prosecution must prove the Defendants intended or foresaw as a possibility that they would fail to comply with the Notice (the event) and if they did foresee the possibility of non-compliance, whether an ordinary person in the same circumstances would have proceeded with the conduct that they did: (*Criminal Code, s 31(1) and (2))*.

10. The *Criminal Code (NT)* defines *act* and *event*, but not *omission*. *Event* is expressed as meaning "the result of an act or omission": *s1 Criminal Code.* This is an offence of either *omission* or *event*, in the sense that the *failure* to comply with the Notice comprises the physical elements of the offence. The actions of Mr Marcon, particularly after the inspection on 29 September 2005 point to the opposite intention than that alleged by the prosecution. The facts indicate he did everything that could reasonably be done to comply and was intent on complying. I am therefore compelled to a reasonable doubt. I find I doubt that the *omission or event* was intended or

foreseen in the sense that must be proven by the prosecution pursuant to *s31 Criminal Code NT*. Although Ms Braun did not give evidence, I have serious doubts that she could have intended or foreseen the failure given the largely unchallenged evidence of Mr Marcon before the Court. Even if they had some foresight of the possibility, applying s31(2) Criminal Code, it is difficult to conclude that an ordinary person in their situation would not have proceeded in the same way.

11. I will order that the complaints be dismissed. The result of this decision, although I firmly believe to be correct as a matter of law, may bring to light some hidden operational compliance and enforcement problems under the *Planning Act (NT)*. If that is the case, it is a matter that with respect needs to be addressed by the legislature.

Dated this 26th day of April 2005.

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JENNY BLOKLAND
STIPENDIARY MAGISTRATE