

CITATION: *Cahill v M* [2010] NTMC 011

PARTIES: LEIGH CAHILL

v

M

TITLE OF COURT: YOUTH JUSTICE COURT

JURISDICTION: Youth Justice Court

FILE NO(s): 20929188

DELIVERED ON: 9 February 2010

DELIVERED AT: Darwin

HEARING DATE(s): 15 January 2010

JUDGMENT OF: Ms Sue Oliver SM

CATCHWORDS:

CRIMINAL LAW – Trespass – warning to stay off - Averments
Trespass Act – s 8, s 12

REPRESENTATION:

Counsel:

Complainant: Ms Horvat

Defendant: Mr Brock

Solicitors:

Complainant: ODPP

Defendant: NAAJA

Judgment category classification: A

Judgment ID number: [2010] NTMC 011

Number of paragraphs: 22

IN THE YOUTH JUSTICE COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 20929188

[2010] NTMC 011

BETWEEN:

LEIGH CAHILL
Complainant

AND:

M
Defendant

REASONS FOR DECISION

(Delivered 9 February 2010)

Ms Sue Oliver SM:

1. M is charged that on 28 August 2009, being a person who was warned on the 17th day of February 2009 under s 8 of the *Trespass Act* to stay off a place, namely Casuarina Square Shopping Centre, being Lot 9576, Town of Nightcliff, 247 Trower Road Casuarina, Northern Territory and its carpark and all improvements thereon did trespass on the said place within one year after giving of that warning. The offence charged is said to have been contrary to s 8(4) of the *Trespass Act*. The charge contains averments that security officer Steven Kunoth was acting under the authority of a person in lawful occupation of the shopping centre and that the warning to stay off was given to M by him under the authority of the person in lawful occupation.
2. It was agreed that at 7.25pm on 28 August 2009 M was at the place described in the charge (“the shopping centre”), at the bottom of the ramp at the Woolworths end. She gave as a reason for her presence that she was

waiting for her cousin and agreed that there was no emergency for her being there.

3. Mr Steven Kunoth is employed by a company called the Reflections Group as a security guard. He said that Casuarina Square Management is their client and that he works at the shopping centre and is responsible, with others, for attending disturbances and keeping the shopping centre safe. He gave evidence that on 17 February 2009 there were a few girls engaging in anti-social behaviour. He could neither remember where that occurred or what was the conduct in which they were engaged. He was shown a document the words on which he said replicated the content of green signs at all the entry points of the shopping centre. The words of that notice (“the Green Notice”) are:

Welcome

We wish you an enjoyable visit

For your comfort and safety, conditions of entering the Centre include but are not limited to:

- No smoking in centre and within 10 m of entry
- No animals [guide dogs excepted]
- No bikes, skateboards or scooters
- No alcohol consumption
- Footwear and neat attire at all times
- No anti-social, offensive and/or criminal behaviour

GPT reserves the right to refuse or withdraw entry to the centre

For your security areas of this centre are under video surveillance.

4. No evidence was given as to the size or prominence of the notices in question. There was no evidence as to what or who “GPT” is a reference to or the authority of “GPT” for or on behalf of the occupier of the shopping

centre to impose those conditions of entry or withdraw the licence to be on premises at the shopping centre.

5. Mr Kunoth gave evidence that he handed a warning to stay off to M on the day in question. That document was tendered. Hand written on the form is the notation “disorderly conduct” and “27.7.93” which was indicated to be the date of birth of M. The notice was signed by M when it was handed to her. The conditions of the notice were stated to her and she was asked to leave the centre. A Police Beat officer witnessed the document (although according to the form the witness is only required where a person refuses to sign the notice which was not the case here). Although Mr Kunoth had no recollection of what the incident involved he said that he believed that he and the police officer came to an assessment that the notice was valid to be issued.
6. No direct evidence was given that Mr Kunoth had the authority of the occupier of the shopping centre public areas to act on its behalf. Indeed there is no evidence as to who is the lawful occupier of those areas. There is no evidence that any police officer had authority from the occupier of the premises to either withdraw permission to be present at the premises or to issue trespass notices. The police officer was not called to give evidence. After M signed the notice she left the premises. She had never trespassed before the alleged incident in February that resulted in her being handed the trespass notice.
7. Section 8 of the *Trespass Act* is in these terms:

8. Trespass after warning to stay off

- (1) Where a person is trespassing or has trespassed on any place, an occupier of that place may, at the time of the trespass or within a reasonable time afterwards, warn that person to stay off that place.

(2) Where an occupier of any place has reasonable cause to suspect that a person is likely to trespass on that place, the occupier may warn that person to stay off that place.

(3) Where a person is found guilty of an offence against this Act committed on or in respect of any place, the Court may warn that person to stay off that place.

(4) A person who, being a person who has been warned under this section to stay off any place, trespasses on that place within one year after the giving of the warning, commits an offence.

8. It is immediately apparent from this provision that at the time of the giving of the warning to stay off, one of three conditions must be met. The person in question must either be (1) trespassing (2) have trespassed on that place or (3) reasonably suspected of being likely to trespass. Mr Kunoth agreed that M had not previously trespassed at the shopping centre and there is no evidence that would suggest that Mr Kunoth had any reasonable cause to suspect that she was likely to trespass at the shopping centre.

Was the defendant trespassing at the time she was handed the notice?

9. The issue then is whether the prosecution can prove beyond a reasonable doubt that M was trespassing at the time that she was handed the warning to stay off.
10. A person trespasses where they enter land without the right to do so or without the authority of the person in possession. In the case of shops or a shopping centre there is an implied invitation to enter those premises during shopping hours for a particular purpose, a business purpose or no purpose at all *Barker v R* (1983) 153 CLR 338 per Brennan and Dean JJ at 361-362; *O v Wedd* [2000] TASC 74 at [8]. The fact that a person might engage in conduct contrary to the purposes for which they have an invitation to enter the premises does not automatically make their entry and presence a trespass. In *Barker v R*, Mason, Brennan and Dean JJ all rejected an

argument that a person who enters a shop with a thought of shop stealing necessarily is a trespasser. Brennan and Dean JJ observed at 362:

“In particular, to take the example on which most reliance was placed, the implied invitation to enter which a shopkeeper extends to the public may ordinarily be limited to public areas of the shop and to hours in which the shop is open for business: it is not, however, ordinarily limited or confined by reference to purpose. Indeed, in the context of the importance of "impulse buying", the mere presence of the prospective customer upon the premises is itself likely to be an object of the invitation and a person will be within the invitation if he enters for no particular purpose at all. The fact that a person enters with the purpose or some thought of possibly stealing an item of merchandise **or of otherwise behaving in a manner which is beyond what he is authorized to do while on the premises** does not, in the ordinary case where the invitation to enter is not confined by reference to purpose, result in the actual entry being outside the scope of the invitation and being trespassory.” (My emphasis)

11. In my view the authority to enter the public areas of Casuarina Shopping Centre, which includes the public car park areas, is not confined to an authority for the purpose only of purchasing goods from a store situated in the actual shopping centre. For example, given the physical situation of the shopping centre it might be entered for the purpose of transit to the nearby Bus Exchange. As their Honours observed, entry for no particular purpose that then results in impulse buying would hardly be discouraged. That a person who has entered subsequently behaves contrary to the terms of entry advised on the Green Notice would not in my view automatically revoke the implicit permission to be at the shopping centre. First, it would be necessary to show that the person was aware that their entry was conditioned in that way. As I have said there is no evidence as to the prominence of the notice so that its terms might be said to have been advised in advance of entry and the invitation conditioned in that way. In any event the condition of “no anti-social ... behaviour” is general and broad and the conditions are

advised in the context that “GSM reserves the right to refuse or withdraw entry to the centre”. Mr Kunoth in his evidence said that there were “high breaches and low breaches” which determined what action was taken. In my view the notice, assuming that it does form part of the terms of the invitation to enter, does no more than advising of conduct that **may** result in the invitation being withdrawn.

12. Permission or invitation to enter and be present on premises can be revoked; however that person does not automatically become a trespasser immediately upon permission being revoked. He or she would need to be advised that permission or authority to remain in the shopping centre had been revoked and be given an opportunity to leave. When a licensee is asked to leave private premises, that person is entitled to a reasonable period in the circumstances to leave the premises and is not a trespasser during that period of time *Wu v Sky City Auckland Ltd* [2002] NZAR 441. ¹ I would respectfully adopt the same view. If a contrary view were to be taken then the person immediately becomes a trespasser and has committed the offence of trespass under s 5 which is the more serious offence than that under s 8 because it carries a penalty of 6 months imprisonment in addition to the financial penalty. A refusal to leave would result in the person becoming a trespasser but where the person agrees to leave they must be given a reasonable opportunity to do so.
13. In this case M was handed the notice and asked to leave and she did immediately leave the shopping centre. She was not trespassing at the time she was handed the warning to stay off and that warning was therefore invalid for the purposes of s8(1) of the *Trespass Act*.

¹ The decision of Chambers J granting an interlocutory injunction was overturned on appeal to the Court of Appeal of New Zealand but not in relation to the finding above.

The averment

14. The charge against M contains an averment that (i) “Security Officer Steven Kunoth [was] acting under the authority of a person in lawful occupation of Casuarina Square Shopping Centre, being Lot 9576, Town of Nightcliff, 247 Trower Road, Casuarina, Northern Territory and its carparks and all improvements thereon in accordance with Section 4” and (ii) that “a warning to stay off was given to [M] by Security Officer Steven Kunoth acting under the authority of a person in lawful occupation in accordance with Section 9”.
15. As I have found that the warning to stay off was not a valid warning pursuant to s 9 it is not strictly necessary for me to consider the question of the averments. However as charges of this nature are quite common in the jurisdiction of the Youth Justice Court, I think that it is necessary for me to consider also the validity of the averments.
16. Section 12 of the Act provides

In proceedings for an offence against this Act, an averment in a complaint or information that –

 - (a) the person is, or was at the relevant time, an occupier within the meaning of section 4 or a member of the Police Force; or
 - (b) a direction to leave or a warning to stay off was given in accordance with section 9, is evidence of the fact so averred.
17. Leaving aside what appears to be a typographical error in the reprinting of the provision by placing the words “is evidence of the fact so averred” within the body of paragraph (b), the issue is whether the averments contained in the charge are ones permitted by s 12.
18. Section 8 of the Act allows “an occupier” of a place to give a warning to stay off. Occupier is defined in s 4, relevant to Casuarina Shopping Centre (that is land that is not Crown land or land occupied by the Territory or the Commonwealth or a statutory corporation) to mean “a person in lawful

occupation of the place”. A trespass charge may therefore contain an averment that a particular individual or corporate entity is the person in lawful occupation of the place and that averment will be evidence that that person is the occupier for the purpose of the giving of a warning to stay off under s 8.

19. The averment in this charge does not however aver a particular entity or person to be the occupier. It avers that Mr Kunoth was acting under the authority of the person in lawful occupation. That is not a matter that can be averred. The notice that was handed to M states that Steven Kunoth of “Security, Reflections Group Pty Ltd being an employee or other person acting under the authority of a person in charge of a place specified below” has issued a warning to stay off. The identity of the occupier is not given in the notice. In *O v Nicola Wedd* above, Blow J considered a notice in similar terms that did not identify the occupier of a shopping centre. He held that the assertion in the notice that the security agent who had given the trespass warning notice was an authorised agent of the person in charge of the land was hearsay and inadmissible. Nor did he think that because a person dealt with security at a shopping centre it could be inferred that the person had authority to issue warnings that had the effect of prohibiting entry to the premises for a given period of time.

“It can be inferred that he had been engaged by or on behalf of the occupier of the public or common areas. It can be inferred that he had authority, as the agent of an unidentified principal, to take reasonable steps for the purpose of maintaining the security of the premises. I think it can be inferred that he must have had authority to eject troublemakers whenever there was a disturbance. However, I do not think it can be inferred from the fact that he was the security manager that he must have had anyone's authority to ban individuals from the premises for any length of time. There was evidence that he had a practice of doing just that, but no evidence that anyone had given him unrestricted authority to do that, nor even restricted authority to do that.” at [10]

20. There was no evidence placed before me that either identified the occupier of the shopping centre or which proved that Mr Kunoth had its authority to issue a warning off on its behalf. The authority of a security officer or an employee to give a warning by way of written notice pursuant to s 9 cannot be averred and is the subject of proof in the ordinary way.

Conclusion

21. I have found that the power to give a warning to stay off was not enlivened under s 8 because at the relevant time of the giving of the notice M was not a trespasser. Even if she had been, I am not satisfied that Mr Kunoth was a person with the authority of the occupier to issue that notice. The charge is dismissed.
22. In passing, I observe that the giving of warnings to stay off and the subsequent charging of offences against s 8 (4) have become increasingly common in the Youth Justice Court. I do not criticise the need to take action to enforce proper standards of behaviour by young people at the shopping centre. It is entirely proper for that to occur and for young people to suffer a consequence if they cannot behave appropriately. There are undoubtedly young people who do cause problems at the shopping centre and who should be excluded. I do however question whether the use of effectively a 12 month exclusion pursuant to s 8 of the *Trespass Act* is achieving that aim and is appropriate in all cases. Twelve months is a lengthy period of time for young persons. Many of the young persons who are brought before the Court are not behaving badly when said to have been found trespassing. Many have been shopping and/or are in company of an adult at the time. In my view, an approach that provides for a initial short period of exclusion that is to be followed by express agreement of the young person as to the standard of behaviour they will observe when allowed to return might well achieve better outcomes than is presently being seen. It would provide an opportunity for young persons to demonstrate that they

have learned from the experience and can behave appropriately in public areas. If they breach the agreement they have entered, then the period of exclusion could be incrementally increased. If they were to enter whilst expressly excluded they may be subject to the s 5 offence under the *Trespass Act*. No legislative change is required for that to occur; a scheme of that nature could simply be implemented by notice and agreement. I recommend that the occupier of Casuarina Shopping Centre give some consideration to that approach.

Dated this 9th day of February 2010.

Sue Oliver
STIPENDIARY MAGISTRATE