

IN THE MAGISTRATES' COURT OF VICTORIA  
AT FRANKSTON  
CRIMINAL DIVISION

Case No. J1069314

MICHELE LOMBARDO

v

FIDRIM HALIT

MAGISTRATE:	MAGISTRATE PRAPAS
WHERE HELD:	FRANKSTON MAGISTRATES' COURT
DATE OF HEARING:	22 June 2019
DATE OF DECISION:	18 December 2019
CASE MAY BE CITED AS	<u>CASEY CITY COUNCIL v HALIT</u>

1. The issue for my determination is whether Fidrim Halit, having previously been convicted for failing to comply with the VCAT order dated 22 July 2016, can be further prosecuted by the Casey City Council for his "continued" failure to comply with the said Order.
2. For him to be so convicted, I must be satisfied that the offence pursuant to s.133 of the Victorian Civil and Administrative Tribunal Act 1998 is a "continuing offence."
3. By agreement, the matter proceeded by way of written submissions.

#### Background

4. Mr Halit was at all relevant times, the registered owner of land at 1205 North Road, Devon Meadows. Between January and November 2009, 15 agricultural igloos had been constructed on the land.
5. Attempts were apparently made to bring about voluntary compliance with the Casey Planning Scheme requirements which the igloos contravened. A retrospective planning permit process failed, as did several written requests from the Council to Mr Halit to remove the igloos.
6. The land was further inspected on 20 August 2014. The igloos remained.

7. Proceedings were commenced by the Council in VCAT for an enforcement order pursuant to section 114 of the *Planning and Environment Act 1987* to bring about planning compliance on the land.
8. A hearing was conducted at the Tribunal on 22 July 2016. On 25 July 2016, the Tribunal issued an Enforcement Order.
9. The Order was as follows:
  - I. By no later than 25 October 2016, Fidrim Halit must remove all buildings and works comprising the 15 agricultural igloos from the land situated at 1205 North Road, Devon Meadows, to the satisfaction of the Responsible Authority.
  - II. The applicant must serve a copy of this order on the owner and occupier of the land pursuant to section 140 of the *Victorian Civil and Administrative Tribunal Act 1998*.
10. On 27 October 2016, the Council further inspected the property in question and discovered that the agricultural igloos remained in place.
11. Mr Halit was charged with an offence pursuant to section 133(1) of the *VCAT Act 1998* by the Council. The charge was as follows:

*The accused at Devon Meadows on 27 October, 2016 did fail to comply with an Order of the Tribunal by failing to remove all buildings and works comprising of 15 agricultural igloos from the land situated at 1205 North Road, Devon Meadows. Such Order of the Tribunal being issued on 25 July, 2016 with a VCAT Reference number P1068/2016.*
12. On 7 September 2017, Mr Halit was convicted of the charge of not complying with an order of the Tribunal and was fined \$3000 with statutory costs of \$81.10 by this Court (*the first prosecution*).
13. On 31 January 2018, the informant further inspected the property on North Road Devon Meadows. She observed the 15 agricultural igloos still present on the land.
14. Mr Halit was again charged by the Council as follows (*the second prosecution*):

*The accused at Devon Meadows between 30 November 2017 and 31 January 2018 did **continue** to fail to comply with an Order of the Tribunal by failing to remove all buildings and works comprising of 15 agricultural igloos from the land situated at 1205 North Road, Devon Meadows. Such Order of the Tribunal being issued on 25 July, 2016 with a VCAT Reference number P1068/2016.*

15. Section 133 of the VCAT Act states:

**133 Non-compliance with order**

(1) A person who does not comply with an order of the Tribunal, other than a monetary order, is guilty of an offence.

**Penalty:**

Imprisonment until the person complies with the order or for 3 months, whichever is sooner or a fine of 20 penalty units and 5 penalty units for each day the non-compliance continues after the making of the order, up to a maximum total fine of 50 penalty units or both imprisonment and fine.

16. Counsel for Mr Halit submits that the second prosecution for this offence is defective as he has already been convicted. For the principle to apply, the charge must be the same or similar and from substantially the same facts.

17. Both parties concede that if I find that the offence pursuant to section 133 is not a continuing offence, the special plea of previous conviction succeeds, and the charge against the Accused must be dismissed.

18. Both parties agree that the determination of whether an offence is a continuing one is a matter of statutory interpretation, requiring an examination of the law creating it – in addition to the statutory notice, obligation or order said to be breached.

**Is section 133 of the VCAT Act a continuing offence?**

Submissions by the Council

19. The Council submits that an offence under section 133 is a continuing offence and the offence of failing to comply with the Order continues until the Order is complied with.

20. The authorities identify the wording of the penalty provision as a key indicator as to the nature of the offence.<sup>1</sup> Here, section 133 provides for a daily penalty for as long as the non-compliance continues (to a maximum three months' imprisonment or total fine of 50 penalty units)<sup>2</sup>

21. It is further submitted that *"Parliament has considered and envisaged that a failure to comply with an order of the Tribunal may extend beyond a particular time and continue day to day and has expressly provided for such circumstances"*<sup>3</sup>.

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<sup>2</sup> Solicitor to Board of Trade v Ernest [1920] 1 KB 816; Jones v Lorne Saw Mills Pty Ltd [1923] VLR 58

<sup>3</sup> Submissions for the Informant 23 April 2019 paragraph 18

22. Both parties submit that the assessment of whether an offence is a continuing one requires an examination of the statutory provision itself in light of the mischief sought to be addressed by section 133.
23. The Council submits that “the gravamen of the offence” is the failure to comply with the Order of the Tribunal, not the failure to comply with the time stipulated under the Order and that the Tribunal made the order “to put an end to prohibited circumstances being the development of the Land in the absence of the requisite planning permission”.
24. The Council further submits that I should rely on the Accused’s failure to remove the igloos as a “continuing obligation” to comply with the VCAT order, in spite of him having already been charged and convicted for this non-compliance in 2017, and that the compliance date in the Enforcement Order, being 25 October 2016 was not a date “as fixed by Statute” and as such, was not an essential element of the offence charged.
25. The Council submits that *“the purpose of section 133 is to ensure compliance with the order of the Tribunal. That the time specified under the Order is not an essential element of the offence charged.”*
26. In response to the Accused’s submissions filed, the Council submits that the cases referred to by the Accused relate to “notice” cases and are therefore distinguishable. Further, that to rely on the enforcement provisions under the *Planning and Environment Act 1987* to determine the true characterisation of section 133 is unhelpful or, at its highest, impermissible.

#### Submissions on behalf of the Accused

27. Counsel for the Accused submit that the penalty provision in section 133 is an equivocal indicator of the nature of the offence. Further, the daily penalty provision does not of itself identify the offence as a continuing one. The VCAT jurisdiction is a large one and section 133 could cover a broad range of VCAT orders, some requiring continued compliance and some not.
28. The Accused further submits that the whilst other jurisdictions across Australia have considered the issue of what constitutes a continuing offence, the Court of Appeal in *Joseph v Worthington & Anor* [2018] VSCA 102, in reviewing the relevant principles and authorities, determined that where a time for compliance is specified, the offence is not a continuing one.

29. Section 133 of the VCAT Act is not directed at bringing about compliance with the planning scheme – rather, these remedial powers exist under section 114 of the *Planning and Environment Act 1987*.

### Ruling

30. Whether an offence is a continuing offence is a matter of statutory interpretation requiring an examination of the meaning of the text itself. However, “*the meaning of the text may require consideration of the context, which includes the general purpose and policy of a provision, in particular the mischief it is seeking to remedy*”.<sup>4</sup>
31. Beyond relying on a single aspect of section 133 (for example, the daily penalty provision), an examination of the “state of affairs” or “mischief” that is sought to be forbidden is to be examined. This concept was analysed and adopted by the Court of Appeal in *Joseph* – the most recent Victorian authority on the issue of what constitutes a continuing offence.
32. In *Joseph*, the issue was whether an offence of failing to pay long service leave was statute barred as it was not filed within 12 months of the offence having been allegedly committed, as required by section 7 of the *Criminal Procedure Act 2009*.
33. The long service leave became payable on the day that the employee ceased employment. The employer failed to pay the leave that was due and payable by the required date, and a charge pursuant to section 72 of the Long Service Leave Act 1992 was filed in 2014 – nearly 2 years after the employment ceased.
34. Unlike the matter before me, the offence provision in section 72 of the Long Service Leave Act did not contain a daily penalty.
35. The Court in *Joseph* accepted that the daily penalty provision was not the only indicator of a continuing offence. Osborne JA makes reference to the decision of Cussen J in *Jones v Lorne Saw Mills Pty Ltd*<sup>5</sup>, a case where the defendant *did not pay wages* due under an award for work done – described as a ‘*non-observance*’ of an obligation that led the Court in that case determined led to the offending.
36. Osborn JA in *Joseph* helpfully analyses the line of authorities from various jurisdictions. It divides the authorities between those that characterise the relevant provision as one concerned with continuing ‘*non-observance*’ or as one concerned with non-compliance with a specific requirement to meet a statutory time limit.

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<sup>4</sup> Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (2009) 239 CLR 27, 46-47

<sup>5</sup> [1923] VLR 58

37. For example, in *Sloggett v Adams*<sup>6</sup>, the relevant provision of the Local Government Act 1919 (NSW) permitted service of a notice requiring a landowner to eradicate noxious weeds within 28 days.

38. Osborn JA cited Street CJ as follows:

The question whether an offence which has been committed is a continuing offence, or one which was committed once and for all at a specified time, depends upon consideration of the language of the Act in question. Some offences once committed are complete and concluded and exist only in the past. Other offences, however, are continuing offences and are committed day to day so long as the state of affairs which is forbidden continues to exist, and the person responsible for creating that state of affairs is liable day by day for those offences. The test, it seems to me is one which was prescribed in *Ellis v Ellis*, by Sir Francis Jeune who said: ***'The test whether an offence is to be treated in law as continuous is, I think, whether its gravamen is to be found in something which the offender can, at will, discontinue'***. In applying that test to the section now under consideration the legislature has made it clear that the offence is the failure to comply with the requirements of the notice. It is true that the notice deals with the eradication of noxious plants from the land and one thing which must be done in order to comply with the notice is to eradicate. But the offence here was not a mere failure to eradicate generally, such as would be included under s472 of the Act; **it was a failure to eradicate within the prescribed time, that is, within the twenty-eight days which expired on 2<sup>nd</sup> July, 1951**. At that moment the offence was complete and concluded, and thereafter it existed only in the past.

39. In *R v Industrial Appeals Court ex parte Barelli's Bakeries Pty Ltd*<sup>7</sup> [1965] VR 615 the court held that the offence was a continuing one as the employer had failed to perform a duty imposed by law – that is, the payment of wages payable pursuant to a Wages Board determination which specified payment by a certain date. In that matter, the offence provision did not specify a date for compliance. Here, the Court held that the offence of contravening or failing to comply with the obligation to pay money is one in which “the time element is extensible”.

40. In *Joseph*, Osborn JA describes the obligation as follows:

Smith J held that the offence charged was not that the employer allowed the time fixed for payment to pass without having paid. It was that, monies having become due and payable, the employer failed to perform the duty imposed by the Act of

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<sup>6</sup> (1953) 70 WN (NSW) 206

<sup>7</sup> [1965] VR 615

paying them. The breach of the duty continued beyond the time fixed for payment. Accordingly, the offence was a continuing one<sup>8</sup>.

41. It is this principle upon which the Council primarily relies in terms of the significance of the compliance date contained in the VCAT order.
42. I am not satisfied that the conduct of the Accused amounts to a failure to perform a duty imposed by the VCAT Order, a breach of which continues beyond the time fixed by the Order.
43. Given the scope of the jurisdiction of the VCAT, it would not be expected that section 133, which imposes a penalty for the non-compliance of a Tribunal order, would contain a date by which a breach of Tribunal order should be complied. The Order of itself specifies the date of compliance – a Tribunal Order is tailored to address the mischief complained of by one party against another party.
44. In this case, it cannot be ignored that the VCAT order contains a date by which the Accused must take overt action to comply – a clear and specific date by which he is to remove the offending agricultural igloos – a date he subsequently ignored, and for which he was subsequently prosecuted in September 2017.
45. To paraphrase Street CJ in *Slogett v Adams*, “at that moment the offence was complete and concluded and thereafter only existed in the past’.
46. The power of the Tribunal to make the Enforcement Order is found in section 119 of the *Planning and Environment Act 1987*.
47. Specifically, section 119(b)(iv) states that an enforcement order made by the Tribunal may direct any person against whom it is made to do any one or more of the following **within a specified period** –
  - (A) To restore the land as nearly as practicable to its condition immediately before the use or development started or to any condition specified in the order or to any other condition to the satisfaction of the responsible authority, a Minister, public authority, municipal council, referral authority or other person or body specified in the Order; or
  - (B) To otherwise ensure compliance with this Act, or the planning scheme, permit condition or agreement under section 173.
48. The Council seeks to distinguish the authorities identified and relied on by the Accused as “notice” cases.

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<sup>8</sup> Ibid, para 60

49. The order made by VCAT on 25 July 2016 was not a mere notice setting out an obligation or duty to be performed by the Applicant within a stipulated time or by a stipulated date. **It is an order of the Tribunal** (as opposed to a notice issued by a statutory authority).
50. The status of the daily penalty (relied on as an indicator of a continuing offence in this context) is a matter that goes to the maximum penalty capable of being imposed in circumstances where there is a refusal to comply with the Tribunal's order. The Accused's non-compliance is tantamount to a contempt of the Tribunal, warranting serious punishment, including imprisonment, as set out in section 133 of the VCAT Act.
51. As such, the date contained in the Tribunal's Order is not a time element that is extensible. The Accused failed to remove the agricultural igloos by 25 October 2016. He was in breach as at 26 October 2016 – the offence is completed and concluded, and he cannot be further prosecuted for the "continued failure" to comply with the Tribunal's order.
52. The Council submits at paragraph 31 of its submissions dated 23 April 2019, that the purpose of section 133 is to ensure compliance with the order of the Tribunal and that the time specified under the Order is not an essential element of the offence charged.
53. The primary purpose of section 133 is not to ensure compliance or to enforce the Tribunal's Order. It is to punish for non-compliance.
54. It is, in my view, permissible and helpful to construe section 133 of the VCAT Act in the context of the *Planning and Environment Act 1987* given that it is this Act that gives the Tribunal its jurisdiction to determine such matters, and it is the role of VCAT to issue orders to enforce decisions made relating to the use, development and protection of land in Victoria, in addition to other decisions relating to its vast jurisdiction.
55. The *Planning and Environment Act 1987* outlines the process for enforcing the Tribunal's Order. Section 123 of the *Planning and Environment Act 1987* permits the Council to carry out any work which an enforcement order required to be carried out and **which was not carried out within the period specified in the order**, and allows for the recovery of the costs of doing so from the person in default.
56. I find that, in this case, section 133 of the VCAT Act is not a continuing offence. Having previously been convicted of the same offence arising from the non-compliance of the same VCAT order, I dismiss the charge against the Accused.