

IN THE SYDNEY DISTRICT COURT

**Jonathon MOYLAN**

**Carly Ann PHILLIPS**

**Georgina Frances WOODS**

**Ridley Heath LEATHART**

Applicants

and

**REGINA**

Respondent

**OUTLINE OF GROUNDS AND SUBMISSIONS ON APPEAL  
AGAINST SENTENCE ON BEHALF OF THE APPLICANTS**

**Introduction**

The applicants were charged with and pleaded guilty to the following offences at the Raymond Terrace Local Court on 29 June 2009:

(i) **Jonathan MOYLAN**

Resist/hinder police in execution of duty c/s 546C Crimes Act

Enter Inclosed Lands c/s 4(1)(b) Inclosed Lands Protection Act 1901

(ii) **Ridley Heath LEATHART**

Resist/hinder police in execution of duty c/s 546C Crimes Act

Enter Inclosed Lands c/s 4(1)(b) Inclosed Lands Protection Act 1901

(iii) **Carly Ann PHILLIPS**

Resist/hinder police in execution of duty c/s 546C Crimes Act

Enter Inclosed Lands c/s 4(1)(b) Inclosed Lands Protection Act 1901

(iv) **Georgina Frances WOODS**

Enter Inclosed Lands c/s 4(1)(b) Inclosed Lands Protection Act 1901

The applicants MOYLAN, LEATHART and PHILLIPS were each fined \$440 and ordered to pay court costs of \$73 for the resist offence. Each of the applicants was fined \$110 and ordered to pay court costs of \$73 for the entering inclosed lands offence. In addition an order was made for the payment of compensation in the sum of \$5,000 in common with co-offenders under the *Victims Support and Rehabilitation Act 1999* (“the Act”).

**The facts of the case**

*Enter Inclosed Lands Offence*

On 9 June 2009, the applicants MOYLAN, LEATHART and PHILLIPS entered within the secure industrial complex of the Tomago Aluminium Smelter and attached themselves to railings with a makeshift device which was locked and under the control of the three applicants. The applicant WOODS was near the area although not secured by any means. WOODS was arrested and cautioned and cooperated with the police.

*Resist/Hinder*

MOYLAN, LEATHART and PHILLIPS were directed by the police to remove their hands from the devices as they were under arrest for entering inclosed lands. They refused and an angle grinder was used to remove the device attaching them to the railings.

### **The antecedent histories**

MOYLAN, WOODS and PHILLIPS each had convictions recorded against them for the offence of entering inclosed lands for which they had received s10 dismissals. LEATHART had no antecedent history.

### **The order for compensation**

The police statement of facts claimed:

“The industrial complex was placed under ‘lock down’; during the incident, which restricts entry of employees and contractors. Also production process had to be adjusted to minimize safety and environmental concerns. This caused the company to pay overtime to employees to assist in catch up. This is approximated to be worth about \$5,000.”

The Magistrate ordered that compensation be paid in the sum of \$5,000.

### **Grounds Of Appeal**

**(a) Compensation ought not to be awarded; and**

**(b) the Magistrate ought have exercised his discretion in respect of the applicant LEATHART under s 10 of the *Crime (Sentencing Procedure) Act 1999***

**(a) Compensation ought not be awarded**

The Magistrate was asked to make an order for compensation based upon a figure put to him as an approximation of the cost of overtime. The decision was erroneous for the following reasons:

- (i) firstly, there was and remains an absence of supporting evidence for any compensation claim or any supporting evidence was inadequate;

- (ii) secondly, there is no causal link between the enter inclosed lands offence and the alleged loss;
- (iii) thirdly, proper regard ought to be had to the matters set out in 77D of the Act; and
- (iv) fourthly, the most appropriate forum for a claim for economic loss would be through civil proceedings due to the nature of the claim and the offences.

Dealing with (i), no order for compensation should be made unless the sum claimed by way of compensation is either agreed or proved (*R v Vivian* 68 CrAppR 53). In *R v Swann and Webster* (6 CrAppR(S) 22, CA) it was said that the effect of the amendments of the original provisions by the *Criminal Justice Act* 1982 (UK) was “slightly to reduce the obligation which was laid down in Vivian’s case,” but that “there is nothing new in these statutory provisions which indicates that a trial judge, when considering compensation should simply pluck a figure out of the air.”

In *R v Horsham JJ ex p Richards* (82 Cr AppR 254 DC) Neill, LJ said that the court had no jurisdiction to make a compensation order without receiving any evidence where there was real issues raised as to whether the claimants had suffered any, and if so what, loss.

The principle that a compensation order should not be made unless the fact that a loss has been incurred, and the extent of the loss, are either proved or admitted, was applied in *R v Watson* (12 Cr.App.R.(S) 508 CA).

It is submitted that the figure for compensation in the present case was plucked from the air by the aggrieved party. It is noted that the Respondent has now produced the statement (albeit unsigned) of Roy Gellweiler which is dated 22 September 2009. It is submitted this statement ought be disregarded since it was not material before the Magistrate at the time of the sentencing. Furthermore, again the figures are an approximation and of no weight. Presumably were there to have been payments for overtime and other costs precise details could have been produced.

Insofar as additional security referred to in the unsigned statement of Roy Gellweiler is concerned, there is no causal link between the offences in respect of which the applicants were convicted and the loss, particularly future loss. It is somewhat analagous to accepting that a shoplifter ought be responsible for the payment of the cost of store detectives should a shop owner decide to engage such following a spate of shoplifting.

As for (ii) there needs to be a causal link between the offences and the loss. The charge in this instance was enter inclosed lands and not remain on inclosed lands. The offence was committed and concluded almost instantaneously and the compensation order was not said to attach to the hinder police charges – which of course only involved three of the four applicants.

Directions for compensation under s 77B of the Act can be made for any loss sustained “through or by reason of” the relevant offence.

In *Regina v Skaf* (2001) NSWCCA 199 (23 May 2001) Grove J observed (at 18):

“Irrespective of the identity of particular statutory provisions which may be applicable, no order can be made unless, at the very least, there is some causative link between the conduct charged against the offender and the loss by the intended recipient of compensation.”

The facts in the unreported case of *Police v Morgan and others*, 14 August 2002, Local Court New South Wales, Eden, were analogous to the present. In that case, protestors entered into inclosed land at Harris Daishowa Woodchip Mill at Eden and were charged with “Enter Inclosed Lands” and “Resist/Hinder/Assault Police”. The prosecutor sought compensation for the Woodchip Mill in the sum of \$17,027.85.

Magistrate Heilpern found that as the defendants had been charged with entering inclosed lands, not remaining on enclosed lands, the causative link between the charge and the compensation was not clear and accordingly not sufficient to justify an award of compensation.

Applying *Morgan*, it is submitted that in the present case, there is no relevant causal link between the unlawful entry offence and the compensation awarded.

Further in this connection, it should be noted that in a number of press statements, the Tomago Aluminium Company Pty Limited (“the Company”) stated that production at the Tomago Aluminium Smelter was unaffected by the protest by the appellants (“Climate change protest targets Australia smelter”, Reuters, 9 June 2009).

It is submitted that even if the applicants were charged with remaining on inclosed lands, the causative link between remaining on the premises of the Tomago Aluminium Smelter and payment of overtime to workers would not be entirely clear.

As for (iii), it is submitted that the compensation order should not be made having regard to the matters set out in s 77D of the Act.

In particular, with reference to s 77D(a) and (c) of the Act, it is submitted that the Court ought to take into consideration the following matters:

- (a) the environmentally damaging practices of the Company in relation to its excessive use of emissions intensive electricity which is contributing to global warming;
- (b) the fact that the offence was committed for the purposes of protecting the environment and in the course of the exercise of the applicants' right to protest;
- (c) the protest was peaceful: it did not cause any damage to persons nor property; and
- (d) the applicants' weak financial positions.

As for (iv), any claim for loss ought properly have taken the form of a civil claim for damages where proper consideration could be given to issues of liability, apportionment of damages, set off and quantum. There would be issues of fact in dispute.

**(b) Discretion under section 10**

The applicant LEATHART ought have been given the benefit of the exercise of the discretion under

s 10 of the Crimes (Sentencing Procedure) Act.

Kenneth H Averre

Forbes Chambers

November 2009