

Land and Environment Court

New South Wales

Medium Neutral Citation:

Camden Council v Rafailidis (No 5) [2014] NSWLEC 85

Hearing dates:

25 June 2014

Decision date:

25 June 2014

Jurisdiction:

Class 4

Before:

Sheahan J

Decision:

(A) Efrem Rafailidis is fined \$10,000, payable to the Registrar pursuant to the Fines Act 1996, plus a monthly fine of \$2,000 payable on the first calendar day of each month, on and from 1 August 2014, until the works the subject of the charge have been completed to Council's satisfaction.

(B) The costs order already made against Koula Rafailidis is amended to read: Koula Rafailidis is ordered to pay Council's costs of the contempt proceedings from 1 October 2013 until and including 23 May 2014, on an indemnity basis, as agreed or assessed according to law.

(C) Efrem Rafailidis is ordered to pay Council's costs of the contempt proceedings since 23 May 2014, on an indemnity basis, as agreed or assessed according to law.

Catchwords:

CONTEMPT: Defendant sentenced in his absence - no basis for more lenient penalty than already imposed on co-offender - indemnity costs.

Legislation Cited:

Land and Environment Court Act 1979
Land and Environment Court Rules 1979

Cases Cited:

Camden Council v Rafailidis [2012] NSWLEC 51
Camden Council v Rafailidis (No 3) [2012] NSWLEC 217
Camden Council v Rafailidis (No 4) [2014] NSWLEC 22
Ken Tugrul v Tarrants Financial Consultants Pty Limited (in liquidation) [No 2] [2013] NSWSC 1971
Rafailidis v Roads and Maritime Services (No 2) [2014] NSWLEC 9
Vincent Francis Stanizzo v Muhammad Badarne &

Ors [2014] NSWSC 689

Category:

Sentence

Parties:

Camden Council (Prosecutor)
Efrem Rafailidis (1st Defendant)

Representation:

Mr C Campbell, solicitor (Prosecutor)
No appearance (1st Defendant)
Lindsay Taylor Lawyers (Prosecutor)
Defendants self-represented

File Number(s):

40855 of 2011

JUDGMENT

INTRODUCTION

- 1 This matter returns to Court today for a sentencing hearing in respect of the 1st respondent/defendant, Efrem Rafailidis.
- 2 On 18 March 2014, the Court found him and the 2nd respondent/defendant, his wife Koula Rafailidis, guilty of contempt of Court, as a consequence of their disobedience of orders of the Court made on 18 September 2012.
- 3 The background facts of the contempt and the conviction of both defendants are fully canvassed in my previous judgment, *Camden Council v Rafailidis (No 4)* [2014] NSWLEC 22, and need not be repeated here.
- 4 Essentially the defendants failed to honour an undertaking given to the Council in 2008, and then disobeyed conditions of development consent requiring them to obtain approval for demolition of an old dwelling on their land, following completion of a new one.
- 5 They subsequently disobeyed notices and orders issued by the Council, and orders made by this Court in support of those Council orders. Eventually this Court granted, in 2012, approval to the retention of the old dwelling, but on quite stringent conditions as to its modification.
- 6 In his judgment of 18 September 2012 (*Camden Council v Rafailidis (No 3)* [2012] NSWLEC 217), Biscoe J extended the compliance period to 4 July 2013, but compliance has not occurred.
- 7 Efrem Rafailidis appeared on 6 December 2013, when the contempt summons against him and Koula was returnable, but he did not appear at the hearing of it before me on 18 March 2014, and he has neither appeared nor been represented today. I granted leave to the prosecutor to proceed again today

in his absence.

RECENT HISTORY

- 8 That 18 March hearing was seriously disrupted by Koula Rafailidis and her supporters, and those events were covered in my judgment, but in the end:
 - (1) I granted leave to the Prosecutor to proceed against Efrem, on the question of liability, in his then unexplained absence,
 - (2) I found him guilty of a contempt, which I classified as "serious" and "wilful" and "not far short of 'contumacious'", and
 - (3) I entered a conviction against him; but
 - (4) I decided he should have a further chance to appear in his own defence before I passed sentence, and so
 - (5) I directed that a copy of my judgment be brought to his notice.
- 9 Process server Mark Slater deposes to having served Efrem personally at the defendants' Catherine Fields address with a copy of the judgment, and an explanatory letter of 27 March.
- 10 Efrem's adjourned sentencing matter was then listed before me for mention and directions on 23 May. Council's solicitor, Mr Christopher Campbell, deposes to his firm having written to Efrem on 9 and 14 May in regard to it. Again Efrem did not appear, but what was a straightforward directions hearing was seriously disrupted by Koula and her supporters.
- 11 The Registrar later fixed today's hearing date, and Council's solicitor was directed to notify Efrem of the hearing date and the pre-trial directions, which included a direction that Efrem file and serve any affidavits upon which he wished to rely not less than seven days before today's hearing. He has filed nothing, and has not availed himself of the liberty to apply I granted both sides.
- 12 Prior to 23 May, Koula Rafailidis launched an appeal in the Court of Appeal against my decision convicting and fining her, and that appeal remains in that Court's lists.

NOTICE AND REPRESENTATION

- 13 At the hearing before me on 18 March, Koula specifically **declined** to represent Efrem (Tpp1 - 3), and he has not appeared in the contempt matter since 6 December 2013.
- 14 In the primary proceedings before Lloyd AJ on 5 March 2012, - see *Camden Council v Rafailidis* [2012] NSWLEC 51 - he did appear, but Koula told his Honour she was "taking control", because Efrem was "not very fluent with English" (Tp3). He did, however, interject on one occasion (Tp30), and then gave oral evidence (Tpp45 - 46), without the aid of an interpreter. From his evidence it emerged that Koula "handles all the paperwork", especially "formal documents", because, he said, he "can't understand everything".
- 15 In the unrelated Class 3 compensation proceedings before Craig J earlier this year - see *Rafailidis v Roads and Maritime Services (No 2)* [2014] NSWLEC 9 - Koula twice told his Honour that she and Efrem were "not on speaking terms", and he did not participate in the hearing. The respondent to those proceedings, Roads and Maritime Services, made contact with him, and then confirmed to his Honour that he told them that Koula was handling the case on their joint behalf.
- 16 On 20 June 2014, Koula emailed Council's solicitor, Mr Campbell, with a copy to the Court, advising that she **does** "act on behalf of ... Efrem Rafailidis", but that she would not attend today's hearing because she felt "at risk of great harm", in view of her unfortunate altercation with a Sheriff's Officer who was removing her from the courtroom, at my direction, during the disrupted directions hearing in May.
- 17 That email did not comply with the requirements of s 63 of the *Land and Environment Court Act 1979*, and/or Rule 7.7 of the Land and Environment Court Rules 1979. Mr Campbell emailed her to that general effect at noon yesterday.
- 18 Koula overnight emailed my associate, with copies to the Chief Judge's associate, the Attorney General's office and the Judicial Commission, but **not** to Mr Campbell. The email is addressed "Greetings Terence", acknowledges that this matter is listed before me today, denies service of any documents on Efrem or herself regarding it, accuses me of directing the sheriff to assault her, and denies they are guilty of any contempt. However, it makes **no** submissions on Efrem's behalf regarding penalty.
- 19 Regarding notice, beyond what I have said above, I note that Council's solicitors wrote to Efrem, as I had directed, on 26 May, confirming the hearing today, and clearly explaining the directions I had made in respect of evidence.
- 20 Process server Stephen Goodwin attended on several occasions the defendants' Catherine Fields address -- where Efrem had been served previously, and

which is now nominated in Koula's email of 20 June as the address at which to contact him - without success in effecting personal service. On 12 June, an envelope containing the letter was left affixed to the front door. The emails received since indicate, at the very least, that the person professing to represent him became aware of the contents of the envelope and, therefore, the contents of the letter.

- 21 I formally refuse Koula Rafailidis's application for leave to represent Efrem Rafailidis in this sentencing matter.
- 22 I would refer both defendants to the Supreme Court's decisions in *Ken Tugrul v Tarrants Financial Consultants Pty Limited (in liquidation) [No 2]* [2013] NSWSC 1971 and *Vincent Francis Stanizzo v Muhammad Badarne & Ors* [2014] NSWSC 689, regarding the impropriety of such direct communications with a Trial Judge's chambers, especially when they exclude the other party.

CONSIDERATION

- 23 I turn now to the substance of today's hearing.
- 24 Council's development compliance officer, Charlie Saab, deposed on 19 June, further to his earlier evidence in the proceedings, that his inspection on that date revealed that, even now, none of the demolition required by the 2012 development consent has taken place. The purging of contempt for which I expressed hope, at [31] of my earlier judgment, has not occurred.
- 25 As I said on 18 March (at [24] - [29]):

24 It troubles me that this Court's decisions in respect of the development of the respondents' property have been favourable to their interests and desires, and yet they have shown total disregard for the orders they achieved. They were given twelve months to comply (by 4 July 2013), and did not. They still had not complied four months later, when this charge was laid.

25 Had they done something about the old house following the laying of the charge of contempt, I would have been inclined to treat the disobedience to that time as "technical" contempt, but it has continued, and their contempt is, at least, "wilful". In fact, it is not that far short of "contumacious", when one takes into account the approach taken to the charge - one defendant did not appear, and the other refused to participate properly, in her own interests.

...

27 ... Although strenuously challenging the relevance of all Koula Rafailidis's filed documents, Mr Campbell accepted that I would have regard to them. In reality, they shed no light on the position with regard to the continuing state of the subject building, and they advance no arguments as to why this Court should be lenient in dealing with Koula Rafailidis and her husband, in respect of their non-performance of the Court's orders.

28 I am satisfied beyond reasonable doubt that both these defendants are guilty of contempt of court, and should be convicted. Theirs is a serious breach; they have made no attempts to purge their contempt; they have challenged the Court, but put nothing in mitigation; they did not plead to the charge, nor show any remorse or contrition.

29 The circumstances call for general and specific deterrence.

26 I made the following orders on that day:

(1) Efrem Rafailidis is found guilty of contempt, and convicted of that charge.

(2) Koula Rafailidis is found guilty of contempt, and convicted of that charge.

(3) Council is directed to bring this judgment to the personal notice of Efrem Rafailidis, and is granted liberty to approach the Registrar not earlier than 28 days from today and on seven days' notice to Efrem Rafailidis with a view to the fixing of a date for his sentencing hearing.

(4) Koula Rafailidis is fined \$10,000, payable to the Registrar pursuant to the Fines Act 1996, plus a monthly fine of \$2,000 payable on the first calendar day of each month, on and from 1 June 2014, until the works the subject of the charge have been completed to Council's satisfaction.

(5) Koula Rafailidis is ordered to pay Council's costs of these contempt proceedings, on and since 1 November 2013, on an indemnity basis, as agreed or assessed according to law.

(6) The Council's exhibit will remain on the Court file.

27 I am satisfied that a penalty no less severe than that which I imposed on Koula on 18 March, should be imposed on Efrem. I will fine him the same amounts, but the monthly fine in his case will commence on 1 August 2014.

COSTS

28 Efrem should be solely responsible for the Council's costs of these contempt proceedings since 23 May.

29 However, the prosecutor submits that Order (5) in respect of earlier costs incurred could possibly be construed as not entitling it to its costs of the preparation of the contempt proceedings. It was certainly my intention that such costs be covered, and I am prepared to now put that more clearly under the "slip" rule.

CONCLUSION AND ORDERS

30 To reflect today's decision, including the clarifying change needed to Order (5), the orders of the Court made on 18 March 2014, and numbered (1), (2), (4), and (6), will stand, but Order (3) will be discharged, and Order (5) amended.

31 The following supplementary orders will now be made:

(A) Efrem Rafailidis is fined \$10,000, payable to the Registrar pursuant to the Fines Act 1996, plus a monthly fine of \$2,000 payable on the first calendar day of each month, on and from 1 August 2014, until the works the subject of the charge have been completed to Council's satisfaction.

(B) The costs order already made against Koula Rafailidis is amended to read: Koula Rafailidis is ordered to pay Council's costs of the contempt proceedings from 1 October 2013 until and including 23 May 2014, on an indemnity basis, as agreed or assessed according to law.

(C) Efrem Rafailidis is ordered to pay Council's costs of the contempt proceedings since 23 May 2014, on an indemnity basis, as agreed or assessed according to law.

- 32 The Court will today enter amended orders, and I direct the prosecutor to serve them, once entered, on both defendants. If personal service is avoided, as in the recent past, it shall be sufficient for them to be attached to the front door of the premises at the address provided. The prosecutor will also need to inform both Koula Rafailidis and the Court of Appeal of the new orders.
- 33 I will publish these reasons, and I direct that copies should also be served on both defendants.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 25 June 2014