

IN THE LOCAL COURT
PARRAMATTA

MAGISTRATE STAFFORD

5

MONDAY 20 JUNE 2016

Auburn City Council v Warren JACK

10 OFFENCE Fail to demolish or remove a building contrary to order

Mr Gough for the Informant
Accused appeared in person

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HER HONOUR: It's a hearing listed, Mr Jack, following a plea of not guilty to an allegation of failing to remove works as ordered by an Environment Planning and Assessment Act order. You're still pleading not guilty?

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ACCUSED: No. I've got legal advice. I'm pleading guilty, but with an explanation, if I can.

HER HONOUR: A plea of guilty. Do you have facts?

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GOUGH: Your Honour, I've just provided a statement of facts to my friend this morning. There's a fairly large amount of paperwork, so my friend was just going through the facts to see if they are agreed facts, but I'm not sure if that task was completed.

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HER HONOUR: Have you had a chance to do that, Mr Jack?

ACCUSED: Yes, I've had a look at it. I can't see anything that's a problem.

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HER HONOUR: Are you happy for me to go ahead now then and read those myself?

ACCUSED: Yes.

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GOUGH: Your Honour, I hand up a statement of facts. There's also a statement of the council officer that is fairly lengthy. I hand this up because there are references to documents in the facts that you will need to refer to.

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HER HONOUR: The witnesses are excused. Having been unfamiliar with this section, Mr Gough, I had a look this morning, and you might have to just assist me. I don't know if you've got it in your facts statement here, but I couldn't see where the penalty - no, here we go. No, costs, I see. Where's the penalty?

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GOUGH: The maximum penalty? I have done some written submissions that do address that, so I can hand those up as well.

HER HONOUR: Have you seen these written submissions?

GOUGH: No, my friend has not. I will just turn to the page that deals with--

5 HER HONOUR: Because when I looked at 121B(1), that seemed to give a power to the consent authority to make the order, but then I was trolling through it, looking for the penalty for not complying and I couldn't find it.

GOUGH: Unhelpfully, it's at s 125B.

10 HER HONOUR: Of course, yes, right.

GOUGH: Yes. It's a maximum penalty for a tier 2 offence of half a million dollars for an individual, but there is a statutory limitation, of course, in the
15 Local Court of \$110,000.

HER HONOUR: 110, is it?

GOUGH: Yes.

20 HER HONOUR: Have I got those submissions?

GOUGH: Yes.

25 HER HONOUR: Mr Jack, did you bring any material that you want me to consider?

ACCUSED: Yes, your Honour.

30 HER HONOUR: You've got a folder of material. Have you seen--

GOUGH: I have seen it, your Honour. I have no objection to you seeing it.

35 HER HONOUR: Mr Jack, I see that material. The architect's documents that are dated July 2014, when were they submitted to the council for the change of use? The reason I raise it is - Mr Gough, you might know - was it the lodgement of the development application that triggered the investigation?

40 GOUGH: No, no. It was earlier than that. The council officer had attended the site and served a stop work order prior to the development application being lodged.

45 HER HONOUR: Yes. No, I did see that, but the one I've got is dated July 2014, which I just can't see when it was lodged, that's all.

GOUGH: Council only received that development application - that was in
September 2014.

50 HER HONOUR: In September?

GOUGH: Yes.

HER HONOUR: Mr Gough, thank you for those submissions. Is there anything you wish to add in the way of oral submissions?

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GOUGH: Your Honour, no, the submissions contain it. The only thing I would like to point out is the severity of the objective seriousness would be that it's a flood affected lot, a development application was refused because water would enter the premises in the event of a flood event, and in receipt of the notice of the proposed order, Mr Jack then tried to sell the property, thus passing the risk to a third person so I think they are the factors which would weigh in a finding that it's in the upper end of seriousness.

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HER HONOUR: It's quite a broad, obviously, range of financial penalty.

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GOUGH: It is, yes.

HER HONOUR: Is there anything by way of assistance, in terms of comparable--

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GOUGH: I don't have that material. All I can say is that the council officer did issue a PIN, and this a court elected from a PIN, and the PIN amount is \$3,000. You're not bound by that, of course.

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CLOSE OF CASE FOR PROSECUTION

HER HONOUR: Mr Jack, a couple of things I would like to know. One is, today you've pleaded guilty. Obviously today is the hearing day. I understand you said you've - after receiving some legal advice. Can you just tell me, when did you let Mr Gough or anyone from the prosecution know that you were going to plead guilty today?

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ACCUSED: When I saw him this morning, about ten minutes after I spoke to my lawyer, because my lawyer just told me this morning to plead guilty. I thought I was pleading not guilty. So as soon as I spoke to John Hajje, I came here and I spoke to the other side straight away.

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HER HONOUR: The only reason I ask is that the timing of the guilty plea is a factor that I take into account in deciding what penalty I should give you. Have you had a chance to read Mr Gough's submissions on sentence?

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ACCUSED: I briefly went over it, your Honour.

HER HONOUR: They're the sentencing principles he's relying on, and you've heard him say that the maximum penalty is half a million dollars, but in the Local Court I have got a jurisdictional limit so having read what the prosecutor has said and heard what he has said today, is there anything you would like to tell me about your financial situation or why you acted in this way?

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ACCUSED: Yes, your Honour. Your Honour, I bought the property with my

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wife from The Salvation Army back in February 2014. We paid GST on the property. We bought the property and we understood the property was commercial. We're still paying commercial rates to council, which is about four times what residential rates are, and we tidied the place up and we
5 started - we moved the business in there. I can't remember if we did the DA to do the business or we moved the business in there first, but then we were told we're not allowed to operate the business there, so we did it--

10 HER HONOUR: The business, I saw the name of it, but I don't know what sort of business it is.

ACCUSED: I have a training school.

15 HER HONOUR: What does that mean?

ACCUSED: We train people, we train - it's a registered training organisation.

HER HONOUR: Training who for what?

20 ACCUSED: We train - sometimes we train disadvantaged people, we train people in the construction industry, we train people in the hospitality industry. We do not do the VET fee help that has been in the news lately, we're not part of that scheme. So we train various people, either to get work, or if they're doing work.

25 HER HONOUR: You moved the business there?

ACCUSED: Yes.

30 HER HONOUR: You're not sure if that was before or after you lodged the DA?

ACCUSED: Correct.

35 HER HONOUR: Yes, and what about the beds and children's toys, et cetera?

40 ACCUSED: We were told we can't operate the business there, they said it's zoned residential. I said, "But we've bought it commercial". I rang the then mayor, because I met him twice before. He came out, and I showed him the letter. Because a month or so before that, when we bought the property, I asked the mayor, I said, "Look, we want to remove this" - there was a rear shed, we asked if we could demolish it, "How do I do it?" He showed me the forms, he assisted me the whole thing and he got the approval done.

45 HER HONOUR: I'm assuming when you bought the property with your wife in February that it was under a contract of sale?

ACCUSED: Correct, yes.

50 HER HONOUR: And there was a zoning certificate attached to the contract?

ACCUSED: I would say so.

HER HONOUR: I would say so. They all do.

5 ACCUSED: Yes.

HER HONOUR: Yes. And it would have shown what use?

10 ACCUSED: Yes, correct. I should have read that, but I didn't. I just presumed because--

HER HONOUR: Well, obviously when you went to the architects, or whoever it was, to do the DA to change the use, it was pretty clear to you when you instructed them that you had to seek council's approval to change the use of it.

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ACCUSED: I thought, from what I understood, they were already doing training in there and they were already using it for church services. I assumed that, because they're already doing training, you could do training in there, and because we're paying commercial rates, we could operate an office there and business, and then I was told we can't. So the then mayor - or he was the mayor the year before, I'm not sure, he was still on the council - said to me, "It's zoned residential. You need to do residential". I don't know exactly the dates.

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25 So he came out and he said, "As long as you don't do any structural changes". He said, "You've already got a kitchen there. Update the kitchen. You've got your bathrooms. Don't change the plumbing, just put partitions in, and you don't need council approval". He came out on no less than four occasions and got me to adjust things in the building. We had the electricity going near the vanities, that he said was too close. I asked the builder to move them. He asked me to move certain partitions and we pulled them down and re-put them in as per his request, because he said, "That's not right. That's not right".

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35 HER HONOUR: This is the mayor, came out and did four site visits?

ACCUSED: Yes, four site visits. So I was going on who I thought was the authority in the area, telling me what to do. We bought the place to run a business. We invested at that stage over a million dollars by the time we got the place ready and everything. We couldn't afford to then get another premises and buy a house. He said, "This is zoned R2, it's residential". He said, "Live in the back". He said, "Providing you do not do any structural alterations to the building, you're only putting partitions in". So we modified the existing kitchen, the same space the kitchen was, we modified that. The bathrooms, it had a girls' toilet and boys' toilet that were quite large. We made one into an ensuite for my wife and myself and one for a children's bathroom, and we put partitions in to make bedrooms for the children. I had a builder doing that work. The builder was talking to the council as well, because he was giving us guidance, and then the builder had a run in with Mr Mooney and I ended up sacking the builder, the builder became very violent.

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HER HONOUR: who's Mr Mooney?

GOUGH: The council officer.

5 ACCUSED: The council officer, yes. I ended up sacking that builder. He started getting very angry with a lot of people, so I ended up sacking him. Mr Mooney came out about four weeks before we finished. On one occasion that I saw Mr Mooney, he was handing me some documents. I rang the
10 councillor and Mr Mooney said to me, "Are you ringing Councillor Attie?" I said, "Yes". I said, "Mr Mooney is here" - "Jason is here. What do I do?" He said, "Don't talk to him. I'm in charge, I'm the boss. Don't listen to him. I'll deal with it when he comes back". He said, "Just finish it and move in there. They cannot throw you out".

15 HER HONOUR: I'm sorry, who said this?

ACCUSED: The former mayor, or the mayor of Auburn Council.

20 HER HONOUR: I think you need to give some sworn evidence about this.

ACCUSED: I'm happy to do that. I've already been to ICAC, your Honour.

HER HONOUR: Yes, I saw that.

25 ACCUSED: I'm happy to swear evidence. Your Honour, I've been visited by some strange people, and I've been told and warned not to go into full details. I've been harassed, my family has been harassed. I'm told certain people are going to come and knock on my door. I'm just trying to live there with my family, and I was scared to go to ICAC before. When the big--

30 HER HONOUR: Anyway, I don't need to know anything about that. What I do need to know is your motivation for not demolishing the work after you were given the order, and that's relevant.

35 ACCUSED: Yes. I have asked council to tell me what I need to do to make it compliant and they haven't told me.

40 HER HONOUR: Just forget about that for now, because it looks as though they knocked back the DA. I know in your submissions, Mr Gough, you said if these - and maybe you were anticipating there might be something like this raised - but are you in a position to deal with it today?

45 GOUGH: Your Honour, it depends if the rules of evidence apply, of course, to the sentencing proceedings, but, I mean, all this is hearsay evidence, so without testing the source of it, it leaves me in a fairly precarious position, because I could only cross-examine the defendant on what was said by a third party. I mean, it's not relevant to the conviction, of course; it's whether it's relevant to a mitigating circumstance in the sentencing. The offence is, an order was served and an order was not complied with. So, as far as your
50 considerations, they are, I think, the limit. What led up to it is not as relevant,

but I can't - my instructions are that those - we have no knowledge of those conversations, of course.

5 HER HONOUR: Yes. This fellow who seems to have overridden what Mr Mooney was telling you, where is he now, is he--

ACCUSED: I believe he has been sacked from council. Mr Mooney was--

10 HER HONOUR: This is the former mayor, is it?

ACCUSED: Yes. Mr Mooney was there when I had conversations with him, and Mr Mooney said, "Are you talking to Councillor Attie?" because he saw and he heard the conversation, and that was in my driveway.

15 HER HONOUR: You see, the thing is, you can't - unless Mr Attie is here - and I'm assuming he's not here?

ACCUSED: No.

20 HER HONOUR: I can't - because of - this is going into a sentence hearing where, in my view, the rules of evidence must apply. One of the important rules is that you can't give evidence about what someone else told you if they're not going to be here for their version to be tested. You can give evidence about conversations you had with Mr Mooney or what was
25 happening around the time you had a conversation with Mr Mooney, but you can't tell me, unless Mr Attie, or whatever his name is, is coming, what he said to you. I will give you, if you wish, an opportunity for an adjournment to subpoena him to come to Court. It's up to you whether you want to take that opportunity or not. If you do, then I will have to adjourn it to another day. If
30 you don't, then I still want you to come into the witness box and tell me what the nature of your conversations with Mr Mooney was, and then Mr Gough might want to call Mr Mooney. I don't know if he's got a different view so do you want to keep going today or do you want to come back another day and subpoena Mr Attie?

35 ACCUSED: I'm not sure, your Honour.

40 HER HONOUR: I'll tell you what, I've got another report I've got to read. I'll just go off the bench for five minutes and just have a think about that.

ACCUSED: Okay, thanks very much.

SHORT ADJOURNMENT

45 HER HONOUR: Was that enough time, Mr Jack?

ACCUSED: Yes, your Honour.

50 HER HONOUR: What do you want to do then?

5 ACCUSED: I spoke to my lawyer. I have actually had another person doing a - I think it's called a building certificate - to legalise the works that have been done. We are going to put another submission into council. If we're not allowed to live there, we will move out and rent them as consulting rooms or something. If we're allowed to live there - and from what I understand from the new consultant, it's to do with--

10 HER HONOUR: All I'm interested in at the moment is do you want me to finalise the matter today or do you want to try and subpoena Mr Attie?

ACCUSED: If I subpoena Mr Attie it's going to get really bad for me.

HER HONOUR: You want me to finalise it today then?

15 ACCUSED: Please.

HER HONOUR: I think you need to come into the witness box, then. Just come around the back of the table. Just bring all of your documents with you, if you like.

20 CASE FOR ACCUSED

<ACCUSED, SWORN(10.22AM)

<EXAMINATION-IN-CHIEF BY HER HONOUR

5 Q. Your full name?

A. Is Warren Leonard Jack.

Q. Mr Jack, where are you currently living, are you living at the house?

A. Yes, your Honour.

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Q. What's that address?

A. 1A Henry Street, Lidcombe.

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Q. You were making some statements from the bar table and I asked you to give some sworn evidence. Just correct me if I'm wrong in my notes. I just want to know now if you're swearing to the truth of this, that you bought the property at 1A Henry Street, Lidcombe, with your wife in February of 2014?

A. Yes.

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Q. You paid GST and you understood it was a commercial property?

A. Yes.

Q. You're paying commercial rates on the property?

A. Yes.

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Q. It was formerly a Salvation Army Hall and you intended to run your training business from the hall?

A. Yes.

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Q. The note I've had is that you moved the training business into the premises and you can't remember if it was before or after the development application was lodged?

A. Correct, yes.

35

Q. You've heard Mr Gough say the council's records are that the lodgement took place in September of 2014?

A. I think that's the second lodgement. I know there was an earlier lodgement that I do remember doing which was for a commercial business, and I think that was rejected.

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Q. Do you know when that was?

A. That would have been after we were told by council we can't operate a business.

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GOUGH: If I can assist, your Honour. I've just gone through the records. There was a development application to change it into commercial premises. That was refused by council on 23 July 2014.

HER HONOUR

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Q. That seems to accord with the dates of the development application you've given me in your folder. So you moved the business in, which is a training business, and you train people in the construction and hospitality industries?

A. Yes.

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Q. Then you said you were told that it was zoned residential. Who told you that?

A. The mayor, or he was the former mayor - I think he was the mayor that year or the year before - which is Ned Attie, because we got a letter--

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Q. How do you spell his name, do you know?

A. N-E-D, A-T-T-I-E, I think. Yeah. I don't know if that's his real name.

Q. What surname did you know him by?

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A. A-T-T-I-E. He goes by the name of Ned Attie.

Q. Ned Attie, I'm sorry. He told you something, and your understanding after that conversation was that you couldn't run your business from there. So what did you do after that?

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A. We, based on what I was told - I was told that it's R2, which is residential, that I couldn't operate a business, its only use was residential. He said residential or a place of worship, because it has been used as a place of worship before.

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Q. When were you told that?

A. That was after the application was rejected.

Q. That was on 23 July?

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A. Yes, it would have been maybe July or August. I'm not sure of the exact date, your Honour.

Q. Your conversation with Mr Attie, was that before or after one of the council people came out on 5 September 2014?

A. Yes, before.

35

Q. You had a phone conversation with him about the restriction on the use, and then you told me before that he came out and did four site visits?

A. Yes.

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Q. So when was that?

A. That was at the - when we were looking at putting the bedrooms in, when we were looking at doing the kitchen, he said, "No, leave the kitchen the way it is. Leave the bathroom divided. Put your partitions here". He said, "Do not touch the structure, you don't need a DA". He said, "Providing you just put partitions". He said, "As soon as you've touched"--

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Q. Again, as I just remind you, you can't tell me what he said.

A. Yeah.

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Q. But all I'm asking is, his four site visits, was that before or after the officer of

the council came out on 5 September?

A. Before and after.

Q. Before and after?

5 A. Yes.

Q. Are you able to say when?

A. I don't know the exact dates. I would have to go through and have a look at old messages and phone records.

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Q. You don't have those with you today?

A. No, I don't, your Honour, sorry.

Q. You also mentioned Mr Mooney from council. Was he the officer who came out on 5 September 2014?

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A. I believe so. I don't know, but I know Mr Mooney has been out a few times. I don't know what exact dates.

Q. The prosecution facts say that 5 September 2014 was when an inspector came out and took some photographs after talking to your builders?

20

A. I do recall the builder told me that.

Q. Then on 8 September the officer went back after making some inquiries and told the people who were working there to stop. You're nodding your head there. Were you aware that the officer had come out, firstly, on 5 September?

25

A. I know the officer came out a few times. I don't know the exact dates, your Honour. I know that he came out, spoke to the builder a couple of times.

Q. Did you have a conversation with the builder about the officer coming out and talking to him?

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A. Yes, I did.

Q. What was your understanding. Don't tell me what the builder told you, but what was your understanding after you spoke to the builder?

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A. I told the builder to stop work, which he then did. He said, "I'm going to continue". I said, "You have to stop work".

Q. When did you tell the builder that?

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A. When he had a notice from the council officer. I said, "Pack up your things and stop work". If you've got an order to stop work, you have to stop work, because otherwise the builder is at risk of getting a fine and I'm at risk of getting a fine as well.

Q. The facts say that the officer served via post an order to stop work. Did you get that?

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A. No, they served it to the wrong address, your Honour.

Q. Did you receive anything by post from the council?

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A. There was, I think, two or three notices that were going to an address that were at two addresses ago. They were going to Waitara, I think it was. Even

though we updated our records at council when we bought the property, they were still sending notices to an address at Waitara, near Hornsby.

Q. How do you know that?

5 A. Because Mr Mooney admitted that to me.

Q. Just going back to my question, though, did you receive any notice from the council around September 2014?

10 A. I believe I did, your Honour, yes. I think it was by hand through the builder or something like that.

Q. The facts go on to say that on the 25th you then lodged a further DA for the change of use?

15 A. Yes.

Q. Had you received anything from the council before that date?

20 A. I can't remember, your Honour. I know there was papers being - that were handed to the builder, or going to be handed, I don't know if they were, but the builder told me that.

Q. The facts go on to say that they served you with a notice advising of their intention to issue an order, in other words, to demolish the work and that that happened on 30 April 2015. Did you get that?

25 A. April?

Q. Yes.

A. I don't think we'd been - I don't think we were doing the work then. We weren't doing the work in April.

30 Q. When did the work stop then?

A. I think in April they asked me to remove signage, and I did. There was signage on the building and I removed that.

Q. But you said before that the builder was sacked?

35 A. That was around September.

Q. Of 2014?

A. Yes.

40 Q. When did the work stop on the premises?

A. It stopped when I asked him to stop, and then after I spoke to the councillor he said to continue, he will sort it out.

Q. Who's the councillor?

45 A. The councillor was Ned Attie.

Q. You said before from the table that you had had a conversation with Mr Mooney where he saw you on the telephone. Tell me a bit about that?

50 A. There was a time where Mr Mooney was out with another person - or one or two people, I can't actually recall. I was standing in the driveway.

Mr Mooney was wanting to hand me papers. He was saying, "Mr Jack, you've got to stop". I rang Ned Attie. He said, "Are you calling Councillor Attie?" He called him "Councillor Attie". I said, "Ned, Jason Mooney is here again". He said, "Do not talk to him", and I said to Mr Mooney, I said, "I can't talk to you".
5 He said, "Walk away from him. I will sort this out". And I think Mr Mooney would recall that, because that was very clear.

Q. When was that?

10 A. I think that would have been in September - late September.

Q. 2014?

A. 2014, yes.

Q. Then when did you try and list it for sale then?

15 A. I'll just refer to my notes. It was after the councillor advised me, "You're best just to get rid of it and save the headache". He then said to me he's got people - this would have been - no, we tried to sell it after we couldn't use it as commercial. After we couldn't use it as commercial, before - no, hang on, sorry, your Honour, I got the years wrong. We tried to sell it in May last year.
20 Now, the people knew that it wasn't - the real estate knew that it wasn't approved as a house, we made that clear to the real estate agent. The real estate agent knew we had a lot of trouble with council.

Q. Don't go into those conversations.

25 A. Sorry. We also teach real estate in my school, so I know the--

Q. Tell me a little bit about your financial situation then.

30 A. My financial situation at the moment is I'm in debt for, at the moment, 2 and a half million dollars, because I've bought another property to operate the business out of. We've got a daughter in year 12. I've got two children from a previous relationship who is ten and 12 years old. They stay with me every weekend - or every second weekend and all school holidays, and I owe the tax department about \$150,000 at the moment that I'm in a payment plan to pay off.

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Q. What's the details of that plan, how much are you paying?

A. With the - the plan is \$10,000 per month, and that was made about two weeks ago.

40 Q. They're your debts. What's your income and what are your assets?

A. Assets, we've got the property at Henry Street, we've got a factory around the corner, which we've moved the business into. Assets, I think, would be - well, they valued the factory, they're saying I paid too much for it. The valuation on the factory came through at about 1.9, but they got it revalued at
45 2.1. I owe a total of 2.5. And the house is valued, I think, at around one or 1.1 million.

Q. Any other significant assets?

50 A. No, your Honour.

Q. What about income?

A. Income, I'm on 150,000 a year.

Q. Your wife?

5 A. My wife is on about - I think around 90,000.

<CROSS-EXAMINATION BY MR GOUGH

10 Q. Mr Jack, you first lodged a development application for commercial, so you were well aware that there was a process that development consent needed to be applied for?

A. I wasn't aware at the time. I've never done developments before.

15 Q. You lodged a development application with council to change the use into commercial purposes in 2014?

A. Correct, yes.

Q. At that stage you were well aware of the process of obtaining development consent, weren't you?

20 A. I used consultants to do that. I don't know the process.

Q. You had no knowledge of that development consent?

A. No, sorry, I'm getting confused with the question. I thought your question was do I understand the process. I don't understand the process.

25

Q. You understand that you need to get development consent?

A. Yes, I do, yes. I understand that because I was told I need to do that.

Q. In September 2014 the council told you to stop work?

30 A. Yes.

Q. Because there was an allegation you didn't have development consent?

A. Correct.

35 Q. You then obviously, from the instructions of your experts, sought a development consent to change the use into a dwelling?

A. The council was consulting to me on what to do. I was told by council to stop and I was told by council to continue and I was told--

40 Q. You were aware in September 2014 that you required development consent to use the premises as a dwelling, because you lodged a development consent for that - application?

A. Yes, correct.

45 Q. You were not told by any consultant town planner or council town planner that you did not require development consent, were you?

A. I was told by a councillor that works at council--

Q. Answer the question: consultant town planner or council town planner?

50 A. What's a consultant town planner?

Q. An expert town planner that you employ to give you planning advice.
A. I don't know what that is.

5 Q. It's a person who has a bachelor of town planning from a university and you employ to give you planning advice. You didn't employ someone to give you planning advice that said you could use this premises without getting development consent?
A. No.

10 Q. Following the order and the refusal of the development application, you resided in the premises, didn't you?
A. Yes.

15 Q. Knowing full well that you didn't have consent?
A. I did have consent.

Q. Where's your consent?
A. By the mayor - or the previous mayor. He told me that he would fix it.

20 Q. You thought that was a development consent, did you?
A. No, he told me he's in charge.

25 Q. You thought it was a development consent?
A. I don't understand what you mean, development consent.

Q. The development consent is something that is issued pursuant to the Environmental Planning and Assessment Act.
A. He told me I don't need one.

30 Q. Yes, but you didn't make inquiries, did you? You made no inquiries except rely on a third person who has no qualifications?
A. I relied on someone from council.

35 Q. You sought a development application to use it as a dwelling and that was refused; you agree with that?
A. Yes.

40 Q. You were fully aware you did not have development consent to use it as a dwelling?
A. When was it refused, what date, the residential?

Q. It was refused on 12 March 2015?
A. I think that's the commercial one. I was already living there.

45 Q. You lodge an application and you started living there before the application was determined?
A. That application is in March. I was living.

50 Q. No, it was lodged in September 2014 and it was refused in March 2015.
A. I've been living there since October 2014.

Q. You lodged a development application in September 2014. You didn't wait for it to be determined. You started living there, knowing full well you had to get a consent, and then council refused it the following year in March.

A. I was told by a councillor to move in.

5

GOUGH: There was an error in the statement of facts as to the date, your Honour. It should read 12 March 2015.

Q. And placing the property up for sale, that was only in response to council issuing you with a notice of a proposed order, wasn't it?

10

A. No, I was going to get - at the time I was getting separated from my wife, because we had enough stress from this.

<THE WITNESS WITHDREW

15

HER HONOUR: Mr Jack, one thing I did forget to ask you, though, was how much you paid for the property when you bought it?

ACCUSED: We paid - I think we paid 830 - roughly 830,000, plus the stamp duty.

20

HER HONOUR: Then when you saw this real estate agent when you decided to put it up for sale, what was the expected sale price you were quoted?

ACCUSED: He didn't know because, as he said, our property is in prime position for development. The people that want it are developers. We're right opposite the park. Next to us is all zoned R4. He said--

25

HER HONOUR: But didn't he give you something in writing saying what the possible range was?

30

ACCUSED: Could be between a million and 1.5.

HER HONOUR: Yes, okay, thanks. Is there anything else you would like to say before I decide on the penalty?

35

ACCUSED: Yes, your Honour. I now know that I have done a development that I should have got advice from or done differently. If I get a criminal conviction today I would not be able to run my business, because I'm a CEO of an RTO, and to be a CEO of an RTO, you are not allowed to have a criminal conviction. I am happy to pay a fine because I now know I've done the wrong thing. I was just trying to live there with my family based on what I was told and advised. If I'm not allowed to live there, we will move out. We will put the property back for sale and move out, or we - I don't know what to do at the moment.

40

45

HER HONOUR: I'm assuming RTO is a, what, registered training?

ACCUSED: Registered training organisation.

50

HER HONOUR: Anything else you would like to say?

ACCUSED: I don't know what else to say, your Honour.

5 CLOSE OF CASE FOR ACCUSED

NO CASE IN REPLY

10 HER HONOUR: Warren Jack pleaded guilty to an offence under the
Environmental Planning and Assessment Act of failing to demolish or remove
works on a premises contrary to an order. The plea of guilty came on the day
of the hearing and I accept Mr Jack's explanation that that followed legal
15 advice he only received this morning to plead guilty. In terms of the discount
his plea of guilty attracts, there has been the saving of a hearing that was
listed for three hours, but because it was notified on the day of the hearing, the
witnesses had to come to Court, but the plea of guilty still attracts a 15%
discount.

20 The offence is laid under s 125B and the starting point of any sentencing
proceeding is what is the maximum penalty Parliament says should attach to
that, and in this case the maximum penalty is half a million dollars, so
obviously a substantial penalty, and that is a penalty that attaches to an
individual, not to a corporation, which of course is higher. The Local Court has
25 a jurisdictional limit of \$110,000. I note by way of passing that a penalty notice
was issued for somewhere in the vicinity of \$3,000, but the amount of that
notice becomes really irrelevant when someone elects to have the matter
brought to Court.

30 My understanding is that Mr Jack has brought the matter to Court for a reason
that is very important to him, and that is because if he is convicted of the
offence then he will lose his ability to trade as a registered training
organisation. Apart from the maximum fine, the next thing I have to consider is
what we call the objective seriousness of the offence. How serious was this
35 offence and what in fact did he do, what happened was Mr Mooney purchased
a Salvation Army Hall in Lidcombe and paid about \$830,000 for it in February
of 2014. He paid GST. He understood that it was a commercial premises.

40 Indeed, after settling on the property, he then instructed a firm to submit a DA
for a change of the use to commercial premises. That was done in late July,
and he moved his training business, which is a business that trains people for
the construction and hospitality industries, among other things, moved it in
either before or after the DA was lodged. In any event, that DA was rejected
by council and he was told that the use was restricted to residential premises.
He told me and gave sworn evidence on this point, that he then had a
45 discussion with the former mayor of Auburn, Ned Attie.

I asked Mr Jack if he would like to apply for an adjournment to subpoena
Mr Attie and he declined that invitation, asking me to finalise the matter today.
In any event, after speaking to Attie, Mr Jack was operating on the
50 understanding that the use was restricted to either a spiritual hall, which he did

not intend to use it for, or residential premises, and after speaking to Mr Attie, who he said made four site visits and spoke to him at the property, Mr Jack's understanding as that as long as he made no structural alterations to the premises and as long as he did not change the services, electricity, plumbing and the like, he could use it as a residential premises and that meant that it was permissible to put up partitions.

In any event, his evidence and the facts show that whatever understanding he was operating under was not sanctioned or authorised by any development consent. On 5 September 2014 an officer from the council went to the property where the builder was working and was told that the work involved constructing internal timber walls to create rooms. The works were being undertaken to create a residence and being done for the defendant and photographs were taken. A review was carried out and then on 8 September 2014 the officer went back to the property and directed the builder to stop work.

On 9 September the officer attended the subject property and observed that the work was still going on. The defendant was at the property at that time. The defendant gave sworn evidence that he had directed the builder to stop work but the builder would not, and continued the work. There was evidence given that the defendant had not received relevant stop work notices by the council, two or three were sent to a Waitara address, which was an old address; and the defendant gave sworn evidence that he sacked the builder in September of 2014 and, "The work was stopped when I asked him to stop".

The defendant then, on 25 September, lodged a further DA seeking change of use to residence plus home office, and that development application was knocked back on 12 March 2015. Then in April a notice of intention to issue an order under s 121B was sent with an extension of time allowed to make representations. Those representations were a further extension was sought and not granted. The order was then issued on 25 June 2015, ordering the following work to be undertaken within four weeks, and that being, to reinstate the internal configuration of the building that it was prior to the unauthorised development, which would mean demolishing or removing the internal walls to create a new office; he had created three bedrooms, a new hall, a walk-in robe; there was a doorway that needed to be enclosed.

There were formerly, when it was the Salvation Hall, separate men and women's toilets. That had been changed to an ensuite and a further bathroom, and part of the order sought the reinstatement of the separate gendered toilets, and also an order removing laundry walls and the associated fittings and services, reinstating a room identified as the corps officer's room, and demolishing a room that had created a pantry. There was also a concrete pavement that had been laid in the yard and that was ordered to be removed and then council sought written certification from a proper practising engineer. The rectification works have not been undertaken, there are photographs before me, and the defendant's sworn evidence was that he put the property up for sale because of the stress associated in the conversion of use. When he listed it for sale the agent quoted the range of somewhere between

\$1 million and \$1.5 million.

5 Assessing the seriousness of that offending, I note that these were internal walls, but it certainly appears that there was some change of the services, particularly the plumbing, or at least fittings and services associated with the laundry. The walls, et cetera, that need to be removed, there is no estimation about how much that would cost, but they certainly, on my viewing of the photographs, at least, seem to be walls that would not cause much structural problem if they were removed so it is works, particularly internally, that could have been done, in my view, quite easily. The concrete driveway no doubt would be a difficult matter, but these concrete driveways are things that are removed quite often and without causing much damage to premises.

15 One thing I do take into account is that the structures that were put in place benefitted Mr Jack. Although he could not use it for the training facilities, it allowed him a residence, and of course everyone knows the Sydney property market is a market where accommodation is always at a tight squeeze, so to convert a place that should have been used in a different way into somewhere that could house, at most, two adults and the children visiting is something that was of considerable benefit to Mr Jack.

25 It certainly seems that, despite his sworn evidence, the failure to comply with the order was a deliberate act. There may have been some misunderstanding initially, but certainly by the time the council officer became involved and the various notices were sent and representations sought to be made, and also, of course, the September DA was lodged, there was really no doubt in his mind that he could not live there and the works had to be demolished, and that is another factor I take into account.

30 In terms of assessing that objective seriousness, also I note that the whole reason the development consent was refused was because the property is subject to a significant flooding risk, which will obviously have a greater effect on a property that is used residentially than commercially or as a hall of worship once a week. Mr Jack's reasons for committing the offence were to get, really, his money's worth from the property at a significantly reduced price, in my view, to what would have been a three-bedroom residential property but also, the ability of a residential property to prevent the perceived impact of a flood, in my view, is quite a serious matter.

40 Although of course this is not one of those refusals to comply with an order where there is a substantial eyesore to the neighbouring community. It is works that are internal, except for the driveway so I assess this as being somewhere towards the mid and slightly under the mid range of objective seriousness. In terms of his state of mind, of course, these are strict liability offences, but I agree with the submission that the reason the work was done was really to increase the value of his property in terms of initially use, and then potentially the sale value of it.

50 Mr Jack is a man who, as I have said, is given 15% discount for the plea of guilty. He is a man who has had no prior convictions, and I accept his

evidence that he was given certain contradictory advice from someone who was in a position of, at the time, great authority; someone who, it seems, was not in a position to give the necessary consent. In terms of the principles of sentencing, to my mind the most significant factor is what we call general deterrence. It is to stop other people from behaving in this way.

Particularly in a property scenario like we have in the Sydney property market, there is a real incentive for people to flaunt what they may see as valueless council decisions or ones that frustrate their own economic interests, but there is an important reason why those procedures are in place and it is so everyone knows exactly what the procedures are, rather than quiet phone calls to mayors who now, it seems, are no longer holding those positions, so everything is above board, which, particularly in this day and age and particularly with Auburn City Council, is a matter that has been attracting widespread public interest, and the public interest really is in the transparency of conduct between private people and the local councils.

Also, I need to impose a penalty that stops Mr Jack from acting in a similar way in the future, but also to denounce the conduct and show the real harm that is done to the community where the council's decisions are so flagrantly ignored. Denunciation is a very important sentencing principle in this matter. Then, to my decision, Mr Jack.

You have asked me for a s 10 and no doubt you have a good reason to ask me for that but to my mind, a s 10 is simply not going to address those very important principles of sentencing I have just referred to, particularly the overwhelming consideration, which is the need for general deterrence and denunciation.

IN THIS MATTER YOU ARE CONVICTED. YOU ARE FINED \$50,000 AND I ORDER PROFESSIONAL COSTS TO BE PAID IN THE AMOUNT OF \$3,764.20.

Mr Jack, you have a month to pay those fines and they must be paid to the Court registry. I know you are on a payment plan with the ATO. It is up to you now, if you need more time to pay these amounts, to speak to the registrar of the Local Court here.