VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

BUILDING AND PROPERTY LIST VCAT REFERENCE NO. BP39/2017

CATCHWORDS

CONTEMPT – whether orders clear and unambiguous – s 137 *Victorian Civil and Administrative Tribunal Act 1998*.

APPLICANT	Mark Ward Trading Pty Ltd
FIRST RESPONDENT	Ms Ainsley Roma Ball
SECOND RESPONDENT	Clancey Blue Pty Ltd (ACN: 112 841 988)
WHERE HELD	Melbourne
BEFORE	Vice President Judge Hampel
HEARING TYPE	Hearing
DATE OF HEARING	25 July 2018
DATE OF ORDER	14 December 2018
CITATION	Mark Ward Trading Pty Ltd v Ball & Ors (Building and Property) [2018] VCAT 1998

ORDER

The application to find the first respondent guilty of contempt is dismissed.

Judge Hampel
Vice President

APPEARANCES:

For Applicant:	Mr D. Colman of counsel
For First Respondent:	Ms A. Ball, in person
For Second Respondent:	No appearance

REASONS

Introduction

1 Mark Ward Trading Pty Ltd (MW Trading) entered into a retail lease for premises at 9367B Western Hwy Warrenheip. The lease was due to expire in October 2017. A dispute arose under the lease. MW Trading issued proceedings under the *Retail Leases Act 2003* in the Tribunal. An agreement was reached at mediation that the lease be renewed. Further disputes arose. MW Trading applied to reinstate the proceedings. By 1 December 2017, the original lease had expired, a renewed lease had not been signed, and MW Trading remained in possession of the premises.

2 On 1 December 2017 the Tribunal made orders restraining Ms Ball, by then the sole owner of the premises, until further order, from evicting MW Trading "from the land described as 9367B Western Hwy Warrenheip or interfering with or preventing [MW Trading] from its use and enjoyment of the Land."

3 On 1 April 2018, whilst the injunction was still in force, Ms Ball took steps to take possession of part of the premises occupied by MW Trading.

4 MW Trading alleges Ms Ball's conduct involved a deliberate breach of the orders made by the Tribunal on 1 December 2017, and seeks to have her dealt with for contempt, pursuant to s 137 of the *Victorian Civil and Administrative Tribunal Act 1998*.

5 Ms Ball admits entering part of the premises occupied by MW Trading on 1 April 2018 with the intention of taking possession, but maintains she believed she was not restrained from seeking to take possession of that part of the premises she entered. She denies a deliberate breach of the injunction, and maintains she has not committed a contempt.

6 This is a deceptively simple encapsulation of the issue for determination. There is a long and complicated history which is relevant to a determination of whether Ms Ball breached the Tribunal's orders, and if so, whether the breach amounts to a contempt.

Background

7 Mark Ward Trading and its director, Mark Ward, have been in dispute with Ms Ball for some years. Mr Ward and Ms Ball had been in a personal relationship. That relationship had come to an end by the time the Tribunal made its orders on 1 December 2017.

8 In 2012, MW Trading entered into a retail lease for a building or buildings with a street address of 9367B Western Highway Warrenheip. How much land that street address described, and whether the lease applied to one or two buildings on the land, are matters in dispute.

9 MW Trading has conducted a business, Amazing Mill Markets on the land or part of it, and in the building or buildings since then. Again how much land MW Trading occupied, and whether it occupied one or both buildings are matters in dispute.

10 MW Trading sublets space to individual traders who in turn offer antiques and other wares for sale to the public. The original lease was for a period of 5 years, expiring on 28 October 2017, with options to renew for successive periods of 5 years.

11 In 2013, Ms Ball and Clancey Blue Pty Ltd, a company also owned and controlled by Mr Ward, purchased, as joint tenants, the land which MW Trading leased. Whether the land they purchased was the whole of the land covered by the lease, or whether they purchased additional land is again in dispute. On completion of the sale, Ms Ball and Clancey Blue took an assignment of the lease the vendor had entered into with MW Trading.

12 At some stage after the purchase of the land, part of the larger building on it was converted for residential use. By the time the VCAT proceedings were issued, Ms Ball was occupying the residential part of the premises. MW Trading continued to conduct its business from the balance of the larger building.

Original VCAT proceeding

13 The original VCAT proceedings under the *Retail Leases Act 2003* were settled at mediation in May 2017. The parties signed terms of settlement. The terms included an agreement to renew MW Trading's lease at the expiration of the original 5 year term.

14 Paragraph 3 of the terms of settlement provided:

> *"The terms of the renewed lease shall be the same as the terms of the lease, save that:*
>
> *(a) the renewed lease commences on 28 October 2017;*
>
> *(b) commencing rent under the renewed lease shall be $3369 (including GST) and that sum shall be the agreed commencing rent as at 28 October 2017;*
>
> *(c) Ball undertakes not to interfere, or procure third parties to interfere, in any way with [MW Trading or Mr Ward's] business on the demised land/premises save for the residential area referred to in paragraph 3 (a) (B) of the points of defence and counterclaim;*
>
> *(d) some of the terms of the renewed lease will necessarily require adjustment to take account of the fact that the lease has been renewed; and*

(e) use of part of the premises as an auction room shall not constitute a breach of the lease or the renewed lease."

15 Following the signing of the terms of settlement, the Tribunal made orders striking out the proceeding, with a right of reinstatement.

Ms Ball becomes sole proprietor of the land

16 After the terms of settlement were signed, but before the renewed lease contemplated by clause 3 of the terms of settlement had been signed, the Family Court ordered Mr Ward's half interest (through Clancey Blue) in the land jointly purchased by it and Ms Ball in 2013 be transferred to Ms Ball. As a result, Ms Ball became the sole proprietor of the land purchased by herself and Clancey Blue, and sole landlord under the lease assigned to her and Clancey Blue at the time of their purchase of the land.

Application for reinstatement

17 Disputes having arisen in the course of negotiating the terms of the renewed lease, MW Trading through its solicitors applied to the Tribunal for the original proceeding to be reinstated. They alleged Ms Ball was in breach of the terms of settlement. Ms Ball through her solicitors opposed reinstatement. Not only did they deny she had breached the terms of settlement, they submitted there was no need to reinstate, maintaining the parties were close to resolving their differences, and signing the renewed lease.

18 On 6 November 2017 the Tribunal notified the parties the contested application for reinstatement was listed for hearing at 12 noon on 1 December, with 60 minutes allocated to the hearing of the application.

The applicant foreshadows an injunction application

19 By affidavit filed after business hours on 29 November 2017, in effect, one working day before the hearing, Mr Ward deposed to his fear that, in the absence of an agreed and signed lease, Ms Ball might move to evict MW Trading from the premises. His lawyers foreshadowed applying for an injunction to restrain her from doing so at the reinstatement hearing of 1 December.

The respondent serves a notice to vacate

20 Ms Ball's lawyers responded within hours, asserting MW Trading had no right to occupy a "shed" on part of the land now solely owned by Ms Ball, and gave notice MW Trading was to vacate it by 30 December 2017. They advised that if the "shed" was not vacated by that date, Ms Ball would take possession without further notice.

The hearing of 1 December 2017

21 As I have noted, the original hearing had been allocated one hour, and was listed for the reinstatement application only. On the materials filed before the hearing, the question of whether the Terms of Settlement had been breached was hotly contested. The tone of the affidavits and exhibits filed by the parties, as well as the exchanges between them the day before the hearing escalated the dispute, and significantly extended what was in issue between the parties, and the scope of the orders sought the following day.

22 Ms Ball and Mr Ward were both present at the hearing. Both Ms Ball and MW Trading were legally represented. The presiding member had a full list. When the matter commenced at 12.30pm, he advised the parties he could not allow more than the hour scheduled for the hearing to their matter, given the demands of the other matters still to be dealt with in the list that day. Mr Colman, counsel for MW Trading advised the Tribunal he had another commitment later that day, and was unavailable from 1.15pm. As it turned out the matter did not conclude until 1:30 pm.

The terms of the injunction

23 Eventually, after hearing from both parties, the presiding member ordered the reinstatement of the proceeding, and restrained Ms Ball until further order, from:

> *" (a) evicting the applicant [MW Trading] from the land described as 9367B Western Hwy Warrenheip (The Land); or*
>
> *(b) interfering with or preventing the applicant from its use and enjoyment of the Land."*

Easter Sunday 2018

24 By Easter Sunday 1 April 2018, the parties had still not resolved their differences, the reinstated proceeding had not been heard, and the injunction was still in force. Early that morning, Ms Ball, assisted by her partner, entered the building described in the letter of 30 November 2017 as the "shed", and took steps to retake possession of part of it. How much of the "shed" Ms Ball accessed, and sought to retake possession of, is in issue.

25 Ms Ball, with the assistance of her partner, removed the goods kept in part of the premises by MW Trading and its subtenants, and placed them outside the building. Some of the items removed by Ms Ball were, the applicant contends, damaged in the process. How much damage was caused, and whether any damage was deliberate or accidental is, again, hotly contested.

26 Ms Ball blocked MW Trading and its subtenants from accessing a doorway which was used as the goods entrance. Although most of the

Mill Market stalls were unaffected, the traders whose goods had been removed from that part of the smaller building Ms Ball had taken possession of were unable to trade that day or the next. Other traders who had stalls in the other part of the smaller building or "shed", were also adversely affected by the removal of the goods of the other traders, and the blocking of access to the goods entrance

27 It would appear that by Tuesday 3 April 2018, traders were able to return to their stalls, their goods had been returned, and the goods entrance was unblocked.

28 It is this conduct which MW Trading alleges breached the injunction granted on 1 December 2017, by entering the smaller building or "shed", removing the sub-tenants' possessions, blocking access to the goods entrance and otherwise interfering with MW Trading and the subtenants' possession and trading activity. It is this which forms the basis for its application pursuant to s 137 of the VCAT Act for Ms Ball to be dealt with for contempt of the Tribunal.

Contempt

29 By s 137(1)(f) of the VCAT Act, a person is guilty of a contempt of the Tribunal if they do any act that would, if the Tribunal were the Supreme Court, constitute a contempt of that court.

30 It is common ground that wilful failure to comply with the order of the Supreme Court is an act that would constitute a contempt of that Court.

31 In *Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd*[1] Gillard J identified the principles which must be established in order for a contempt by failure to comply with an order of the Tribunal is to be established. Those principles are:

(a) an order has been made by the Tribunal;

(b) the terms of the order are clear, unambiguous and capable of compliance;

(c) the order was served on the contemnor, or service has been excused or dispensed with;

(d) the contemnor has knowledge of the terms of the order;

(e) the contemnor has breached the terms of the order; and

(f) the act constituting the breach was deliberate and voluntary.

32 As contempt is punishable by imprisonment, it has long been established that it must be proved beyond reasonable doubt. That is, in the context of an allegation of contempt of the Tribunal under s 137(1)(f), each of the matters listed in *Advan* must be established beyond reasonable doubt.

[1] [2003] VSC 201 at [28] – [34], [36], [45]

33 It is clear that an order was made by the Tribunal, and that Ms Ball has knowledge of the terms of the order. She was present when it was made, and no issue has been taken with her either having been served with it, or by reason of her presence at the Tribunal when the order was made, service being excused or dispensed with. That is sufficient to deal with the requirements in sub-paragraphs (a), (c) and (d).

34 Mr Colman submitted that I should be satisfied beyond reasonable doubt that the requirements of sub-paragraphs (b), (e) and (f) have also been established. That is, that the terms of the order were clear, unambiguous, and capable of compliance, that Ms Ball breached the terms of the order by her entry into the shed on 1 April 2018, and that her conduct, in entering the shed, and doing what she did, was voluntary.

35 It is Ms Ball's contention that the orders were not clear and unambiguous, that she believed, at the time she entered part of the "shed" and sought to take possession of it, she was entitled to do so. It follows that it is her case that if in fact she breached the injunction by seeking to take possession of part of the "shed", she did so as a result of her misapprehension as to the effect of the terms of the orders made by the Tribunal, and so, has not committed a contempt.

36 I approach the evidence in respect of the contested issues here, therefore on the basis I must be satisfied beyond reasonable doubt the terms of the order were clear and unambiguous, that Ms Ball's conduct in entering that part of the shed she entered, and acting as she did, was deliberate and voluntary. That is, that she entered that part of the shed, and acted as she did, knowing that she was restrained by the orders of the Tribunal from doing so.

The differences in the description of the land in the certificate of title, contract of sale and lease

37 I have already noted there is a dispute about what land was subject to the lease, what building or buildings were occupied by the applicant, and what land was purchased by Ms Ball and Clancey Blue. I have extracted from the materials filed before and after the hearing of 1 December 2017 what is now uncontroversial.

38 However, it is important to bear in mind that these matters were not necessarily clear, or reflected a common understanding of the parties, or the Tribunal, at the time of the hearing of 1 December 2017.

- The land which Ms Ball and Clancey Blue purchased in 2013 was Lot 1 of certificate of title volume 10254 Folio 162 and Lot 2 of certificate of title volume 10254 Folio 163. That is same certificate of title volume number, but different Folio numbers for each lot. Lot 1 is, according to the certificate of title 15,710 m^2, and Lot 2, 8020 m^2.

- The schedule to the contract of sale recites that Lot 1 is not subject to lease, and Lot 2 is subject to the lease from the vendors to MW Trading. A copy of the lease was attached to the vendor's statement.
- Clause 4 (a) of the schedule to the original 2012 lease in favour of MW Trading recites the lease is in respect of "all of the land and including the building". Note the use of the singular "building", not the plural "buildings".
- Title particulars in the lease are given as Certificate of Title Volume 10254 Folio 163 (more particularly described as Lot 2, plan of subdivision 341182N).
- The lettable area of the premises is recorded as 8020m^2. That is the size of Lot 2 as recorded on the plan of subdivision in the certificate of title.
- Clause 33 of the lease recites that the landlord is also the owner of Certificate of Title Volume 10254 Folio 162 (more particularly described as Lot 1, plan of subdivision 341182N).
- MW Trading was, by clause 33, granted access to water from a bore on Lot 1, and in return, made liable for water rates charged to Lot 1 for bore water.
- The original lessor, in respect of Lot 2, was Ian Barry Ballis as trustee for the Geelong West Property Trust (by his agents Kenneth Stewart Sellers and Matthew Campbell Muldoon of Sellers Muldoon Benton in their capacities as receivers and managers of 9367B Western Highway Warrenheip).
- The vendor, in respect of Lots 1 and 2 was Ian Barry Ballis as trustee for the Geelong West Property Trust (by his agents Kenneth Stewart Sellers and Matthew Campbell Muldoon of Sellers Muldoon Benton in their capacities as receivers and managers of 9367B Western Highway Warrenheip).
- Clause 4 (a) of the schedule to the original 2012 lease describes the street address of the leased premises as 9367B Western Highway Warrenheip Victoria.
- If the contract of sale of Lots 1 and 2 recited a street address for the land, that part of the contract has not been exhibited. There is no evidence before me, apart from the description of Sellers Muldoon Benton in their capacities as receivers and managers of 9367B Western Highway Warrenheip in both the original 2012 lease, and the schedule to the contract of sale, as to whether Lot 1 at the same or a different street address to Lot 2.
- There is a large building on Lot 2. There is a smaller building, apparently connected to it. A survey commissioned by Mr Ward and produced in the course of the Family Court proceedings, shows the boundary between Lots 1 and 2 runs through the smaller building. That is, some of it is on Lot 1 and some of it on Lot 2.
- Lot 1 is otherwise vacant land.

The competing contentions of the parties as to whether the whole of the land was subject to the lease, and whether the whole of the land was occupied by MW Trading

39 Mr Ward deposes that it was his belief the land which was purchased was the same as the land which was leased. It was only shortly before the orders of 1 December 2017 were made, he deposed, that he and his lawyers first appreciated the land which had been purchased by Ms Ball and Clancey Blue comprised Lots 1 and 2, but that the lease, as originally granted, and as assigned, was in respect of Lot 2 only.

40 It is not clear on the filed materials whether Ms Ball was always aware of the difference in description of the leased land and the purchased land, or only became aware of it after the terms of settlement had been signed, and in the course of the negotiations for the renewed lease.

41 It is however clear that in October 2017, during the negotiation of the renewed lease, Ms Ball asserted that MW Trading's rights under the original lease were in respect of Lot 2 only, and declared that her obligations under the terms of settlement to enter into a renewed lease applied in respect of Lot 2 only. It is also clear that that is what precipitated the applicant's foreshadowed injunction application, and Ms Ball's notice of intention to retake possession the day before the reinstatement hearing.

42 As already noted, Lot 1 is vacant land, but for the encroachment of part of the smaller building over the boundary and onto Lot 1. Mr Ward asserts MW Trading had occupied the smaller building (or shed) for 2 ½ years before the injunction application. Ms Ball asserts it had only occupied it since September 2017.

The hearing of 1 December 2017

A The materials filed by the parties

43 Mr Ward has now sworn three affidavits relevant to the contempt application, and Ms Ball two. They have exhibited some correspondence passing between their legal representatives, and between Ms Ball and Mr Ward's solicitors, once Ms Ball's legal representation came to an end, shortly after the hearing of 1 December 2017. Each of Ms Ball and Mr Ward gave evidence at the hearing before me. Ms Ball was not legally represented at the hearing before me. She gave evidence she could no longer afford representation. Mr Ward, or strictly speaking, MW Trading, was legally represented.

44 Extracting the relevant facts from the affidavits and exhibits was difficult. The hostility between the parties, and, I regret to note, their legal advisers is palpable. Much of the language in the affidavits, the correspondence and in the applicant's submissions is emotive, inflammatory and argumentative. That made the task of working out what Ms Ball knew, or believed at the time of the making of the orders

on 1 December 2017, and how that bore on my assessment of her credibility more difficult than it otherwise would have been. The passages extracted below are not only relevant to the central issue of whether those orders were clear and unambiguous, but demonstrate the emotive and argumentative tone of the materials.

45 In addition, the extracts from the applicant's affidavits I have set out below are expressed in conclusionary and argumentative terms, and contain assertions or expressions of opinion about what Ms Ball and her lawyers would have understood at the conclusion of the hearing. I have done my best to set aside the opinions, conclusionary and argumentative matters, but nonetheless to understand the evidentiary foundation for the applicant's arguments as to whether the orders were clear and unambiguous.

46 For this reason, I have set out the relevant parts of the affidavits, before going to the transcript. Although the transcript is clearly the objective and reliable evidence as to what was actually said, unfortunately, and despite the endeavours of the applicant to obtain it before the hearing, it only became available in the course of the hearing.

47 Mr Ward's affidavit of 5 April 2018:

> *"16 … An injunction application was not contested with respect to Lot 2. But with respect to Lot 1, it was strenuously contested. The Member decided that the injunction should apply to both Lots. The exchanges between the bench and counsel expressly distinguished the Lots. Therefore when formulating the orders it was agreed and understood the property address would be an appropriate generic reference to both Lots. Thus the description of the "Land" in paragraph 3(a) of the order … was a reference to Lots 1 and 2. Similarly there was no question the order in 3(b) … was a reference to Lots 1 and 2.*
>
> *17 Neither [Ms] Ball nor her (then) lawyers, could have been under any confusion with respect to the meaning of the orders."*

48 Ms Ball's responding affidavit of 3 May 2018:

> *"1 … I believe the injunction prevented myself from evicting the tenant was in reference to the leased land being Lot 2 and Lot 1 was not under the jurisdiction of VCAT as it was clearly excluded from the leased area of Lot 2 8020 square metres. Lot 1 is 15,710 square metres."*

49 Mr Ward's response, in his affidavit of 16 May 2018:

> *"9 It was the receipt of the 30 November 2017 email [the notice to vacate] that prompted the Applicant to seek the injunction. That email alleged, I maintain inaccurately, "Lot 1 is not included in the lease". But for the receipt of that threat the Applicant would not have sought the injunction. That email, and the question of the distinction Ms Ball*

now seeks to draw between Lot 1 and Lot 2 was discussed openly, and at length, at the hearing. Ms Ball and her partner were present in the hearing room throughout the hearing of the 1 December 2017 application, including when the orders were announced. The Applicant persuaded Member Sweeney to grant the injunction given the threat contained in the 30 November 2007 email. Member Sweeney said that when announcing the orders.

10 During argument I saw Ms Ball give instructions directly to counsel representing her, Mr Brian Kennedy. In that sense, she took an active part in the hearing. She clearly understood what was being discussed. Her (then) solicitor was also present, and instructing Mr Kennedy.

11 After the tribunal was adjourned, and before I left the hearing room, I saw Ms Ball, her partner, Mr Kennedy and his instructing solicitor huddle together and talk amongst themselves. I then left the hearing room.

12 In the circumstances neither Ms Ball, nor her (then) lawyers could have been under any confusion with respect to the meaning of the injunction."

50 Mr Ward's third affidavit, sworn 28 May 2018:

"10 In her affidavit [Ms] Ball asserts by inference, if not perhaps expressly, that her belief that the injunction ***excluded*** *Lot 1 was* ***reasonably held****.*[2] *I dispute this. At the hearing she was accompanied by her partner Mr Atwood, as well is her legal team. I do not believe her belief was reasonably held. Subsequent to the granting of the injunction neither I, [nor] my solicitor, received any correspondence from, or on behalf of, [Ms] Ball, let alone any warning of re-entry. [Ms] Ball well knew Easter Sunday is the Market's busiest trading day of the year. It is unclear from her affidavit why she chose the morning of that day, five months after the injunction, to break in. Absent that explanation the inference is open, I submit, that she did so to maximise the impact, and embarrassment, the break in would have on the Applicant. I believe that was her reason. I believe she wilfully disregarded the injunction, and the advice her legal team must have provided to her with respect to what the injunction meant. I note her team have not provided affidavits. Nor has Mr Attwood."*

51 And finally, the applicant's written submissions:

"16 The injunction was sought over all of the property described as 9367B Western Highway. It was not disputed that that address comprised both Lots. The injunction application was not contested with respect to Lot 2. But with respect to Lot 1, it was strenuously contested. After hearing argument, Member Sweeney determined that

[2] Applicant's emphasis

the injunction should apply to both Lots. The exchanges between the bench and counsel expressly distinguished the lots, but the street address in the orders was a collective reference to both. This would have been obvious to [Ms] Ball from the argument she witnessed. It was also consistent with the generic street address terminology deployed by her and her lawyers in paragraph 24(a) of the counterclaim … and the actual street address of both lots. Thus the description of the "Land" in paragraph 3(a) of the order … was a clear and unambiguous reference to all of the land so described including/comprising lots 1 and 2.

19 It is therefore inconceivable that [Ms] Ball could have been confused about that, as she (by inference) asserts in her affidavit. She witnessed the Applicant seeking orders to the effect her ***threat to evict***[3] *be restrained. She witnessed the orders being granted. The orders only made sense insofar as they restrained her from doing anything, and she had only threatened to evict the applicant from Lot 1. Indeed she does not assert she was confused at all: she asserts "Lot 1 was not under the jurisdiction of VCAT". It seems her contention is that the tribunal somehow did not have the power to make a decision about Lot 1 notwithstanding that Member Sweeney did so. The Tribunal can be satisfied beyond reasonable doubt her lawyers would not have advised her the tribunal did not have relevant jurisdiction. The plain fact is that it did, and does, have jurisdiction. The Applicant submits it is difficult to imagine a situation where a respondent could be more keenly aware of precisely what she was restrained from doing. And to the extent that she harboured doubt, she had experienced counsel and solicitor immediately at hand."*

52 I must acknowledge, even after setting aside the at times overblown language of the applicant's submissions, and the argumentative assertions contained in Mr Ward's affidavits, I approached Ms Ball's evidence as to what she understood, or must have understood she was restrained from doing after the orders were made on 1 December 2017 with considerable scepticism. In light of the fact that the parties had been in dispute over whether the lease applied, or should have applied to Lot 1 as well as Lot 2 before the hearing of 1 December 2017, my initial response to her claim she believed the injunction applied to Lot 2 only, and her assertion that VCAT only had jurisdiction over Lot 2, was that it was disingenuous.

B Transcript of hearing of 1 December 2017

53 This then brings me to a review of the transcript of the hearing of 1 December 2017.

[3] Applicant's emphasis

54 I am satisfied Mr Ward's belief as to what was said, and what Ms Ball understood, or must have been understood is not as clear cut as the applicant contends. As is often the case, the transcript, that dispassionate and accurate record of proceedings, does not always contain everything a party thinks was said, in a proceeding.

55 The hearing commenced with the reinstatement application, and up until p 15 of the transcript, there is only passing reference to the dispute about what land was subject to the lease.

56 There was some confusion in opening, in the description and roles of Mr Ward, MW Trading, and Clancey Blue respectively. Mr Colman at times referred to Mr Ward and at other times to MW Trading as the applicant, and as his client, and at times referred to MW Trading, and not Clancey Blue as the co-owner of the land. He corrected himself a number of times, and on occasions, as he sought to move on, the Tribunal brought him back to seek clarification of what person or entity owned, co-owned, or leased the property, and whether the whole of the purchased land was subject to the lease.

57 In the course of that opening discussion Mr Colman told the Tribunal the applicant had occupied and rented the whole of the premises the subject of the dispute before the Tribunal. He told the Tribunal the respondent had threatened to evict the applicant from part of the premises, but did not at that stage explain the land was on two titles, or that the lease document itself, and the references to the lease in the contract of sale of the land referred to the lease as being Lot 2 only. Nor at that stage did he say that the threat to evict in the letter of 30 November 2017 had been made in respect of Lot 1 only.

58 When Mr Kennedy for Ms Ball responded to Mr Colman's submissions about reinstatement, he made passing reference to there being a dispute about what land was subject to the lease. Neither he nor Mr Colman had at that stage referred to the land by reference to the two separate Lot numbers. Nor did he at that stage refer to the difference between the land as described in the contract of sale, and the land as described in the lease. He did, however, put it squarely to the Tribunal that the notice to vacate served by Ms Ball's lawyers was in respect of the "use of one shed on the property which does not form part of the demised premises".

59 When the dispute over whether the respondent had breached the terms of settlement showed no sign of abating, the member indicated he would reinstate the original proceeding, and reserve the question of whether there was a breach of the terms of settlement for the substantive hearing. He then raised the possibility of dealing with the foreshadowed injunction by the giving an undertaking. In the course of that discussion, Mr Colman began to recite the actual terms of the undertaking he submitted would protect his client's interests. He did not complete that recital of the actual terms proposed by him. In outlining the actual terms

of the undertaking, he used the address, 9367B Western Highway Warrenheip to identify the land. It was in the course of reciting the terms of the undertaking sought, that Mr Colman interrupted himself, and told the Tribunal the lease referred to Lot 2 only. He followed that with an assertion that the parties had treated each other on the basis both Lots 1 and 2 were leased, (although that was a contested fact) and then moved on to explain that the border between the Lots ran through the middle of a building. In the course of that explanation he said:

> "And on the other side of Lot 2 that they're seeking to evict us from there are 15 stallholders."

He then made reference to clause 4 of the schedule to the lease which he told the Tribunal described the premises both by the street address of 9376B Western Highway, and by reference to the Lot 2 on the certificate of title.

60 Mr Colman did not go back and complete his recitation of the full terms of the undertaking sought, and his narrative did not distinguish between contested and uncontested facts.

61 Discussion then turned, for the next three pages of transcript, to the possibility of the reinstatement proceeding resolving, that is, by the parties agreeing on the terms of the renewed lease and signing it. During that discussion, when the member directly sought Mr Kennedy's position on the proposal he make the reinstatement order, without determining whether there had been a breach of the terms of settlement, Mr Kennedy raised his concern about the complexity of the contested factual issues, and their impact on the wording of the undertaking. He said:

> "there might be some difficulty in the phrasing of the undertaking. This involves having a look at the lease. I'm aware of some of the issues, but it would be difficult for me to give that in court right now without instructions of course."

62 Mr Kennedy then moved to a discussion of the time for preparation of affidavits in the reinstatement proceeding, before the discussion again turned to the basis on which reinstatement would be ordered. In the course of that, Mr Colman interposed to indicate that the applicant would accept the respondent's consent to reinstatement without admission of breach of the terms of settlement. That is, that the applicant would agree to reserve the argument as to whether there was a breach of the terms of settlement for the final hearing of the reinstatement proceeding.

63 The discussion then turned to whether the parties could reach an agreement about the giving of an undertaking. The member made reference to the amount of hearing time which had already been spent on the matter that day, and the limited time remaining. He spoke of the undesirability, in the event discussions did not result in agreement, of the

parties having to return to the Tribunal for further argument the following week.

64 This represented a frequently changing landscape to a lay observer or participant.

65 The matter was stood down for four minutes (between 1.09pm and 1.13pm). On resumption, the Tribunal was told there was agreement about the time for filing affidavits, a matter that had been discussed, but left unresolved, before the discussion had turned to reinstatement without a finding of breach of the terms of settlement, the drafting of an undertaking, or having another hearing in a week's time if the parties could not agree on the terms of an undertaking. There was no indication as to whether the parties had also discussed the giving of an undertaking, or its terms, in the four minute adjournment.

66 Mr Colman, having outlined the agreed times for filing affidavits, again turned to reciting the terms of the undertaking sought. Again, he did not recite the full terms of the undertaking he sought. Again, he interrupted himself in an attempt to explain what he wanted. He did not return and complete the recitation of the terms of the undertaking before the discussion, again, changed course. Leaving out filler words, this is the exchange:

> "So the undertaking I seek is that there be no – we not be evicted pending further order by the Tribunal, and that we be permitted to go on it and trade as we currently are. So the ways in which I recommend injunction to – it's pretty obvious what we're trying to do. We're trying to continue to trade as we've always traded on the premises
>
> …
>
> And I don't want a technical point to get my client and 15 of his stall holders tossed off, or not tossed off but not allowed to use the premises …
>
> I think there should be in order something like, or an undertaking, that until further order of the Tribunal the second respondent not (a) evict the applicant from the premises known as 9376, and (b) interfere with his capacity to use those premises."
>
> Mr Kennedy responded:
>
> 'the issue is, in relation to the shed, that it's only very recently that Mr Ward has moved in and started using it. Perhaps there will be an objection about what I've just said - - -
>
> Mr Colman interrupted:
>
> "you bet there is"
>
> before Mr Kennedy resumed:

"- - - but that's my client's instructions. But there is an issue about his capacity, his right, to actually use that part of the premises at all. If there is an undertaking it has to be noted that that's- that that remains a live issue.

Mr Colman: Of course

Mr Kennedy: Yes. And I don't think my learned friend was – yes was suggesting it shouldn't be.

Mr Colman: No this is not a permanent injunction so this is pending a further order of the Tribunal.

Mr Kennedy: And ---

Mr Sweeney: I think that there is nothing in the current suggested draft that is pejorative about rights, or could be construed as such, at a future hearing of the substantive matter.

Mr Kennedy: Yes

Mr Sweeney: In fact it probably presages that is that there is an issue about that one way or the other but without any colouring to it.

Mr Colman: And it couldn't possibly be suggested by my camp, sir, that by those orders by my learned friend's client is somehow being - her rights are compromised except ---

Mr Sweeney: Yes

Mr Colman:--- except during the course of - except until further order of the Tribunal. We're just trying to preserve the status quo.

Mr Sweeney: I mean an undertaking seems elegant but, you know, if there is a problem there, well, then you end up really talking about a formal injunction with the usual undertakings et cetera."

67 Again, the terms of the undertaking sought were not recited in full, and again, Mr Kennedy had no opportunity to respond. Yet another dispute had flared up as the possibility of giving an undertaking was being discussed. This one was about how long MW Trading had occupied the shed. Without resolving that, the exchange moved rapidly to references to reserving rights in respect of substantive issues, compromising rights and preserving the status quo.

68 This rapid move between contested fact and uncontested fact, without distinguishing what was contested and what was not was, in my view, productive of considerable and unnecessary confusion. There was no agreement about what constituted the status quo. Mr Colman said it was a two and a half year occupancy of the shed, Mr Kennedy said it was a few months.

69 After a further brief exchange about the limited life of the undertaking Mr Kennedy again sought to raise a matter in relation to the undertaking. Again, he was interrupted by Mr Colman:

"Mr Kennedy: Your honour there is a difficulty with the undertaking. I'm instructed. I'm not sure what I ---

Mr --- I think it needs a minute

Mr Colman: It's just better to order it sir. Can I seek a formal order along those lines."

70 Reviewing the transcript away from the heat of the hearing, it is clear that as Mr Kennedy was trying to tell the Tribunal there was an issue he wanted to raise in relation to the undertaking, Mr Colman overrode him, and abandoning his pursuit of an undertaking, pressed for an injunction without further argument.

71 The transcript then continues:

"Mr Colman: here's what the letter says that I'm responding to

> *"your client currently occupies the shed on Land 1 (sic) without any right or title to such occupancy. Your client is hereby notified and must vacate the shed on Lot 1 forthwith. If your client has not vacated the shed on Lot 1 after 30 days, that is, by 30 December, my client will take possession of it. Please further inform your client that neither it nor its director, employees, agents, contractors or subtenants may enter any part of the premises of Lot 1 for any purpose without my client written permission."*

Now he has been using it for two and a half years. There are 15 stallholders in it and it goes right through the middle of a building.

Mr Sweeney: Yes

Mr Colman: In that case the order I formally seek without consent is that, until further order, the second respondent be restrained from (a) vacating- at least evicting- the applicant and – next line – (b) preventing the applicant from using any part of the land described as 937B Western Highway Victoria."

72 Again this is difficult to follow. There are rapid shifts from topic to topic, and none are followed through, or able to be responded to before the next topic is broached. After Mr Kennedy was cut off as he tried to make a submission on behalf of Ms Ball in relation to the terms of the undertaking sought, Mr Colman moved in rapid succession from substituting an application for a "formal order" for the undertaking which had been being discussed, to reading aloud from a document he described only as "the letter I'm responding to" (presumably the notice to vacate of 30 November 2017), to an assertion as fact of the length of time MW Trading had occupied the shed when whether it was for two and a half years or a few months was a contested issue, to the concluding sentence "There are 15 stallholders in it and it goes right through the middle of the building".

73 In hindsight, it might be clear the first part of that sentence refers to the 15 stallholders Mr Colman had previously told the member were occupying that part of the shed which was on Lot 1, and the second, to the fact the boundary between the Lots ran through the shed. But it is far from clear that would have been apparent at the time. There was no time to process that sentence before Mr Colman changed course again, repeating his request for an injunction to be granted forthwith.

74 It is not productive of clarity in my view, and in that context, for Mr Colman then to describe the land in respect of which the injunction was sought, by reference to the way it was described in the lease. Because the lease describe the land by street address and as Lot 2, and by the certificate of title details and land size applicable to Lot 2.

75 Instead of following up on any of the matters just outlined by Mr Colman, Mr Kennedy suggested an alternative possibility: avoiding the need to fight over the terms of an injunction or an undertaking, or for Ms Ball to give an undertaking or the Tribunal to grant an injunction, if the matter could be heard before the 30 day notice period referred to in the notice of 30 November 2017 expired.

76 The member indicated he was minded to grant an injunction in the terms sought, but at the same time advised he was making inquiries about whether there could be a hearing before the 30 day notice expired.

77 Whilst waiting for advice about the date for hearing, yet another dispute arose between Mr Colman and Mr Kennedy. This time it was about whether the matters put to the Tribunal were based on the evidence contained in the voluminous affidavits and exhibits filed before the hearing, or on bar table assertions. Mr Colman said he was referring to an email sent by Ms Ball's instructing solicitor to the applicant's lawyers. In response Mr Kennedy sought to produce a diagram (presumably of the shed with the boundary between Lots 1 and 2 running through it). The member again reminded counsel there was no time to resolve the contested factual issues underlying the dispute, or to begin to examine evidence, whether it had been presented on affidavit in advance of hearing, or presented from the bar table. Immediately after that, the bench clerk reported the matter could not be fixed for hearing within 30 days, and the next available date was nearly three months away.

78 Again this is a rapidly changing and in my view confusing exchange. There was little or no agreement between the parties, assertion was met by counter assertion and suggestion by counter suggestion. No topic was followed through, responded to or resolved.

79 Consistently with his indication he would grant an injunction if the matter could not be relisted within 30 days, the member said he would grant an injunction in relation to the specific part of the premises that was said to be in issue, and asked counsel they could agree upon the

wording. Not surprisingly, given the tenor of the exchanges I have detailed, they could not.

80 Mr Colman submitted the injunction should refer to 9367B Western Highway. Mr Kennedy maintained the injunction should be confined to the shed in issue. The member asked whether the description 9367B Western Highway covered all of the land the subject of the dispute and both Mr Kennedy and Mr Colman agreed.

81 This passage makes it clear the member had decided to grant an injunction over the disputed building. It also indicates both counsel agreed the street address covered all the land the subject of the dispute. This supports the applicant's contention the injunction applied to both Lots 1 and 2. However matters did not stop there

82 This brief exchange was followed by further discussion about preserving the status quo, and what was the status quo. That there was dispute about what was the status quo was immediately apparent, as the competing contentions of the parties as to how long the applicant had been in occupation of the shed, or that part of the shed that was on Lot 1were again aired.

83 The transcript then contains the following passage:

> "Mr Colman: I just seek the injunction so. It a status quo issue. I'm seeking what was actually described in the lease, at least in part of clause 4 (a) of the lease, which says:
>
> > "*9367B Western Highway, being all the land including the building*"
>
> That's what I'm seeking
>
> Mr …: On Lot 2
>
> Ms …: On Lot 2
>
> Mr Colman: and - - -
>
> Mr Kennedy: it describes Lot 2 not Lot 1.
>
> Mr Colman: Well, what they say sir is Lot B, then goes on to describe Lot 2 but not Lot 1 and that's precisely the- - -
>
> Mr Sweeney: I think we're – we're spinning wheels. The lack of comfort between the parties goes to the heart of the matter.
>
> Mr Kennedy: Your honour
>
> Mr Sweeney: It's a real issue about what's encompassed in this matter of the rights are, and the appropriate course is to maintain that status quo and if that's February- and it is a date rather closer than some other matters and if there is seen to be some untoward consequences are waiting for that period of February that becomes apparent, then there is liberty to apply.

Mr Kennedy: Sir - - -

Mr Sweeney: One of the problems with this is that what we seek to look and take into account of all sorts of things that we don't know may or may not happen, but I can't hear that sitting here because there is no evidence one way or the other for it. I understand the parties concerns, injunctions that preserve the status quo are crafted to do that. If that leads to some other consequential damages or something that may be something counsel are going to take up a future hearing. I'm not saying that it necessarily follows."

84 It is clear from this exchange that the parties could not agree about what the injunction or undertaking should cover, and how the order should be framed to describe the land the subject of the injunction. Mr Colman wanted to use the street address. Mr Kennedy maintained the injunction should refer to that part of the shed which was on Lot 1. Mr Colman's expressly stated reason for preferring the street address was because he said it accorded with the wording of the lease.

85 Mr Colman then handed up a draft in his handwriting of the terms of the injunction he sought, using the street address as it appeared in the lease, namely 9367B Western Highway, and the Tribunal made the orders in those terms. The member then asked whether there were any questions on the orders.

86 The transcript then records the following:

"Mr Kennedy: the drafting of - excuse me, sir - the drafting paragraph (b), preventing him from using any part of the land?

Mr Sweeney: land was defined as - - -

Mr Kennedy: 9367B

Mr Sweeney: Western Highway Warrenheip

Mr Kennedy: 9367B is currently greater than anything he has a right to – and anything Mr Ward has a right to. It's broadly drafted.

Mr Colman: We dispute that, sir

Mr Sweeney: That's germane to the whole dispute isn't it.

Mr Colman: And it's just a …

Mr Sweeney: Let him, okay

Mr Colman: … In the lease

Mr Sweeney: It would require me to receive evidence and make findings about - - -

Mr Kennedy: yes

> Mr Sweeney: - - - what the lease is and thereby make an order that is tailored to whatever the result of that was on the evidence of the injunction."

87 Even after the orders had been pronounced, the parties were contesting what land the dispute related to, and the orders should, or could, cover. On one reading of this passage, Mr Colman was insisting the lease applied to all the land, that is, Lots 1 and 2. That is the way the applicant puts its case. On another reading, he is disputing Mr Kennedy's complaint the injunction was too broadly drafted, reassuring Mr Kennedy the injunction, by reference to the street address, was not broadly drafted, but simply reflected the terms of the lease. That is the way the respondent puts her case.

88 After a final reference to liberty to apply, the proceeding was adjourned at 1:30 pm.

Reconciling the transcript with the evidence

89 In paragraph 16 of Mr Ward's affidavit of 5 April 2018 (extracted above), and in the applicant's written submissions it was asserted the injunction application was not contested with respect to Lot 2, but was strenuously contested with respect to Lot 1, and that the exchanges between the bench and counsel expressly distinguished the Lots. This lengthy analysis of the transcript demonstrates that that is not the case.

90 In paragraphs 9 to 11 of Mr Ward's affidavit of 16 May 2018, he deposes to his observations of the communications between Ms Ball and her lawyers at the hearing, in support of the applicant's contention Ms Ball and her lawyers could not have been under any confusion with respect to the meaning of the injunction. This was again referred to and relied on in the applicant's submissions.

91 Ms Ball said both in her affidavits and in cross examination she found the discussions and submissions before the member on 1 December 2017 confusing, and maintained that she believed the injunction prevented her from Lot 2 only as that was the land described in the lease.

Findings

92 There was considerable confusion and correction at the start of the hearing when describing the land and buildings, the various parties, the history of the grant of the lease, the purchase of the land, the assignment of the lease, the subsequent change in ownership of the land, the original VCAT proceedings, their resolution, as reflected in the terms of settlement, the disputes that arose during negotiation of the terms of the renewed lease, the late realisation by the applicant the lease on its face referred to Lot 2 only, and the service of the notice to vacate in respect of Lot 1. It was not easy to work out what was common ground, and what in dispute.

93 As the hearing progressed, there were interruptions, as assertions were challenged, or further matters in dispute identified. Each party was intent on protecting their interests (as they saw them) and quick to object to anything which they saw as infringing their rights. There were proposals, and counter proposals for resolving the matter raised at various times. Although there was an attempt to deal with the reinstatement application first, and then proceed to the injunctive relief sought, the reliance by the applicant on breach of the terms of settlement as the basis for reinstatement meant the dispute about whether the lease was understood to, and intended to apply to both Lot 1 and 2, or just Lot 2, as the schedule to the lease recited, was raised as an aside in the course of the reinstatement application.

94 It is significant, in my view, that Mr Colman's assertions the lease was, or was intended and understood to be in respect of both Lots was met, each time Mr Kennedy responded, with a challenge, and the counter assertion it covered, and was intended to cover Lot 2 only. However the manner in which the hearing was conducted (and this is no criticism of the presiding member, who made concerted efforts to confine the parties to the issues capable of being resolved that day) meant the competing assertions of the parties as to what land was covered by the lease were not followed through and resolved. Similarly, the contested issue of how long the applicant had been in occupation of the smaller building (the shed), and when it was appreciated part of that shed was on Lot 1 was raised a number of times, but again, the competing assertions were not developed or determined.

95 Over half the hearing was concerned with the reinstatement application, with, as I have noted, reference at various times, to the dispute about whether the lease covered, or was intended to cover, or had been believed to have covered Lot 2 only or both Lots. When the hearing turned to the injunction, much time was spent on canvassing the possibility of the giving of an undertaking instead of granting injunctive relief. When it became clear that would not be an achievable outcome in the available time, the discussion turned to whether injunctive orders could be avoided by listing the next hearing before the 30 day period set in the notice to vacate expired, before again returning to the question of injunctive relief.

96 There had been various references throughout the hearing to the terms of the injunctive relief sought on behalf of the applicant. As the passages I have extracted reveal, Mr Colman interrupted himself in his early attempts to precisely identify the terms sought, and then diverted either to an explanation of the reason the injunction or undertaking was sought, or some other reference to a matter in dispute. At no stage, before Mr Colman handed up a handwritten draft of the terms of the orders sought, had they been clearly and precisely articulated. And, significantly, the

course of discussion and argument never permitted Mr Kennedy to make submissions about the actual words proposed, or propose an alternative.

97 By the time Mr Colman handed up his draft, the hearing had run well over time. Just before he handed up his draft, Mr Colman told the member the orders sought would preserve the status quo. That prompted a response from Mr Kennedy making it clear the parties could not even agree on what the status quo was. The issue of how long the applicant had occupied that part of the shed that was now known to be on Lot 1 had been raised more than once. Reference had been made to the recent discovery part of the shed encroached the boundary of Lot 1. But there was no reference in that context to the large tract of vacant land which apart from the encroaching building, was Lot 1.

98 The focus throughout that part of the hearing was on the right to occupy the building, or more precisely, that part of it which was on Lot 1. That was what Mr Colman had told the member was his client's concern: the right of the 15 stallholder subtenants to continue to occupy that part of the shed which was on Lot 1. It was that part of the shed which was on Lot 1 which was the subject of the notice to vacate. Although the notice had gone on to deny the applicant permission to enter any part of the premises of Lot 1, there had been no reference in the whole of the hearing to any occupancy of, or right or desire to use the vacant land by the applicant.

99 With the benefit of hindsight, it would have been better if Mr Colman had described the land by reference to the Lot numbers. His insistence to the member he was relying on clause 4(a) of the lease when describing the land and buildings covered by the injunction, in my view created an unnecessary and avoidable ambiguity.

100 Although Mr Colman was insistent the lease applied (or should have) to both Lots, on its face, it clearly did not. Clause 4(a), in addition to using the street address 9367B Western Highway, also described the leased land by reference to the certificate of title, folio and lot numbers, and land size. It was expressly confined to the certificate of title, folio and lot number and land size for Lot 2.

101 Thus the very clause Mr Colman relied on to support his contention the injunction covered both Lots, says, but for the street address, it applies to Lot 2 only.

102 It is the applicant's case that Ms Ball knew the street address applied to both Lots. The applicant relies on the assurance given to the member by both Mr Colman and Mr Kennedy that the street address covered the whole of the land in dispute, in the course of the hearing. The applicant also points to the use of the street address to refer to both Lots in the applicant's counterclaim.

103 I am not affirmatively satisfied Ms Ball knew, or believed, at the time she sought to take possession of that part of the shed that was on Lot 1, that she knew the street address, as recited in the injunction, applied to Lot 1 as well as Lot 2. Ms Ball gave evidence she did not know whether the street address was the same for Lot 1 as for Lot 2. Pressed in cross examination, she said she assumed that the suffix B to the street number describing Lot 2 in the lease implied Lot 1 would have the suffix A attached to it. There is an attractive logic to that reasoning.

104 The fact Lot 1 was vacant land, but for the recent discovery that part of the shed was on Lot 1, lends support for, or does not undermine Ms Ball's evidence she did not know the street address was the same for both lots. There had been no need to use the street address for Lot 1 before the dispute about the renewed lease arose. Nor do I consider the use of the street address in respect of both lots in the counterclaim to the original VCAT proceeding to be of great moment, given the fact it was prepared and filed by Ms Ball's legal advisers before the dispute which led to the application for reinstatement flared up in October 2017.

105 Mr Kennedy, despite his identification of a difficulty with the terms of the undertaking proposed, and his request for time to seek instructions, ultimately did not have the opportunity to seek instructions from Ms Ball about whether she accepted the street address applied to both lots.

106 Whilst it is neither necessary nor appropriate to determine whether the original lease should have included Lot 1 as well as Lot 2, there is support for the proposition that Clause 4(a) did not mistakenly omit Lot 1. I have already referred to the description of the leased land in Clause 4(a) by reference to certificate of title and folio number, plan of subdivision, Lot number and land size, which are expressly confined to Lot 2, and to Clause 33 of the lease. As it deals with the right of the lessee to use the bore water from Lot 1, in return for payment of Lot 1's water rates, the applicant's reliance on its payment of rates for both Lots for the lifetime of the lease does not assist in resolving the ambiguity in description in favour of the applicant.

107 Similarly, the schedule to the contract of sale distinguishes between the leased Lot 2 and the vacant Lot 1 when describing the encumbrances on the land to be sold. Again, that is of no assistance in resolving the ambiguity in description in favour of the applicant

108 The fact that Lot 1 was vacant land, but for the discovery during the Family Court proceedings part of the smaller building encroached over the boundary is also significant. Even if Mr Ward's assertion the smaller shed, which encroached on Lot 1 had been occupied for two and a half years is correct, it means the occupation of part of Lot 1 did not occur until after the land had been purchased by Ms Ball and Clancey Blue in 2013. It was not therefore occupied during the time the original lessor was still the lessor.

109 Given the findings I have made about the confusion generated by the manner in which the parties conducted the hearing, I do not consider the applicant can draw support for its case from the fact Ms Ball was legally represented at the hearing, and had the opportunity to consult with the lawyers. Nor do I consider the fact Ms Ball did not seek legal advice before she sought to take possession of that part of the shed that was on Lot 1 on Easter Sunday supports the applicant's case.

110 Ms Ball gave evidence that soon after the hearing of 1 December 2017 she stopped retaining her lawyers, as she could no longer afford representation. She said that she had not sought clarification from them as to the meaning of the orders, because so far as she was concerned, although the hearing itself was confusing, she believed the outcome restrained her only from interfering with the applicant's right of occupancy in respect of the land described in the lease, namely Lot 2.

111 Ms Ball gave evidence she had not sought advice from them before moving to take possession on 1 April 2018 because she was no longer represented by her lawyers, and in any event did not consider there to be any confusion or misunderstanding in respect of what she was restrained from doing. If Ms Ball did believe the injunction restrained her in respect of Lot 2 only, then there is nothing sinister in not seeking advice or confirmation that she could do something she believed she could.

112 It follows in my view that the combination of no longer being legally represented, and believing she was restrained only from interfering with the applicant's rights in respect of Lot 2 provides a reasonable explanation for not seeking further legal advice before taking action on 1 April 2018. I cannot exclude that is a reasonable possibility.

113 As I have said, I approached Ms Ball's evidence with considerable scepticism. The absence of any advance warning Ms Ball was now seeking to take possession in reliance on the notice of 30 November 2017, and the choice of Easter Sunday to seek to take possession provide support for the applicant's contention Ms Ball was seeking to maximise embarrassment and inconvenience to the applicant and Mr Ward. The evidence before me reveals considerable bad blood between Mr Ward and Ms Ball over a considerable period of time. However I am not satisfied that it, alone or in combination with other evidence leads me to reject as a reasonable possibility that Ms Ball believed she could act on the notice of 30 November 2017, without giving further warning of her intention to do so.

114 I accept the evidence that Ms Ball, or her partner at her direction must have gone onto part of the shed which was on Lot 2 in order to access keys to the stalls which were on Lot 1. I accept the evidence that the conduct of Ms Ball, or Mr Atwood at her direction in parking a car across the entrance to the shed on Lot 1, and preventing access to the doorway on the lot one side of the shed, and which had been used as a

goods entrance caused inconvenience to the occupants of Lot 2. I am not satisfied on the evidence that that conduct amounts to an interference with or preventing of the applicant from its use and enjoyment of Lot 2.

115 It is for the applicant to satisfy me beyond reasonable doubt that the terms of the injunction were clear and unambiguous. That is that it applied to Lot 1 and Lot 2. I am not so satisfied. Mr Colman made it clear in the hearing that he was relying on the description of the property contained in clause 4 (a) of the lease. Although that clause recited the street address, and it is possible the street address applied to both Lots 1 and 2, the balance of clause 4 (a) of the lease clearly and unambiguously qualified that description by reference to Lot 2 only. That is by reference to the certificate of title number, folio number, Lot number and land size applicable to Lot 2 only. Lot 1 had the same certificate of title volume number, but a different folio number, a different Lot number and a vastly different land size.

116 I am not satisfied the terms of the order were clear and unambiguous. I am not able to exclude as a reasonable possibility, that Ms Ball believed the injunction applied only to Lot 2. I am not satisfied beyond reasonable doubt that in seeking to take possession of Lot 1 in the manner and circumstances in which she did on 1 April 2018, Ms Ball deliberately and voluntarily engaged in conduct which she knew was in breach of the terms of the injunction.

117 It follows that as I am not satisfied beyond reasonable doubt that Ms Ball is guilty of contempt of the Tribunal, the application to deal with her for contempt is dismissed.

Judge Hampel
Vice President