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CONTEMPT of an ORDER OF THE TRIBUNAL

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CONTEMPT IN THE TRIBUNAL

Although resort to contempt proceedings is not a common occurrence in the Tribunal, it is useful to consider:

- the circumstances in which such a proceeding might be brought,
- the matters which should be ventilated at a hearing, and
- the circumstances in which an order might be made.

Care must be taken to prove a contempt has occurred.

Section 137 of the *Victorian Civil and Administrative Tribunal Act* 1998 provides:

(1) A person is guilty of contempt of the Tribunal if they—

(a) insult a member of the Tribunal while that member is performing functions as member; or

(b) insult, obstruct or hinder a person attending a hearing before the Tribunal; or

(c) misbehave at a hearing before the Tribunal; or

(d) interrupt a hearing before the Tribunal; or

(e) obstruct or hinder a person from complying with an order of the Tribunal or a summons to attend the Tribunal; or

(f) do any other act that would, if the Tribunal were the Supreme Court, constitute contempt of that Court.

(2) If it is alleged or appears to the Tribunal that a person is guilty of contempt of the Tribunal, the Tribunal may—

(a) direct that the person be arrested and brought before the Tribunal; or

(b) issue a warrant for his or her arrest in the form prescribed by the rules.

(3) On the person being brought before the Tribunal, the Tribunal must cause them to be informed of the contempt with which they are charged and thereafter adopt any procedure that the Tribunal thinks fit.

Subsection (f) of s 137(1) has been the subject of recent consideration by the Tribunal.

Tests applicable to proving a contempt of a Tribunal order were established by Mr Justice Gillard in Advan Investments Pty Ltd v Dean Gleeson Motor Sales Pty Ltd & Ors [2003] VSC 201. His Honour said:

[31] In order to prove a civil contempt of court involving a breach of an order of the court, the plaintiff has to prove the following:

(i) that an order was made by the court;

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

(iii) that the order was served on the alleged contemnor or excused in the circumstances, or service dispensed with pursuant to the Rules of Court;

(iv) that the alleged contemnor has knowledge of the terms of the order;

(v) that the alleged contemnor has breached the terms of the order.

[32] It is necessary for the plaintiff to prove each element beyond reasonable doubt. In accordance with the principles of the criminal law, in proving element (v) it must be proven that the act or omission which constituted the breach of the order was deliberate and voluntary.

Banyule CC v Tomasevic [2011] VCAT 2377

Mr Tomasevic was found by the Tribunal (constituted by Judge Lacava, Vice President) in June 2009 to be using his property to store vehicles, goods or equipment (basically a junk yard). That was not a permitted use, and an enforcement order was made requiring him (interalia) to cease the use of the land for a store or for materials recycling, and to remove numerous vehicles, materials, goods and equipment from the land. Mr Tomasevic, who appeared in person, failed to comply with the enforcement order. Two years later, the responsible authority applied for a contempt order. Evidence was led by Mr Tomasevic that he suffered mental health issues.

The Tribunal [29] considered the tests of Gillard J above and went on to observe that his Honour had surveyed English authority and what was said on the question of whether there is a requirement to prove a wilful breach of an order or an intentional act or omission. His Honour also dealt with the question of whether there remains a residual discretion in a judge hearing a contempt application to not punish for contempt, notwithstanding there may have been a breach or failure to comply with an order.

The Tribunal then set out the analysis of Gillard J of previous decisions. The Tribunal summarised this analysis by stating that, what needs to be proved is that the Respondent, with knowledge of the order, deliberately breached the order. In the case of Mr Tomasivic, the Tribunal determined that the body of medical evidence led by Mr Tomasevic showed not only why the enforcement orders had not been complied with, but also why they were required in the first place – that is, that Mr

Tomasevic suffered from a chronic major depressive illness for which he was heavily medicated. The Tribunal was not satisfied that the applicant Council had proved beyond reasonable doubt that the respondent deliberately acted, or failed to act with respect to the enforcement orders. [38]

The Council were then criticised for bringing the application for a contempt order when it could have proceeded under s. 123 of the P&E Act (responsible authority may carry out work). The applicant's approach was said to be entirely misconceived [40]. Further, even if the contempt had been proved beyond reasonable doubt, the Tribunal would not have convicted Mr Tomasevic of contempt. That was because the Tribunal had a discretion to not make the order, which discretion it exercised in favour of Mr Tomasevic, having regard to the Council's failure to avail itself of the better alternative remedy [41].

Glen Eira CC v Dimitriou [2013] VCAT 1709

More recently, Glen Eira CC also failed to prove its case before the Tribunal (Acting President Judge Macnamara). The Tribunal heard accusations that Mrs Dimitriou had not brought a development into compliance with endorsed plans by a specified date, and was therefore in contempt of a Tribunal order. At [26] …….. a failure to obey an order of the Tribunal made under an enforcement order subject to the establishment of the various matters ... would constitute a civil contempt of the Tribunal punishable under Section 137.

The Tribunal referred (at [25]) to the Advan decision of Gillard J, where his Honour said:

> [28] In *Australian Consolidated Press v Morgan*, Windeyer J at p.498 described a proceeding for civil contempt as being:
> "Used primarily to compel obedience rather than to punish disobedience."
> [29] However, in some cases, because of the nature of the civil contempt, it is treated as a criminal contempt and deserves severe punishment.
> [30] The party which brings a proceeding for contempt bears the onus of proof and must satisfy the elements of the charge of contempt beyond reasonable doubt, see *Witham v Holloway.*

There followed [31] and [32] set out above (and in Banyule v Tomasevic). His Honour continued:

> [33] Where the allegation is a failure to comply with the order, it may be difficult to prove that the omission to do something was deliberate and voluntary. However, it is trite to observe that this will depend upon all the circumstances.
> [34] …….. As a general proposition, it is unnecessary to prove that the contemnor committed the breach with an intention to disobey the order. In *Knight v Clifton*. Sachs LJ said:
> "When an injunction prohibits an act, that prohibition is absolute and it is not to be related to intent unless otherwise stated on the face of the order."
> ……..

[36] If the disobedience was "casual or accidental and unintentional", this is relevant to penalty and also whether the court should exercise the contempt jurisdiction.

[46] ... In my opinion, it would not be a defence to a contempt proceeding to show that the disobedience came about by some casual or accidental and unintentional act. ..... However, in my opinion if the evidence revealed that the breach was casual or accidental and unintentional, that would be relevant to whether or not this court should exercise its contempt jurisdiction and, on any view, is relevant to the question of penalty if the court comes to the view that it should exercise the jurisdiction.

The facts were that Mrs Dimitriou was the sole owner of the property in question, although she had bought it as a family home. She was married to Mr Dimitriou who was a well known and active property developer in the Glen Eira area. The decision suggests that Mrs Dimitriou was unsophisticated in property matters and referred all correspondence and decisions in that respect to her husband.

It seems the enforcement order was made against both Mr and Mrs Dimitriou, but the contempt application was brought only against Mrs Dimitriou.

The Tribunal found that the case was made out with respect to four of the five tests postulated by Gillard J. That is, that an order was made, that its terms were clear, that it was properly served, and there was a breach. As for the test of knowledge of the terms of the Order however, the Tribunal observed that even though the requirement for service was made out, the requirement for knowledge of the order is a separate and distinct requirement [37].

Mrs Dimitriou did not take an active part in the business of land development for which her husband was responsible, and correspondence relating to the contempt matter was referred off to him and not read by Mrs Dimitriou. "The evidence establishes in my view , that Mrs Dimitriou gave her husband plenary authority to deal with ….. issues" [31].

In the circumstances, the Tribunal could not find beyond a reasonable doubt that the Mrs Dimitriou had knowledge of the terms of the order, as distinct from having been served with it. For that reason, the applicant had failed to make out is case on **all** the elements of the charge of contempt.

Julie is a member of the Victorian Bar. She has for many years practised in land development, planning, local government and associated areas. Julie is an experienced VCAT advocate in its many jurisdictions. In addition to private practice, she has worked within local government and a metropolitan water company. She holds a Bachelor of Laws degree (Melbourne University), a Master of Business (Corporate Governance) (RMIT); and is a certified Mediator. Julie can be contacted through Foley's list on 9225 7777, 0412322111 or julie.r.davis@vicbar.com.au.