

# SUPREME COURT OF QUEENSLAND

CITATION: *Berghofer v Wicks* [2024] QSC 4

PARTIES: **JACOB DANIEL BERGHOFER**  
(plaintiff)  
v  
**PETER DAVID WICKS**  
(defendant)

FILE NO/S: BS No 13664 of 2020

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 10 January 2024

DELIVERED AT: Brisbane

HEARING DATE: 14 and 15 February 2023; written submissions on behalf of the plaintiff dated 24 February 2023; written submissions on behalf of the defendant dated 3 March 2023; reply submissions on behalf of the plaintiff dated 6 March 2023; review on 15 December 2023

JUDGE: Burns J

ORDER: **THE ORDER OF THE COURT IS THAT:**

- 1. The defendant, Peter David Wicks, is adjudged not guilty of the charges of contempt specified in subparagraphs (h), (p)(ii), (q), (s) and (w) of paragraph 1 of the application filed on 24 January 2023;**
- 2. The defendant, Peter David Wicks, is adjudged guilty of the charges of contempt specified in subparagraphs (a), (b), (c), (d), (e), (f), (g), (i), (j), (k), (l), (m)(i), (m)(ii), (n),(o), (p)(i), (r) (t), (u) and (v) of paragraph 1 of the application filed on 24 January 2023;**
- 3. The parties are directed to make submissions on penalty and costs.**
- 4. The application is otherwise adjourned to a date to be fixed by the court for the determination of penalty and any order as to costs.**
- 5. Peter David Wicks is directed to appear in person on the date fixed by the court in accordance with**

**paragraph 4.**

**CATCHWORDS:** PRACTICE – CONTEMPT OF COURT – CIVIL CONTEMPT – BREACHES OF COURT ORDERS – where the defendant as lessor and the plaintiff as lessee were parties to the lease of a grazing property – where complaint was made that the defendant had acted inconsistently with the plaintiff’s right to quiet enjoyment of the demised land – where an interlocutory injunction was granted by the court to restrain the defendant from impeding, obstructing or acting in any way that was inconsistent with or in breach of the plaintiff’s rights to peaceful occupation, possession and enjoyment of the demised land – where the plaintiff alleged that the defendant had acted in breach of the injunction – where the plaintiff applied for an order that the defendant be punished for contempt – whether the defendant acted in breach of the injunction – whether the defendant was guilty of contempt

*Uniform Civil Procedure Rules 1999* (Qld), r 898, r 925, r 930, r 931, r 932

*Australian Consolidated Press v Morgan* (1965) 112 CLR 483, cited

*Australasian Meat Industry Employees’ Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, followed

*Bakir v Doueihy* [2002] QSC 19, followed

*Camm v ASI Development Company Pty Ltd* [2007] QCA 317, cited

*Colefax v Colefax* [1933] St R Qd 222, cited

*Construction, Forestry, Mining and Energy Union v Grocon Constructions (Vic) Pty Ltd* [2014] VSCA 261, followed

*Costello v Courtney* [2001] 1 Qd R 481, cited

*Emmanuel College v Rowe* [2014] QSC 238, cited

*Hafele Australia Pty Ltd & Anor v Maggbury Pty Ltd & Anor* [2000] QCA 397, cited

*Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, cited

*Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531, followed

*Matthews v ASIC* [2009] NSWCA 155, cited

*McNair Anderson Associates Pty Ltd v Hinch* [1985] VR 309, followed

*O’Connor v Hough* [2016] 2 Qd R 543, followed

*O’Connor & Ors v Hough & Ors (No 2)* [2017] QSC 68, cited

*Plomp v The Queen* (1963) 110 CLR 234, cited

*Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165, cited

*Witham v Holloway* (1995) 183 CLR 525, followed

*Wright, Layman & Umney Ltd v Wright* (1949) 66 RPC 149, cited

**COUNSEL:** DR Cooper KC for the plaintiff  
M Donovan for the defendant

SOLICITORS: Creevey Horrell for the plaintiff  
Marland Law for the defendant

- [1] The plaintiff, Jacob Berghofer, applies to the court for orders pursuant to the provisions of Chapter 20 of the *Uniform Civil Procedure Rules 1999* (Qld) that the defendant, Peter Wicks, be dealt with for contempt of an order of the court made on 23 December 2020. No less than 25 breaches of that order are alleged by way of charge in the application and, for the reasons that follow, I have found most of them to be proven to the required standard.

### **Background**

- [2] At all times material to this application, Mr Wicks was the registered owner of a grazing property known as Lochavon which is situated in Gordonbrook in the South Burnett region of Queensland. The property is comprised of 941 hectares in six contiguous parcels of land bounded by Wicks Road on the eastern side. In sequence from north to south, these parcels are more particularly described as follows:

- (a) Lot 391 on CPFY805 on title reference 13466104 (**Lot 391**);
- (b) Lot 390 on CPFY805 on title reference 13651040 (**Lot 390**);
- (c) Lot 269 on CPFY1035 on title reference 13651041 (**Lot 269**);
- (d) Lot 268 on CPFY1035 on title reference 16259029 (**Lot 268**);
- (e) Lot 267 on CPFY 1035 on title reference 18338167 (**Lot 267**); and
- (f) Lot 266 on CPFY 1034 on title reference 13332006 (**Lot 266**).

Holts Road runs in a generally east-west direction between Lots 268 and 267.

- [3] The parties first met in early 2015 when Mr Berghofer inspected Lochavon. This led to what seems to have been at first an informal arrangement whereby Mr Wicks allowed Mr Berghofer to move cattle onto the property and the pair worked co-operatively and for the common good until around the middle of 2019. In the meantime, and for much of 2017, the terms of a more formal arrangement were negotiated by the parties culminating in the execution of a written lease in February 2018.
- [4] By the lease, and subject to only one qualification, the whole of the land comprising the six Lots was leased by Mr Wicks to Mr Berghofer along with the buildings, other structures and improvements on that land.<sup>1</sup> The qualification – clause 19 – was in these terms:

#### **“EXCLUSION OF RESIDENCE/CURTILAGE/HORSE Paddock”**

- 19.1 The parties agree that the Lessor shall during the term or extended terms, be entitled to remain in occupation and possession of the residence, curtilage and horse paddock located on Lot 390 on CPFY805, and the Lessee shall have no responsibility to maintain or repair any of the improvements;

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<sup>1</sup> Clause 2.2 and Item 3 of the Schedule.

19.2 the Lessor shall (together with his invitees, agents and employees) have the right to traverse the other parts of the land for the purpose of accessing the area reserved under clause 19.1;

19.3 the Lessor in exercising his right under clause 19.1 shall not hinder or obstruct the Lessee's use, business and enjoyment of the remainder of the land." [Emphasis in original]

[5] Reference should also be made to clause 12.1:

**“QUIET ENJOYMENT:** The lessor warrants that the lessee paying the rent hereby reserved and observing and performing the covenants, conditions and restrictions on its part herein contained shall and may peaceably hold and enjoy the demised premises during the said term without any interruption by the Lessor or by any person rightfully claiming through under or in trust for it." [Emphasis in original]

[6] The lease was for a term of three years commencing on 1 January 2018 and expiring on 31 December 2020.<sup>2</sup> There were two options to renew, each of three years' duration, with the first option if taken up to commence on 1 January 2021 and expire on 31 December 2024.<sup>3</sup> The permitted uses under the lease were cattle grazing and farming.<sup>4</sup> Rental was agreed in the sum of \$40,920 inclusive of GST for each year of the term,<sup>5</sup> although clause 3.3 provided for additional rental to be payable by Mr Berghofer in the following circumstances:

**“ADDITIONAL RENT PAYABLE:** The annual Rental shall be increased by \$50.00 per annum for each hectare of the property which is planted by the Lessee under crops, on condition that the Lessee must apply appropriate amounts of fertiliser to any part of the land in which crops are grown. ..." [Emphasis in original]

[7] There was no description (or other specification) in the lease of the "residence", "curtilage" or "horse paddock" preserved for the "occupation and possession" of Mr Wicks under clause 19.1. That of course will not affect the validity of the instrument where the meaning of those terms can be objectively ascertained by the court, and such a task will usually be aided by evidence of the parties' subjective understanding of the meaning of the terms. Of course:

"It is not the subjective beliefs or understandings of the parties about their rights and liabilities that govern their contractual relations. What matters is what each party by words and conduct would have led a reasonable person in the position of the other party to believe. References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That, normally, requires

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<sup>2</sup> Item 4 of the Schedule.

<sup>3</sup> Item 7 of the Schedule.

<sup>4</sup> Item 6 of the Schedule.

<sup>5</sup> Item 5 of the Schedule.

consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purpose and object of the transaction.”<sup>6</sup> [Citations omitted]

- [8] Here, there was no dispute regarding what was meant by “residence” or “curtilage”; each was quite apparent at the time when the lease was entered into and readily definable from markings on a copy of a Queensland Globe map made by Mr Wicks well after the lease was entered into and put in evidence at the hearing.<sup>7</sup> There was accordingly a common understanding regarding what was meant by those terms and, in that regard, it is to be noted that both the “residence” and “curtilage” (or house yard) are wholly situated on Lot 390.
- [9] However, where the evidence of the parties was apart concerned the metes and bounds of the “horse paddock” referred to in clause 19.1 but, for reasons I later discuss,<sup>8</sup> I could not accept Mr Wicks’ evidence on that point (or on much of anything else in contention). He falsely claimed that the “horse paddock” referred to in the lease ranged across almost the whole width of Lot 390 when in fact (at the time the lease was entered into) he intended it to refer to a much smaller fenced portion of that lot and the same portion as Mr Berghofer identified in his evidence.<sup>9</sup> It follows that, in truth, the parties had a common understanding (and intention) regarding the meaning of the three terms and the lease is to be read consistently with that understanding. Those meanings, in any event, are perfectly in accordance with what a reasonable person would attach to clause 19.1, taking account of all of the relevant circumstances established by the evidence which I do accept.
- [10] The map to which I have just referred has its focus on Lot 390. On it, the outline of six paddocks was hand-drawn and labelled – viewed from west to east – 1A, 1B, 1C, 1D (smaller), 1D (larger) and 1E. In addition to two separate paddocks having been labelled 1D, it appears that the area occupied by the paddocks labelled 1A and 1B was a single paddock until divided by a fence that was erected sometime after the lease was entered into. Again, for reasons that follow,<sup>10</sup> the horse paddock referred to in clause 19.1 of the lease was the smaller of the two paddocks labelled 1D.
- [11] As earlier mentioned, there was no conflict between the parties until the middle of 2019. To the contrary, Mr Berghofer deposed that he and Mr Wicks “enjoyed an excellent working relationship” until that point in time. A dispute then arose concerning clause 3.3 of the lease. Mr Berghofer understood that additional rental would only be payable where “cash crops” (such as peanuts or grain) were planted whereas Mr Wicks believed that clause 3.3 also applied in the case of forage crops or improved pasture. Mr Berghofer had planted forage crops. In the end, Mr Berghofer paid the additional rental, but their relationship never recovered.
- [12] Without in any way intending to be exhaustive regarding subsequent events, Mr Wicks sent Mr Berghofer a text message on 22 May 2019 in which he asserted that the “horse paddock” excluded from the lease was “portion 390” and that he would be “removing all livestock” from that portion. He added that he did “not want livestock

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<sup>6</sup> See *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [40].

<sup>7</sup> Part of exhibit JDB-06 to the fourth affidavit of Mr Berghofer filed on 14 December 2022.

<sup>8</sup> At [25] ff.

<sup>9</sup> As to which see the following paragraph.

<sup>10</sup> At [25] ff.

traversing ploughed ground or planted”. By August 2019, a water trough on Lot 390 had been electrified so that stock could not drink from it and, although Mr Berghofer remedied this on discovery, the float valve for the trough was removed in November 2019 which effectively rendered the trough unusable. From around that time, gates between paddocks on the property were left open or only partially closed, allowing Mr Berghofer’s cattle to move into areas of the property for which they were not intended and this caused, and continued to cause, significant disruption to the carrying on by Mr Berghofer of his stud cattle business. Eventually, Mr Berghofer installed security cameras on the property to get to the bottom of what was going on and, in footage taken on 24 November 2020, Mr Wicks is depicted opening a gate, moving through it and then leaving it partially open. A large number of photographs and short videos taken by Mr Berghofer with his mobile telephone between January 2020 and December 2020 depicting gates having been left open were also placed into evidence at the hearing.<sup>11</sup>

- [13] Eventually, Mr Berghofer applied to the court for an injunction restraining Mr Wicks from “impeding, obstructing or acting in any way that is inconsistent with or in breach of his rights to peaceful occupation, possession and enjoyment as lessee” under the lease. The application came on before Davis J on 23 December 2020 when orders were made, paragraph 1 of which provided that Mr Wicks was, “until the resolution of these proceedings or further order”, restrained “from impeding, obstructing or acting in any way that is inconsistent with or in breach of [Mr Berghofer’s] rights to peaceful occupation, possession and enjoyment of” each of the lots the subject of the lease.
- [14] As I will find, Mr Wicks was not deterred, acting in breach of the injunction within a fortnight of the order having been made. Then, after a string of breaches between January 2021 and November 2022, the subject application was filed on 24 January 2023.

### **Proceedings for contempt**

- [15] As I have previously observed,<sup>12</sup> the jurisdiction of the court to punish for contempt is both inherent and provided for under Chapter 20 of the *Uniform Civil Procedure Rules 1999* (Qld).<sup>13</sup> Because the liberty of the subject is potentially at stake, it is well established that strict compliance with the rules of procedure is required in a proceeding for contempt.<sup>14</sup> It is equally well settled, and for the same reason, that nothing short of proof to the criminal standard will suffice in order to make out such a case.<sup>15</sup> Of course, although it has been observed that a proceeding for contempt is essentially criminal in nature, it is not a proceeding that can be equated with a trial on indictment.<sup>16</sup> Rather, it is a proceeding in the civil jurisdiction of the court and, as

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<sup>11</sup> Exhibit JDB-09 to the fourth affidavit of Mr Berghofer filed on 14 December 2022; exhibits JDB-23 and JDB-24 to the fifth affidavit of Mr Berghofer filed on 13 February 2023; and Exhibit 2 on the hearing.

<sup>12</sup> *O’Connor v Hough* [2016] 2 Qd R 543, [41].

<sup>13</sup> *Bakir v Doueishi* [2002] QSC 19, [6]-[8].

<sup>14</sup> *Colefax v Colefax* [1933] St R Qd 222, 224; *Hafele Australia Pty Ltd & Anor v Maggbury Pty Ltd & Anor* [2000] QCA 397, [29]; *Costello v Courtney* [2001] 1 Qd R 481, [9]; *Camm v ASI Development Company Pty Ltd* [2007] QCA 317, 10.

<sup>15</sup> *Witham v Holloway* (1995) 183 CLR 525, 534.

<sup>16</sup> *Hinch v Attorney-General (Vic)* (1987) 164 CLR 15, 89; *Witham v Holloway* (1995) 183 CLR 525, 534.

such, the UCPR apply. In that regard, save for one thing, all of the requirements of the UCPR were met in this case and the deficiency – personal service of the application and supporting material – was cured before the substantive hearing got underway.

- [16] When a party moves the court to punish someone for contempt, the onus is at all times on that party.<sup>17</sup> That said, although all of the elements of a charge of contempt must be made out, the particulars of the charge do not need to be made out in their entirety; it is enough if those particulars which are established by the evidence are sufficient to constitute proof of the essential elements of the charge.<sup>18</sup>
- [17] In order to prove a charge of contempt involving the breach of a court order, it must be established that “the order is clear and capable of compliance, that the alleged contemnor has knowledge of the terms of the order and has by his act or omission breached the terms of the order”.<sup>19</sup> The ordinary rules of construction apply, it not being the case that an order cannot be enforced unless the language of the undertaking is unambiguous and certain. To the contrary, if the order “bears a meaning which the court is satisfied is one which ought fairly to have been in the contemplation of the person to whom the order was directed ... as a possible meaning, the fact that that meaning results from a process of construction and involves a choice of possible meanings does not ... preclude the court from enforcing the order ... in the sense which the Court assigns to it”.<sup>20</sup>
- [18] Under the general law, “the public interest requires that any disobedience more than casual, accidental or unintentional must at least be regarded as wilful”.<sup>21</sup> As such, a deliberate act or omission which is in breach of an order will “ordinarily constitute wilful disobedience unless the alleged contemnor is able to show, by way of exculpation, that the default was casual, accidental or unintentional”.<sup>22</sup> However, there must be “actual disobedience”, and that will not be so where the breach “occurs by reason of circumstances outside the control of the alleged contemnor”.<sup>23</sup> Because of the way in which this case was litigated,<sup>24</sup> it is unnecessary to determine whether a less onerous test applies when proceeding under Chapter 20 of the UCPR – and, in particular, rr 898 and 925 – to enforce an order of the court by means of an application for punishment for contempt.<sup>25</sup> Instead, the approach I intend to take is to not find any of the charges proven unless I am satisfied beyond reasonable doubt that the breach alleged in each instance was wilful in the sense just discussed.
- [19] In addition, because a finding that Mr Wicks was guilty of contempt will necessarily depend on the court’s willingness to draw an inference (in the case of each charge)

<sup>17</sup> *Witham v Holloway* (1995) 183 CLR 525, 530; *Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531, [65], [101].

<sup>18</sup> *Matthews v ASIC* [2009] NSWCA 155, [48], [67]; *Emmanuel College v Rowe* [2014] QSC 238.

<sup>19</sup> *Construction, Forestry, Mining and Energy Union v Grocon Constructions (Vic) Pty Ltd* [2014] VSCA 261, [139].

<sup>20</sup> *Australian Consolidated Press v Morgan* (1965) 112 CLR 483, 492.

<sup>21</sup> *Construction, Forestry, Mining and Energy Union v Grocon Constructions (Vic) Pty Ltd* [2014] VSCA 261, [140].

<sup>22</sup> *Australasian Meat Industry Employees’ Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 111-112; *Witham v Holloway* (1995) 183 CLR 525, 530-534, 538-542; *Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531, [26], [55]-[65] and [101]-[103].

<sup>23</sup> *Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531, [63].

<sup>24</sup> As to which, see *O’Connor & Ors v Hough & Ors (No 2)* [2017] QSC 68, [26]-[28].

<sup>25</sup> See the discussion in *Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531, [67]-[75].

that he acted wilfully, it is important to keep in mind that such an inference must not only be a rational inference from the proven circumstances but it must also be the only rational inference capable of being drawn.<sup>26</sup> The same approach is required in the case of any finding that it was Mr Wicks and not some other unknown person who engaged in the alleged conduct.

- [20] Rule 930 UCPR applies if the court decides that a contempt has been committed. In the case of an individual, the court may punish that individual by making any order that could be made under the *Penalties and Sentences Act 1992* (Qld): r 930(2). The court may also make an order for punishment on conditions, including, for example, a suspension of punishment during good behaviour, with or without the giving of security: r 930(4). If the court orders that the contemnor be imprisoned, it must specify the prison at which he or she is to be imprisoned: r 931(1) UCPR. Costs are at the discretion of the court whether a specific punishment is imposed or not: r 932 UCPR.

### **The charges**

- [21] The 25 charges preferred by paragraph 1 of the application span the period from 3 January 2021 to 11 November 2022. They may be conveniently grouped as follows:
- *Opening gates*: Charges by which it is alleged that Mr Wicks opened gates and then either left the gate open or failed to secure it – Charges (a), (b), (c), (d), (e), (f), (g), (i), (j), (k), (l), (m)(i), (o), (s) and (w);
  - *Sequestering cattle*: Charges by which it is alleged that Mr Wicks locked some of Mr Berghofer’s cattle in his yards without access to water or to “feed or water” – Charges (h) and (q);
  - *Damaging property*: A charge by which it is alleged that Mr Wicks damaged two gates belonging to Mr Berghofer – Charges (m)(ii) and (n);
  - *Obstructing access*: Charges by which it is alleged that Mr Wicks obstructed Mr Berghofer’s access to and from particular paddocks by different means – Charges (p)(i), (r) and (v);
  - *Interfering with activities*: Charges by which it is alleged that Mr Wicks interfered with the conduct of Mr Berghofer’s grazing and farming activities – Charges (p)(ii) and (t);
  - *Attempted termination*: A charge by which it is alleged that Mr Wicks purported to unlawfully terminate the lease – Charge (u).

### **The witnesses**

- [22] In addition to two affidavits sworn by him, Mr Berghofer relied in support of his application on affidavits sworn by James Gillon (a nearby farmer), Troy Grundy (a farm manager employed by Mr Berghofer) and Joey Conway (a farm hand employed by Mr Berghofer). Each deponent was cross-examined at the hearing.
- [23] Mr Wicks swore two affidavits in response to the application. An affidavit from his partner, Karen Irianto, was also relied on. Both were cross-examined at the hearing.

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<sup>26</sup> *Plomp v The Queen* (1963) 110 CLR 234, 252.



- [24] Mr Berghofer was a forthright witness and although still angered by the overall dispute, made concessions where appropriate. I found his account overall to be reliable. So, too, did I find the other witnesses called in support of the application to be truthful and reliable.
- [25] On the other hand, Mr Wicks was not a truthful witness. He was constantly evasive and frequently argumentative. At one point during the hearing, I gave consideration to whether he had simply adopted a wrongheaded view of the rights granted to Mr Berghofer by the lease, but his conduct overall was more sinister than that. I have no doubt that he settled on a strategy that was calculated to force Mr Berghofer to quit the lease. Lease or no lease, he wanted Mr Berghofer off his property.
- [26] Part of Mr Wicks' strategy involved a false claim as to the area and location of the horse paddock referred to in clause 19.1 because he must have thought that, through the maintenance of such a claim, he could pretend to be entitled to open slather across most of Lot 390. However, the falsity of that claim became only too apparent.
- [27] *First*, clause 19.1 of the lease refers to a single paddock and not, as Mr Wicks attempted to convey, several paddocks covering almost the entirety of Lot 390. *Second*, the proposition that Mr Berghofer would have agreed to a lease of Lochavon with the demised land – and therefore access – being effectively bisected by such a large tract of excluded land (and containing as Lot 390 did most of the infrastructure as well as a critical source of water) is absurd. *Third*, clause 3.3 of the lease provided for additional rent to be paid if any part of the demised land was cropped. Part of the land that was cropped was paddock IA which was situated wholly within Lot 390. As earlier explained, Mr Berghofer paid this surcharge after a forage crop was planted in this paddock and, yet, Mr Wicks maintained that the paddock was excluded from the lease. If that were so, why Mr Berghofer was allowed to plant anything on the land remains a mystery but, even more to the point, additional rent was only payable with respect to land that had been leased and was later cropped. *Fourth*, and perhaps most importantly, I have no hesitation accepting Mr Berghofer's account that neither he nor Mr Wicks were in any doubt at the time the lease was entered into that the horse paddock referred to in clause 19.1 was the smaller of the two paddocks later marked paddock 1D on Mr Wicks' map. There was no confusion about that. That was their common understanding, and intention. Furthermore, when viewed objectively, no other conclusion is reasonably open when regard is had to the text of clause 19.1, the surrounding circumstances known to the parties, and the purpose and object of the transaction. Indeed, that this must have been so is further reinforced by the feature that the parties managed to proceed almost half way through the initial term of the lease without any conflict and only fell out in May 2019 over money.
- [28] It should also be recorded that, as a strategy, the false claim as to the excluded area cannot have been thought through very carefully. That is because, even if the whole of Lot 390 was excluded from the lease, clause 19.3 nevertheless obliged Mr Wicks when exercising his right to "occupation and possession" of the excluded area to "not hinder or obstruct [Mr Berghofer's] use, business and enjoyment of the remainder of the land". That would necessarily involve not impeding Mr Berghofer's access to, and use of, the remaining lots and, yet, one sees from the charges preferred by paragraph 1 of the application that many of the breaches allege that precise type of conduct and, for that reason, it matters not what might or might not have been the true position regarding Lot 390.

[29] The other part of the strategy was to engage in the conduct constituting those breaches. In one of the few passages from his evidence that I am prepared to accept, Mr Wicks when being cross-examined was forced to reveal the intent behind this part of his strategy:

“You would agree with me wouldn’t you that if gates were being routinely left open on the property, that could be very prejudicial to the way Mr Berghofer conducts his business. You’d agree with that, wouldn’t you?--  
-Yeah.

It’s common sense?---Yeah.

And if gates were left open, it would let cattle stray out into main roads, wouldn’t it?---That’s correct.

Which could lead to cattle being killed, which is, in fact, what happened here, isn’t it?---Cattle were killed. Yes.

Because they were allowed to roam out on the road because the gate was left open. Correct?---A gate. Yes.

All right. You would know that because of the cattle operation that Mr Berghofer was conducting, the stud operation, that it was imperative to keep certain cattle separate from other cattle?---Yeah.

And so if gates were left open and they were allowed to intermix, that would cause a lot of problems for Mr Berghofer, wouldn’t it?---That’s correct.

If it be the fact that these problems just kept going on and on and on, it may force Mr Berghofer to have to leave the property, mightn’t it? Mightn’t it?---Might.

It probably would, wouldn’t it, because it would disrupt his business so much?---I can’t speak for him.

No. But as a man of common sense, a 57 year old man, if you were in his position and your business was being continually compromised because gates are being left open, it stands to reason that you would want to leave, wouldn’t you?---Yeah.”<sup>27</sup>

[30] None of any of this reflected well on Mr Wicks’ credit. I find that he was, from around the middle of 2019, motivated to engineer a situation whereby continuance of the lease became unworkable if not completely intolerable to Mr Berghofer. Importantly to the outcome of this application, this desire to frustrate Mr Berghofer’s use of the land did not abate when the injunction was granted and probably continued in earnest until the application to deal with him for contempt was filed. Then, facing the prospect of being dealt with, he contested almost every charge and, for the most part, advanced false denials in an attempt to avoid responsibility, as I shall now explain.

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<sup>27</sup> Transcript; 2-6 – 2-7.

### **Are any of the charges proven?**

- [31] The order was clear in its terms, and effect. Its purpose was to restrain Mr Wicks from impeding, obstructing or acting inconsistently with (or in breach of) Mr Berghofer's rights to peaceful occupation, possession and enjoyment of the demised land until the trial or earlier order. Those rights are of course to be derived from the lease and, in particular, from clauses 12.1 and 19.1. The conduct alleged against Mr Wicks by each of the charges is conduct that, if proven, would constitute impeding, obstructing or acting inconsistently with those rights. Moreover, Mr Wicks could not have been in any doubt as to the type of conduct proscribed by the injunction because it is precisely the same type of conduct on the part of Mr Wicks that provoked its making.

*Opening Gates – Charges (a), (b), (c), (d), (e), (f), (g), (i), (j), (k), (l), (m)(i), (o), (s) and (w)*

- [32] By these charges it is alleged that Mr Wicks opened gates on the property and left them open or on the ground or not secured. In all but two of the charges, they are supported by photographs or videos which were in evidence.<sup>28</sup> The evidence supporting the two exceptions – charges (s) and (w) – was struck out by agreement.<sup>29</sup> In the result there is no evidence to support those charges and Mr Wicks will be adjudged not guilty of each.
- [33] As to the balance, it was not submitted that the particular gate particularised in each case had not been left open or that this had not occurred on the date specified by the charge. Rather, it was submitted that the court could not be satisfied beyond reasonable doubt that Mr Wicks was the person who was responsible. In that regard, Mr Wicks advanced an elaborate version at the hearing to the effect that he always left gates as he found them and that, if gates were left open, that was likely because of unauthorised entrants such as shooters hunting kangaroos or pigs. The main problem with that version was that it ran counter to Mr Berghofer's observation of the tracks left in the vicinity (Mr Wicks) as well as his experience of the property and was unsupported by anything other than Mr Wicks' word which I do not accept. It was also inherently improbable because if there ever was such a problem on the property, shooters would travel in vehicles, but the photographic and video evidence showed that in almost every instance, the relevant gate was left partially open. In other words, the gates were left in a state that would allow cattle to pass, but not vehicles. The suggestion that the drivers of unknown vehicles might have opened the gates, travelled through them and then alighted from the vehicle to only partially close the gate must be regarded as nonsense.
- [34] In the end, Mr Berghofer did not reside on the property but Mr Wicks did (along with Ms Irianto from June 2021). It not being suggested for one moment that Ms Irianto was responsible for leaving any gates open, that leaves Mr Wicks who of course not only engaged in similar conduct prior to the granting of the injunction but who was also motivated throughout to force Mr Berghofer off the property. The only rational inference that can be drawn from the proven circumstances is that Mr Wicks acted in the respects alleged in these remaining charges and that he did so wilfully as part of his strategy to force Mr Berghofer to quit the lease. I am therefore satisfied beyond

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<sup>28</sup> Exhibits JDB-11 and JDB-14 to the fourth affidavit of Mr Berghofer filed on 14 December 2022; Exhibit 2 on the hearing.

<sup>29</sup> Transcript 1-34 and 1-35.

reasonable doubt that he is guilty of charges (a), (b), (c), (d), (e), (f), (g), (i), (j), (k), (l), (m)(i) and (o).

*Sequestering Cattle – Charges (h) and (q)*

- [35] These charges respectively allege that Mr Wicks locked cattle belonging to Mr Berghofer in the cattle yards on the property on 10 February 2021 (charge (h)) and 14 June 2022 (charge (q)). Charge (h) further alleges that the cattle were locked up “without access to water” and charge (q) alleges that the cattle were locked up “without access to feed or water”.
- [36] A considerable body of evidence was adduced on the hearing regarding these two charges but it is unnecessary to here examine it in detail because of the conclusion I have reached to the effect that Mr Wicks must be found not guilty of both.
- [37] Although I accept that Mr Gillon was told by Mr Wicks that he was locking Mr Berghofer’s cattle in the yards to “teach Jake a lesson” and, further, accept that the cattle were at times sequestered in the yards without *adequate* water or feed, the view I take of these particular charges is that the allegations that the cattle were locked up “without access to water” (charge (h)) or “without access to feed or water” (charge (q)) are elements of the respective charges and therefore must be strictly proved. On the whole of the evidence, I am left in doubt whether the cattle were *wholly* deprived of water or feed. In fact, relying in no small way on the evidence of Ms Irianto, I think the better view is that the cattle in question were given access to some water as well as to some hay.
- [38] I therefore find Mr Wicks not guilty of charges (h) and (q).

*Damaging Property – Charges (m)(ii) and (n)*

- [39] By these charges it was alleged that Mr Wicks bent a gate on 19 June 2021 (charge (m)(ii)) and damaged a double gate in November 2021 with a bulldozer (charge (n)). The damage done to the gate on 19 June 2021 was the subject of a video.<sup>30</sup> Photographs along with a video of the aftermath of the damage occasioned in November 2021 were also in evidence.<sup>31</sup> Mr Wicks admitted driving the bulldozer through the gate, but said it was an accident. The version he gave was that there was a “dam ... looking like it was bursting” and so he “had to get down to the dam as ASAP with the dozer”. The implication was that he flattened the gate rather than opening it in order to save time. I reject that evidence as being entirely implausible.
- [40] I have no doubt that the acts constituting both charges were deliberately done by Mr Wicks as part of his campaign to induce Mr Berghofer to quit the lease. I am satisfied beyond reasonable doubt that Mr Wicks is guilty of charges (m)(ii) and (n).

*Obstructing access: Charges (p)(i), (r) and (v)*

- [41] In the case of these charges it was alleged that Mr Wicks wired and thereby locked a gate to paddock 1A on 18 February 2022 (charge (p)(i)), placed two large tractor tyres

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<sup>30</sup> Exhibit 2.

<sup>31</sup> Exhibit JDB-15 to the fourth affidavit of Mr Berghofer filed on 14 December 2022; Exhibit 2 on the hearing.

across a gate to paddock 1C on 19 June 2022 (charge (r)) and placed a cable across a gate to paddock 1A on 10 November 2022 (charge (v)).

- [42] By the time Mr Wicks finished giving evidence at the hearing, there was no real dispute that he acted in the ways alleged and there was otherwise ample evidence to support that conclusion.<sup>32</sup> His conduct was wilful and again formed part of a series of acts designed to frustrate Mr Berghofer's rights under the lease. I am satisfied beyond reasonable doubt that Mr Wicks is guilty of charges (p)(i), (r) and (v).

*Interfering with Activities – Charges (p)(ii) and (t)*

- [43] With these charges it was alleged that Mr Wicks ploughed pasture that had been grown in paddock 1A on 18 February 2022 (charge (p)(ii)) and drove a tractor directly at Mr Berghofer, Mr Conway and cattle they were mustering to interfere with the muster (charge (t)).
- [44] I am not persuaded beyond reasonable doubt about Mr Wicks' guilt on charge (p)(ii) because the evidence in support of this charge is less than clear. There is, for example, evidence of Mr Wicks being allowed by Mr Berghofer to cultivate some of the leased land, most notably, paddock 1B where a crop of peanuts was grown. Mr Wicks will be judged not guilty of this charge.
- [45] As to charge (t), I accept the evidence Mr Berghofer and Mr Conway gave about the incident. I reject Mr Wicks' attempted explanation to the effect that he was simply engaged in slowly ploughing the paddock and did nothing to affect the muster. I find that he deliberately drove the tractor towing the plough in the manner recalled by Mr Berghofer and Mr Conway and with the intention of disrupting the muster. I am satisfied beyond reasonable doubt that Mr Wicks is guilty of charge (t).

*Attempted Termination – Charge (u)*

- [46] The evidence in support of this charge was uncontroversial. No doubt acting on advice, Mr Wicks through his solicitors attempted to terminate the lease on 20 September 2022.
- [47] It is almost trite to state that an injunction must be strictly obeyed and remains binding on the parties unless and until it is discharged.<sup>33</sup> Indeed, the court is entitled to assume that those to whom injunctions are directed will act in good faith and seek to comply with them.<sup>34</sup> It therefore ill-behoves a person restrained by order of the court to act on a view, whether on advice or otherwise, that the restraint no longer applies because of some intervening circumstance. It can be no defence that the party doing the act honestly believed, or was wrongly advised, that he or she would not be in breach of the order, if the act was deliberately done.<sup>35</sup> An interlocutory injunction such as the one ordered by Davis J in this case is capable of being dissolved or varied and an injunction granted at trial may be set aside on appeal, but for so long as an injunction stands it must be obeyed. As Sir William Page Wood, VC said in *Spokes v Banbury*

<sup>32</sup> See, for example, exhibit JDB-21 to the fourth affidavit of Mr Berghofer filed on 14 December 2022; Exhibit 2 on the hearing.

<sup>33</sup> *McNair Anderson Associates Pty Ltd v Hinch* [1985] VR 309, 313.

<sup>34</sup> *Wright, Layman & Umney Ltd v Wright* (1949) 66 RPC 149, 152.

<sup>35</sup> *Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531, [24], [44].

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“[T]he simple and only view is, that an order must be obeyed, that those who wish to get rid of that or must do so by the proper course, an appeal. So long as it exists, the order must be obeyed, and obeyed to the letter and anyone who does not obey it to the letter is guilty of committing a wilful breach of it, ...”.<sup>37</sup>

- [48] The attempt constituting this charge represented an attempt not merely to act inconsistently with the rights granted to Mr Berghofer under the lease, it was an attempt to terminate those rights altogether. The injunction was intended to preserve, and did preserve, those rights until trial or earlier order. Regardless of whatever view may have been held about the existence or otherwise of a ground to terminate the lease, the court ought to have been approached before anything was done. It is, to say the least, most regrettable that Mr Wicks’ solicitors appear to have aided this breach.
- [49] This charge is made out to the requisite standard. Mr Wicks will be adjudged guilty of charge (u).

### **Disposition**

- [50] It follows that Mr Wicks is to be adjudged not guilty of charges (h), (p)(ii), (q), (s) and (w) and guilty of charges (a), (b), (c), (d), (e), (f), (g), (i), (j), (k), (l), (m)(i), (m)(ii), (n) and (o), (p)(i), (r), (t), (u) and (v).
- [51] The parties will accordingly be directed to make submissions on penalty and costs on the return of the application. Mr Wicks’ personal appearance will be required at that time.

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<sup>36</sup> (1865) LR 1 Eq 42, 48.

<sup>37</sup> Ibid, 48.