SUPREME COURT OF QUEENSLAND

CITATION:	*White IT Pty Ltd v Heywood & Anor* [2019] QSC 215
PARTIES:	**WHITE IT PTY LTD ACN 600 490 266** (applicant) **v** **MATTHEW HEYWOOD (AKA MATT HEYWOOD; AKA MATTHEW WAKELING)** (first respondent) **HEYTECH IT PTY LTD ACN 630 311 434** (second respondent)
FILE NO:	3120 of 2019
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	17 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	9 August 2019
JUDGE:	Dalton J
ORDERS:	**1. Declare that charge 1 is proved as a contempt of Court.** **2. Declare that charges 2 and 3 are not proved as contempt of Court.**
COUNSEL:	P Somers for the applicant M Black for the respondents
SOLICITORS:	Bennett & Philp Lawyers for the applicant PM Lee & Co Lawyers for the respondents

[1] This is an application seeking that the respondents be punished for contempt for conduct said to have been prohibited by an order made in the applications jurisdiction on 27 March 2019. It is convenient to begin by setting out that part of the order which it is alleged has been breached:

> "THE ORDER OF THE COURT IS THAT:
>
> 1. Until the trial of this proceeding, or earlier or other order, the first respondent and the second respondent be restrained from:

(a) approaching or accepting any approach from any of the applicant's clients, with a view to soliciting the business of the client for the respondents or anybody else;

(b) inducing or encouraging any of the applicant's clients to terminate or restrict their trade relationship with the applicant;

(c) using in the respondents' business the applicant's electronic data downloaded from the applicant's SharePoint files and CRM database;

(d) acting, or will cease acting, for any of the applicant's clients and provide evidence of such refusal or ceasing to act to the applicant.

…"

[2] The background to the proceeding is that Mr David White, who is the sole director of the applicant company, carries on an information technology business using the applicant company as the vehicle. On 24 November 2017 the applicant entered into a contract with the first respondent pursuant to which the first respondent agreed to provide the applicant with services – cl 2.1. The parties did not enter into an employment relationship, but the first respondent was essentially to perform some of the work of the business carried on by the applicant. Clause 5 of the agreement between the applicant and the first respondent reads as follows:

"5. RESTRAINT OF TRADE

The Contractor will not in any capacity, directly or indirectly:

(a) induce, encourage or solicit any of the Principal's employees or agents to leave the Principal's employment or agency;

(b) approach or accept any approach from any of the Principal's clients with a view to soliciting the business of the client for the Contractor or anybody else;

(c) approach or accept any approach from any of the Principal's clients with a view to gaining employment for the Contractor or anybody else;

(d) induce or encourage any of the Principal's clients or suppliers to terminate or restrict their trade relationship with the Principal; or

(e) counsel, secure or assist any person to do any of the acts referred to in this clause, without the Principal's written permission.

The parties agree that this clause continues to be in full effect for a period of 12 months after this agreement is terminated or terminates."

[3] The applicant provided the first respondent with a laptop computer and a mobile phone to use while performing work pursuant to the consultancy agreement.

[4] On 3 December 2018, while still working for the applicant, the first respondent set up and registered the second respondent company. He is the second respondent's sole director and shareholder. The first respondent had flagged his intention to start his own IT training business in a conversation with the applicant in about August 2018. At the beginning of January 2019 the first respondent proposed to the applicant that he would start his own IT business which might operate in some way in conjunction with the applicant's business. This plan was short-lived. On 17 January 2019 Mr David White on behalf of the applicant sent an email to the first respondent asking him to cease working pursuant to the contract between them and asking for the return of the applicant's equipment. The first respondent replied to the request to return equipment as follows:

> "All devices including any IP will be returned on payment of outstanding invoices, including works I still need to invoice. Understandably some invoices are in dispute. It's not in my best interest to want to keep your equipment. I want to terminate this relationship as soon as possible. Let's come up with an accepted figure, you pay the invoices and I'll return the kit immediately."

[5] By 27 March 2019 the relationship between the parties had deteriorated to the point where the order at paragraph [1] was made. At the time the 27 March 2019 order was obtained the first respondent appeared on behalf of himself and the second respondent. He was present in Court when the order was made and was given a copy of the sealed order – t 1-21.

[6] The order made on 27 March 2019 contained the notice required by r 665(3) of the UCPR.

[7] It was common ground on the hearing before me that the contempt should be proved beyond reasonable doubt. The proceedings commenced with the applicant calling evidence and then closing his case. After that the respondents elected to go into evidence.

Ambiguity of order made 27 March 2019

[8] The respondents submitted that paragraph 1(a) of the order of 27 March 2019 was so ambiguous that there could be no successful contempt charge brought. That is, I was asked to dismiss the charges simply on the basis that paragraph 1(a) of the order was ambiguous.

[9] It is convenient to restate the terms of paragraph 1(a) of the order.

> "1. Until the trial of this proceeding, or earlier or other order, the first respondent and the second respondent be restrained from:
>
> (a) approaching or accepting any approach from any of the applicant's clients, with a view to soliciting the business of the client for the respondents or anybody else;
>
> …"

[10] The respondents' written submissions as to the ambiguity of this order included the following:

> "(a) There is no way of discerning from the face of the Orders who might be one of 'the applicant's clients' and the Orders are silent on the question of the relevance, in any, of the Respondents' knowledge of who might be clients.
>
> (b) There is no definition of what makes a person a client – eg, must there be a current contract or retainer? Is it sufficient if the Applicant has merely undertaken some work for the person?
>
> (c) There is no indication of whether the term 'the applicant's clients' encompasses clients current as at any particular date, or whether it includes former clients- eg, for how long does a person remain a client after the last work was carried out?
>
> (d) There are at least three possible constructions of the term 'the applicant's clients' that arise: (i) that it applies to persons who were clients at any time; (ii) that it applies to persons who were clients when the relationship between the Applicant and First Respondent ceased; (iii) that it applies to persons who were clients when the Orders were made on 27 March 2019."

[11] I think the law as to ambiguity in this context is conveniently summarised by Beazley JA in *Pang v Bydand Holdings Pty Ltd*:[1]

> "52. A person cannot be committed for contempt of court for breach of an order or undertaking, the terms of which are ambiguous: *Australian Consolidated Press Ltd v Morgan* [1965] HCA 21; 112 CLR 483. If on its plain reading, objectively construed, the undertaking is of uncertain or ambiguous meaning, there will be no contempt for a failure to obey it: *Spokes v Banbury Board of Health* at 48-49. Nor can a person be committed for contempt on the ground that upon one of two possible constructions of an undertaking, the person had breached the undertaking: see *Australian Consolidated Press Ltd v Morgan* per Owen J at 515-516, referring to the statement of Jenkins J in *Redwing Ltd v Redwing Forest Products Ltd* (1947) 177 LT 387.
>
> 53. There is a distinction, however, between an undertaking the terms of which are ambiguous and the situation where there are difficulties of construction: see *Redwing Ltd v Redwing Forest Products Ltd* (1947) 177 LT 387 per Lindgren J at 121. In that case, Lindgren J pointed out that neither a contemnor's lack of understanding of the terms of the undertaking according to their true meaning nor lack of awareness that his or her conduct constituted a contempt means the alleged contemnor cannot be found guilty of contempt: cf *Watkins v AJ Wright (Electrical) Ltd* [1996] 3 All ER 31.
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> 54. In *Kirkpatrick v Kotis* [2004] NSWSC 1265; 62 NSWLR 567 Campbell J (as his Honour then was), was concerned with whether the

[1] [2011] NSWCA 69, [52]-[57].

terms of a court order were ambiguous. His Honour referred to the statement of Sir W Page Wood VC, in *Spokes v Banbury Board of Health*, that a court order must be obeyed unless it is ambiguous.

55. Campbell J, at [55], then made the following observation:

> 'In my view, the court approaches the question of whether the order is ambiguous with the caution appropriate to a type of litigation which could result in the defendant being punished - if an order is really not clear, it is unjust for someone to be punished for not obeying it. As well, though, the court approaches the question of whether the order is ambiguous on the basis that the recipient is expected to try to understand it and obey it. If a person taking that approach to the order could be in real doubt about what it meant, in a respect which is relevant to the particular charge of contempt which is brought, the charge will fail. This means that there will sometimes be orders which a grammatical analysis would show to contain a syntactic ambiguity, but which are none the less enforceable if it is the type of ambiguity that has no real risk of misleading. There will sometimes be orders which contain a term which has multiple meanings, but where that semantic ambiguity has no real risk of misleading. If there were to be an order addressed to a promoter of musical groups not in any way to be involved in the advertising or promotion of a band under some particular name, the order would be enforceable notwithstanding that a "*band*" can sometimes be a rubber band, or a headband.' (emphasis added)

56. As these authorities indicate, various phrases have been used when seeking to determine whether the terms of an undertaking are ambiguous. These include: whether its terms were really not clear; whether the terms were such that a person reasonably trying to obey them would know what they meant; whether the person required to comply with the undertaking could be in real doubt as to what the undertaking meant: see *Kirkpatrick v Kotis* at [55]; whether the terms of the undertaking could mislead the person bound upon a plain reading of its words: see *Spokes* at 48-49.

57. It is clear on the authorities that if the terms of an undertaking are truly ambiguous, there can be no contempt, because it cannot be said what it was that required compliance. It also appears to be common ground on the authorities that regardless of how the question is formulated, the terms of an undertaking are to be given a sensible meaning, consistent with its actual terms. It must be possible on that meaning for the undertaking to be capable of being obeyed."

[12] So far as paragraph 1(a) of the order of 27 March 2019 is concerned, I think that Justice Beazley's words about the undertaking given in *Pang* are apposite here:

> "It must be said that the terms of the undertaking given by the appellant leave something to be desired. Nonetheless, the Court should seek to give meaning to the undertaking, if its terms so permit." – [59].

[13] I do not think the terms of paragraph 1(a) of the order are so ambiguous as to be meaningless, although it may be that in any particular case the drafting is sufficiently ambiguous that it cannot be said with any certainty that the respondents have breached the terms of the order. For this reason I do not think that the approach urged by the respondents – to find that paragraph 1(a) of the order is so ambiguous there could not possibly be a contempt finding in relation to it in any case – should be taken. Rather, I think that each alleged breach ought to be examined to see whether or not the conduct alleged is in breach of the order, bearing in mind as part of that exercise that ambiguity in the order may prevent a finding of contempt in any particular case. This is in accordance with the words of Windeyer J in *Australian Consolidated Press Ltd v Morgan,* another case on ambiguity in the area of contempt:

> "Logically the first question is, Was there a breach by the appellant of its undertaking to the Court? That involves a consideration of the true meaning and scope of the undertaking."[2]

[14] The applicant alleges that the respondents breached the order of 27 March 2019 in three ways. I will consider each in turn. The application makes the same three charges against each respondent. The evidence about the charges does not disclose any occasion where the first respondent was not acting on behalf of the second respondent, and I consider the position of both respondents together.

Charge 1

[15] Charge 1 alleges that on 31 May 2019 the second respondent sent (and the first respondent caused to be sent) an electronic message on LinkedIn to the firm Rodgers Reidy. It is alleged that "from at least January 2015 to 31 May 2019 Rodgers Reidy was a client of the applicant". This was proved by Mr White's unchallenged evidence. It is alleged that the LinkedIn message sought to solicit Rodgers Reidy's business. I find that allegation made out having regard to the content of the message. The message read:

> "Just wanted to reach out to see if there's anything you need – I provide IT Support to clients in your space and I know all about the trials and tribulations you and the team can face re: your IT. And boy, isn't it a blessing when the IT guy can break down the technical jargon into honest-to-goodness everyday English?
>
> Would love to help out if you ever needed a hand – We provide a free onsite audit that at a minimum provides you an updated asset register and a report of what's what."

[16] As part of the charge it was alleged that the respondents knew that Rodgers Reidy was a client of the applicant because as part of his work for the applicant the first respondent

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[2] (1964-1965) 112 CLR 483, 502.

provided IT services to Rodgers Reidy. In evidence Mr Heywood accepted this – t 1-35.

[17] There was no evidence as to whether or not Mr Heywood knew that Rodgers Reidy was a client of the applicant at the time the LinkedIn message was sent, ie., 31 May 2019. I would not infer such knowledge because that was more than four months after the first respondent stopped working for the applicant.

[18] No specific submissions were made by the respondents that this lack of factual information meant that there was a difficulty determining whether or not the sending of the message on 31 May 2019 fell within the "true meaning and scope" of the order, to adopt the words of Windeyer J (above). In general terms a question as to whether or not there was ambiguity in these circumstances was raised, see paragraph [10](a) above. In my view, having regard to the factual matters relevant to charge 1, there is no ambiguity in the terms of the order of 27 March 2019 preventing me determining whether it has been breached. The terms of order 1(a) do not require that the respondents not approach persons they know to be clients of the applicant, just that the respondents do not approach clients of the applicant. One might speculate that, had Mr Heywood been represented by a lawyer on 27 March 2019, the order might have been worded in a way more favourable to him in that regard. However, this is a different thing to finding that the words of the order are unclear in this regard. In my view, they are not.

[19] Mr Heywood swore that the sending of the message to Rodgers Reidy happened by accident. Mr Heywood said that he obtained 3,937 email addresses from his personal LinkedIn profile in mid-May 2019 – tt 1-37-38. He said that he put those details into an electronic spreadsheet and then, aware of the order of 27 March 2019, typed the word "exclude" on the spreadsheet adjacent to anyone he knew to be a client of the applicant, including Rodgers Reidy – t 1-38. He then sent the electronic spreadsheet to a lady in the Philippines and paid her a small sum to send the same message as was sent to Rodgers Reidy to everyone on the list, on behalf of the second respondent. This evidence was challenged. It had a number of difficulties which I shall now examine.

[20] In his affidavit affirmed on 9 August 2019 (Ex 3), Mr Heywood swore:

> "In about early to mid-May 2019, I obtained a complete list of my connections from my LinkedIn account in the form of a spreadsheet. I went through the spreadsheet manually to exclude any contact that I knew to be clients of the Applicant. I did this by placing a mark in the column next to those known clients to indicate they should be excluded from the marketing message."

[21] Mr Heywood was questioned as to why he deposed in his affidavit to "placing a mark" on the spreadsheet, but in his oral evidence to having written the word "exclude" on the spreadsheet. He explained that the mark he placed was the word "exclude" – t 1-50. By itself this discrepancy is nothing more than odd use of language. However, this is not the only discrepancy.

[22] In his affidavit (Ex 3) Mr Heywood swore:

> "I uploaded the spreadsheet containing my list of connections to a Google drive that I shared with JoAnne. Google drive is a cloud storage location that enables multiple parties to access, upload, edit and collaborate on documents together. I explained to JoAnne via our online collaboration platform Trello that I wanted her to use my LinkedIn account to send messages to my connection list, but excluding those marked with 'EXCLUDE'. Unfortunately, when JoAnne (or her assistant) used my LinkedIn account to send the marketing messages on 31 May 2019, [Rodgers Reidy] was accidentally not excluded (that is, the message was accidentally sent to [Rodgers Reidy])."

[23] Mr Heywood was cross-examined about this evidence and said:

> "Now, you talk here about you explained to Joanne via our online collaboration platform, is it Trillo; is that how you pronounce it?--- Trello.
>
> Trello. Does that keep a record of that conversation, that platform?--- No, Trello is more – it's not a chat tool per se, it's a project management software.
>
> Yes. And does it keep a record of the exchanges you have with someone on that platform?--- Sure, yes, but not – there was no conversations on that platform, but it keeps a record of things done, yes.
>
> Okay. Well, you say, 'I explained to Joanne'?--- Yes.
>
> If there's not a conversation on the platform how did you explain it to Joanne?--- We have Skype meetings.
>
> Well, then that's not explaining it to Joanne via Trello, is it?--- No.
>
> Right. So your affidavit is mistaken in that regard isn't it?--- Yes."[3]

[24] There was a third discrepancy about this evidence. It is found in this extract from the cross-examination of Mr Heywood:

> "And when do you say this – I guess we would call it a conversation by Skype with Joanne occurred?--- Approximately April.
>
> …
>
> So what you're talking about or referring to there is this spreadsheet we've been talking about that has the reference to exclude in it; is that right?--- Correct.
>
> Okay. And I'm putting to you that you couldn't have been having a conversation about that in April because the list didn't exist until May; do you accept that?--- No, the conversation still occurred, but it was in light of when the list was going to be generated.
>
> See you use the tense 'marked with "exclude"'. 'Marked' indicates you're talking about something that had already been marked, in the past tense; do you accept that?--- No. The – when I – when I spoke to Joanne about the

[3] t 1-51.

> exclusion of certain people, not just clients of White IT, it was in relation to the list that would be created in the future that would be marked with 'exclude'.
>
> Right. It's a little bit different from what's written there in the affidavit, isn't it?--- Yes."[4]

[25] Next, paragraph 13 of Mr Heywood's affidavit (Ex 3) read:

> "I apologise to the Court. It was not my intention for the message to be sent to [Rodgers Reidy]. This occurred by accident. When this was drawn to my attention, I stopped that LinkedIn marketing campaign."

[26] Mr Heywood was asked when the fact that he had sent a message to Rodgers Reidy was brought to his attention and replied that it was shortly after 31 May 2019 – t 1-52. Later when questioning returned to this topic, Mr Heywood said that he came to be aware of the message sent to Rodgers Reidy after the application for contempt "came in". The application was filed on 17 June 2019. Mr Heywood could not give any explanation for this discrepancy in his evidence other than that he "misspoke" – t 1-57.

[27] During Mr Heywood's evidence about this matter counsel for the applicant called for the electronic document constituting the spreadsheet – t 1-38. Arrangements were made during the luncheon adjournment. When Court resumed, the first respondent produced the document on his laptop while he was giving evidence. During the course of his evidence some screenshots showing various aspects of the document were produced and tendered. The information on the computer (and recorded in those exhibits) showed times and dates when the spreadsheet had been electronically dealt with and showed the different versions of the document from time to time.

[28] Mr Heywood could not explain why the electronic version of the spreadsheet did not show the word "exclude" having been written on that document as at 31 May 2019. His first response was to say that the word "exclude" was in fact on the spreadsheet as at 31 May 2019 – t 1-47 – although he did appear to accept that the electronic version of the document did not show the word "exclude" either at 31 May 2019 or 10 June 2019 – tt 1-47-48. I find that the document did not contain the word "exclude" as at 31 May 2019 – that is what the exhibits show.

[29] The word "exclude" did show on the version at 11 July 2019 – t 1-48. Mr Heywood accepted that the information on the spreadsheet showed that he had had made changes to the spreadsheet at 8.52 pm that day – t 1-48. However, Mr Heywood would not accept that the changes he made that day were to add the word "exclude" – t 1-49. Nonetheless, he could not explain why the word "exclude" did not appear on the earlier versions of the document; he held to his evidence that the word "exclude" was in the document from a time in early or mid-May 2019 – t 1-50 – despite the document showing the contrary.

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[4] tt 1-51-52

[30] There is one final difficulty with Mr Heywood's evidence concerning this topic. In his affidavit (Ex 3) Mr Heywood swore that after the message sent to Rodgers Reidy was drawn to his attention he stopped the marketing campaign and further that:

> "I have since gone through all marketing lists that I used and removed any contacts that I know or believe are clients of the Applicant. That has been difficult, however, because I have never been given a list of clients that the Applicant says I should avoid contacting."

[31] The difficulty is that the electronic spreadsheet on Mr Heywood's computer recorded that the most recent version of the spreadsheet was saved on 9 August 2019 and that version showed Rodgers Reidy still on the spreadsheet, so that Mr Heywood accepted that he had not removed Rodgers Reidy from the list – t 1-57.

[32] In the context of dealing with Mr Heywood's credit I record that the order of 27 March 2019 contained a requirement that the respondents swear an affidavit detailing the particulars of the sale of the applicant's mobile phone and laptop computer and a requirement that the respondents pay the applicant an amount of $1,500 in respect of that equipment. The affidavit which was sworn by the first respondent in compliance with the order deposed to the fact that he sold the applicant's mobile phone and laptop on Gumtree on 24 January 2019. I regard this as dishonesty which is relevant to my assessment of the first respondent's credit.

[33] In addition, the matters outlined at [45]-[52] below bear negatively upon my assessment of the first respondent's credit.

[34] The respondents submitted that I ought to accept the first respondent's evidence that he instructed the marketer engaged by the second respondent to exclude Rodgers Reidy from the marketing campaign and that, by her fault, that instruction was not heeded. The submission was then made that because the conduct of sending the message was "casual, accidental or unintentional", it did not amount to contempt.[5]

[35] Because of the matters outlined at [20]-[33], I have grave reservations about the respondent's evidence that his marketer was instructed to exclude Rodgers Reidy from any marketing messages. I am conscious that although I am making a final decision on these contempt charges, the credit of the first respondent will be in issue on the trial of this proceeding. In those circumstances, I think I should make the minimum finding necessary as to the respondent's credit. That finding is that the first respondent's evidence that he instructed his marketer to exclude Rodger Reidy from the list of people to receive the contentious message is so unreliable I would not act upon it. Accordingly, I put it to one side. The only other evidence is that a contempt was committed. The consequence is that I find this charge proved by the applicant beyond reasonable doubt.

[36] I will hear the parties as to the appropriate punishment for that contempt.

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[5] I am not at all convinced that this was correct as a matter of law, see the judgment of Keane JA in *Lade & Co Pty Ltd v Black* [2006] 2 Qd R 531, [58], [62], [66] and [77].

Charge 2

[37] It is alleged that Systemax Pty Ltd was a client of the applicant as at 17 December 2018, the date when the first respondent ceased working for the applicant. The evidence is that the first respondent's contractual arrangements with the applicant ended on 17 January 2019.[6] The evidence was silent as to whether or not Systemax was a client of the applicant at 17 January 2019. Mr Heywood admitted that after he ceased working for the applicant he and his company, the second respondent, started undertaking work for Systemax – t 1-23. By 15 March 2019 Systemax had terminated its contract with the applicant – t 1-10. That is, by the time the order of 27 March 2019 was made, Systemax was no longer one of the applicant's clients.

[38] In my view, that last factual circumstance gives rise to a real difficulty in determining whether or not work carried out by the respondents for Systemax after 27 March 2019 was in breach of the order. My conclusion is that the order is too ambiguous for me to make such a finding.

[39] The ambiguity stems from the fact that the order does not say anything about the time relevant to determining whether customers were "the applicant's clients". It appears to me there is a good argument that this phrase means clients as at 27 March 2019. That is, that the order speaks of the applicant's clients as at the date it was made.

[40] It was argued on behalf of the applicant that, having regard to the terms of cl 5 of the contract between the applicant and the first respondent, paragraph 1(a) of the order should be interpreted to mean any of the people who were the applicant's clients as at the date of termination of the contract between the applicant and the respondent.

[41] The contractual right which the applicant has to protect itself against the respondents poaching its clients is the right at paragraph 5 of the contract. Therefore, if one were drafting the terms of an injunction to address breaches of that clause, one might well set out to frame the terms of the injunction in a way which corresponded to the contractual right. And indeed the words of paragraphs 1(a) and (b) of the order do bear considerable resemblance to cl 5(a) and (b) of the contract between the applicant and the first respondent. It must however be noted that the remainder of cl 5 and paragraph 1 deal with disparate matters. Furthermore, the words of paragraph 1(a) of the order do not in terms refer to clients as at the date of the termination of the contract. In my view, there is no necessary implication that it is those clients who are the subject matter of paragraph 1(a) of the order. In one major respect the terms of paragraph 1 of the order depart from cl 5 of the contract: the protection granted by cl 5 of the contract is to last for one year after termination; the prohibition at paragraph 1(a) of the order is to last until the trial of the proceeding or earlier order. Secondly, the contract bound only the first respondent; the order binds both respondents.

[42] Even if I am wrong about this and paragraph 1(a) of the order means applicant's clients as at the date of the termination of the contract between the applicant and the first respondent, there is no evidence as to whether Systemax was a client of the applicant as at 17 January 2019. In a proceeding where the applicant must prove his allegations

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[6] Court Document 2, paragraph 20, and "DW11".

beyond reasonable doubt, I think this is enough to prevent my finding that the contempt is proved.

[43] I therefore dismiss charge 2 against each respondent.

[44] I will record, *obiter,* my views about the other issue in contention between the parties as to charge 2. It was whether or not the respondents ceased to act for Systemax on and after 27 March 2019. My conclusion is that the respondents did not cease to act for Systemax on and after 27 March 2019 and I now record the reasons for that view.

[45] While Systemax was a client of the applicant its data was backed up to a third party provider on the SkyKick Office 365 system. This system, so far as it is relevant here, worked by having the applicant, as Systemax's IT provider, open an account with SkyKick and use that account to back up Systemax's data online – t 1-9. When Systemax changed IT providers to the first or second respondent, it was necessary for SkyKick to transfer the data from the applicant's account to the respondents' account. To achieve this it was necessary for SkyKick to receive the appropriate requests and information from the relevant people. The transfer was something done by SkyKick; no client or IT provider could itself make the transfer – t 1-9 and t 1-17. In this case, both the applicant and the respondents had SkyKick accounts.

[46] On 19 March 2019 the applicant approved transferring Systemax's data out of the applicant's account and into the respondents' account.[7] According to Mr White the process of transfer should be "pretty much immediate" – t 1-17. However, in this case he continued to receive charges from SkyKick until June (although Systemax did not pay him). He deduced from the fact that the data remained in his account that Systemax had not authorised its transfer to a new account – tt 1-17-18.

[47] The order of 27 March 2019 required the respondents to provide evidence that they had ceased to act for any of the applicant's clients. On or around 4 April 2019, Mr Heywood swore an affidavit in the matter in which he said:

> "I, Matt Heywood (First Respondent) and/or Heytech IT (Second Respondent) have ceased acting for companies Systemax Pty Ltd and Energy Resources Consulting Pty Ltd as per marked 'MH-1' and 'MH-2'."

[48] The exhibit marked "MH-1" was an email sent to Systemax on 27 March 2019 at 10:09 pm which read:

> "As discussed, I will be unable to provide IT Support and Services to Systemax. I'd certainly like to thank you all for the professional relationship during our time together and wish you and your business all the very best in the future."

[49] In his evidence before me Mr Heywood swore that he did not continue to work for Systemax after 27 March 2019, but ceased working for them on the same day as the Court order – t 1-23. I think that answer has to be read against the background of what

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[7] Court Document 2, Exhibit p 35, t 1-17.

Mr Heywood says about the matter in Exhibit 3, effectively his evidence-in-chief on the hearing before me. In Exhibit 3 Mr Heywood said the following:

> "18. In order to cease acting for Systemax Pty Ltd without causing or risking loss or damage to their business or data, I needed to do a proper hand-over to a new IT provider.
>
> 19. After I advised Systemax that I was unable to continue providing them with IT services, Tracey Green from Systemax Pty Ltd asked me if Lucas Meadowcroft of Crofti IT would be a suitable new IT provider. I believe that Tracey's sister uses Crofti IT for their IT Support. I told Tracey I thought Crofti IT would be suitable and a good fit. I am aware that discussions occurred between Crofti IT and Systemax Pty Ltd, but Systemax did not ultimately appoint Crofti IT as its provider. Eventually, Systemax instead appointed a company called InfoTech to be its IT provider.
>
> 20. The work that I had undertaken for Systemax Pty Ltd, through the Second Respondent, since the Orders of 27 March 2019 is as follows:
>
> (a) On 1 April 2019, I did about 1.75 hours of work meeting and discussing hand-over work. This is recorded in my invoice number 1108 dated 26 April 2019, a true copy of which is exhibited hereto and marked MH-2.2.
>
> (b) On 30 April 2019, I did about 0.25 hours of work taking a call from Systemax's new IT provider and collating documentation for him. This is recorded in my invoice number 1119 dated 8 May 2019, a true copy of which is exhibited hereto and marked MH-2.3.
>
> (c) On 6 May 2019, I did about 0.75 hours of work calling and emailing Systemax's new IT provider in relation to the hand-over of service. This is also recorded in my invoice number 1119 which appears as MH-2.3.
>
> (d) On 9 May 2019, I issued an invoice to Systemax for the cost of the SkyKick backup account that I had used for their backups. The arrangement was that I had a SkyKick account in my name that was used for backing up Systemax's data, and I passed on the fee charged by SkyKick (without any mark-up). Exhibited hereto and marked MH2.4 is a true copy of my invoice number 1121 recording that charge.
>
> 21. I have not undertaken any other work for Systemax since the Orders of 27 March 2019."

[50] In cross-examination Mr Heywood was taken to an email from the respondents to Systemax sent on 29 March 2019 (a Friday) at 12:42 am. It read:

> "Multifactor authentication has now been enabled.
>
> Could you please advise all Systemax users when they get a chance to log into their Office 365 mailbox via https://www.office.com when they get a

chance? It will prompt them to enter their mobile phone number codes to go to."

[51] Counsel for the applicant spent some time trying to have Mr Heywood tell him when he had enabled multifactor authentication for the email accounts in the Systemax office:

> "That's something that you had done around the 29th of March; is that right?--- That's correct.
>
> Did you do it on that day, the 29th of March?--- I can't recall, I'm sorry.
>
> Okay. You did it after the 27th of March, didn't you?--- I can't recall, I'm sorry.
>
> …
>
> And I'm putting to you that it was either on the 28th or 29th of March, being around the time you sent the email or shortly before you sent that email. Do you accept that?--- No.
>
> Okay. It was at least done after the 27th of March 2019, wasn't it?--- No.
>
> Okay. Is there a way that this could be established as to when you did that work – sorry, I'll go the other way. Sorry, it's for Systemax, isn't it? Yes. Is there a document which would establish when you undertook that work?--- I – I don't know.
>
> Is there a record kept of when these things are done?--- On the – on the Microsoft portal on the account there is, which I no longer have access to.
>
> Okay. If you read the next sentence then:
>
> *Could you please advise all Systemax users –*
>
> etcetera?--- Yes.
>
> Again, that's following from doing that multifactor authentication, isn't it?--- Correct.
>
> That's something that needs to follow as the next step?--- Correct.
>
> Okay. And again, if you had done this work at least three days prior or two days prior, that is, prior to the 27th of March, you would have asked the Systemax team to pass on that information at an earlier time, wouldn't you have?--- No."[8]

[52] In my view, Mr Heywood was dishonestly prevaricating through that passage of evidence. At the end of cross-examination I asked him a series of questions about it:

> "… Can you just have a look at that – I'm interested in the second paragraph where you're asking:
>
> *Please advise all Systemax users to log into their mailbox and then they'll receive a prompt.*

---

[8] tt 1-24-25.

If they didn't do that, would they be able to use their mailbox?--- No.

So if someone had gone to work – I was actually looking up the date before. So this was sent on Friday. So if someone had gone in on Monday and tried to use their mailbox, they – it wouldn't have worked as normal?--- No, your Honour.

All right. Well, you were asked about whether you sent this email closely following on from doing the task of enabling the multifactor authentication?--- Yes.

And it seems to me you must have sent the email closely following on from doing that task because otherwise the Systemax office would have run into problems because people would have turned up – yes. I mean, this was sent very early in the morning on Friday. But if – if you had done the task sometime before the 27th of March on the days following, you know, the 28th and the 29th of March, you – Systemax would have been on the phone saying, 'Something's gone wrong with our email. Nobody can access their email?--- Correct. One of the – and one of the things that, perhaps, I should have mentioned is that this multifactor authentication is that I had the passwords to all the users, all their mailboxes and email accounts. And so this multifactor authentication is in reference to the handover process. So to change their passwords and to ensure that I myself am locked out as the IT company as a part of that process---

Yes, I understand that. But do you remember Mr Somers spent quite a bit of time asking you about, 'Well, don't you think you would have done this on the 28th or 29th of March?' that is, that you would have enabled the multifactor authentication on the 28th and 29th of March. And you said, 'No, no, no. Not at all. I couldn't possibly agree to that.' But you must have, mustn't you, because the Systemax office would have been chaos on the 28th and 29th of March?--- Not necessarily, your Honour. So how it happens: if I flick that switch, for example – let's say, for example, on the Wednesday I flick that switch and enabled multifactor authentication, the next time a person would go to their computer and log in, it would prompt him and say, 'Hey, you need to type your mobile phone –' if someone was on leave, for example, for two weeks and they didn't get back to their computer to two weeks later, then it would prompt them when they're in front of their machine. But when that – when that switch is flicked, it then says to the user, the next time the log in, 'Hey, please provide me your mobile phone.'

I understand that. You don't think the whole of the Systemax office was on leave on the 28th and 29th of March, do you?--- No, your Honour.

So if you – can you see the logic of what I'm saying to you?--- Yes.

It must be that you sent this email very soon after you enabled the multifactor authentication?--- I see what you're saying, your Honour. Yes. I---

Do you agree with that?--- I agree with that, your Honour.

> All right then. Thank you. Did you have any – out of any of that, Mr Somers?
>
> MR SOMERS: Just one question, potentially, your Honour: would you accept that there's about 35 people at Systemax, employees, staff that have email accounts?--- I think it's more around 20 staff."[9]

[53] The evidence at [49] and [52] shows that Mr Heywood sought to draw a distinction between undertaking new projects for Systemax and working to assist Systemax to move to a new IT provider – see also t 1-26 of his evidence.

[54] He made another distinction which was evident in his contemporaneous documents. For example, his email of 26 April 2019 to Systemax said, "… While we have technically stopped trading together, I'm not about to halt something critical like backups regardless how your previous IT incumbent feels about it. In due course this will be gracefully handed over to Crofti or your chosen IT provider."[10] That is, he thought his duty to ensure that Systemax data continued to be backed up overrode Mr White's interests. He does not seem to consider the relevance of the Court order.

[55] Mr Heywood's evidence about that was that at that stage he was backing up Systemax's data to SkyKick and did not stop doing that until Systemax arranged for SkyKick to transfer the account to another IT provider. Systemax took some time finding a new IT provider.

[56] It was put to Mr Heywood that his affidavit sworn on or around 4 April was incorrect in saying that he had ceased acting for Systemax. He replied, "It was – for me it was correct. I stopped trading with Systemax in the sense I was----" – t 1-29. He went on to say that, "I had ceased trading with Systemax and the – the next process was to hand over that IT and that documentation to a new IT incumbent, but the invoices sent to Systemax were to cover my time and my – and the – the SkyKick backup. There was no profit. There was no additional value from – from that."

[57] In my view, the respondents continued to work for Systemax after 27 March 2019. That work was limited to tasks associated with backing up Systemax's data and making arrangements to hand over to a new IT provider. The respondents billed Systemax for this work.

Charge 3

[58] The third charge alleged against the respondents was that Discount Lighting Qld was a client of the applicant as at 17 December 2018, the date when the first respondent ceased to work for the applicant. Again, I record that the date established by the evidence is 17 January 2019. Mr Heywood admitted that after ceasing to work for the applicant he, on behalf of the second respondent, undertook work for Discount Lighting, he thought from February 2019 – t 1-32.

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[9] tt 1-63-64.

[10] Court Document 23, Exhibit Bundle p 22.

[59] Mr White swore that between November 2018 and March 2019 Discount Lighting was a client of the applicant. On 7 March 2019 Mr White contacted Discount Lighting with the suspicion that Mr Heywood had been working for them. Discount Lighting replied, acknowledging that they had been using Mr Heywood's services but saying, "The service we received from White IT was excellent, but it came at a cost and that cost was greater than we could afford."[11] Mr White accepted in cross-examination that on 7 March 2019 he knew that Discount Lighting would not be using the services of the applicant again. There is no evidence as to when Discount Lighting stopped using the applicant's services. The email of 7 March 2019 shows it was some time prior to that date.

[60] For the same reasons as I express at paragraphs [39] and [42], I dismiss charge 3 because the facts of this charge raise an ambiguity as to whether or not the respondents have breached the order.

Alternative relief

[61] In the alternative to the three charges of contempt, the applicant asked for an order that "the Court stipulate a time seven days from the date of the order within which the respondents are to perform the matters specified in paragraph 1(d) of the orders of 27 March 2019". That is, a time by which the respondents are to cease acting for the applicant's clients and provide evidence of that. While my findings about the contempts alleged were final, this alternative relief is sought on an interlocutory basis. I determine these issues on the balance of probabilities.

[62] While I have not found for the applicant in relation to contempt charges 2 and 3, it seems to me that the applicant has a strong case that after 27 March 2019 the respondents continued to act for Systemax and Discount Lighting. Further, on the evidence before me both those companies may well have been customers of the applicant as at 17 January 2019, the date when the contractual arrangements between the applicant and the first respondent were terminated. In these circumstances, it seems to me that the applicant has made a prima facie case that the first respondent has infringed cl 5 of the contract between the applicant and the first respondent.

[63] On the evidence before me, the balance of convenience favours the applicant. I can therefore see a basis to issue an order against the respondents, restraining them from further acting for Systemax and Discount Lighting and compelling them to depose to the dealings they had with Systemax and Discount Lighting from 17 January 2019 until the date the respondents ceased to act for those two customers. The restraint established by cl 5 of the contract was to last only one year and the terms of any order should reflect that. I will ask the parties to provide a draft.

Order for delivery up of password or code

[64] Lastly the applicant sought an order that:

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[11] Court Document 16, Exhibit page 1.

> "Within seven days of the Court's order, the first respondent provide to the applicant any and all passwords, access codes and other access passes relating to any programs, software or systems of any client of the applicant's business he has in his possession or control."

[65] Again, for clarity, so far as this part of the application is concerned, I am asked for interlocutory orders and I apply the standard of proof on the balance of probabilities and take into account a passage of hearsay evidence to which objection was taken on the contempt charges.

[66] It is uncontroversial that while working for the applicant Mr Heywood set up a Microsoft Office 2006 system for a client of the applicant, Crafers Engineering. Before changes to that system can be made on the Crafers Engineering computer system, Microsoft requires authentication to show that the person making the changes is the owner of the system. There are two ways in which authentication can be provided. A password can be provided. The password would have been set by Mr Heywood when he set up the system. Alternatively, a code which is valid for a limited time can be sent to a telephone number which, at the time the software was initially installed, was associated with the software.

[67] Mr White swears, and his evidence was not challenged, that Mr Heywood did not record a password in the applicant's systems for use in relation to the Crafers Engineering software he installed. Further, so far as the applicant can discover, the mobile telephone which Mr Heywood linked to the Crafers Engineering software account was not a phone number associated with the applicant and was not a phone number associated with Crafers Engineering. The only information the applicant has is that the mobile telephone number ends in "00". Mr Heywood has a mobile telephone number which ends in "00". Further, at the time Mr Heywood worked for Crafers, he had had a motorcycle accident, smashed his work phone, and was therefore reliant on his personal mobile phone. Mr Heywood admitted that at the relevant time he had an accident on a motorcycle and had damaged his work phone – t 1-59. However, he denied that he was using his mobile phone for work purposes at the time – t 1-59.

[68] Although the applicant has attempted to have Mr Heywood pass on a code sent to his mobile telephone number, Mr Heywood refuses to co-operate with this process. His approach has been simply to be sarcastic: "You have clearly forgotten the password for the Microsoft account for your client. If you are in need of a competent IT company to assist with the recovery of this password, I'm happy to assist."[12]

[69] The respondents submitted that this interlocutory relief was of a mandatory kind and therefore the Court had to be convinced to a much higher level than on an ordinary interlocutory injunction. That may be accepted. However, the applicant has I think made out a sufficiently strong prima facie case and the relief sought will provide very little inconvenience, and no detriment, to the respondents. While it may well be that the applicant could seek some formal relief against Microsoft in relation to the problem, as the respondents suggest, balancing all things in the evidence before me, it would be far

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[12] Court Document 16, "DW6".

more convenient for the respondents to provide the information and co-operation necessary than for the applicant to pursue Microsoft.

[70] It was further submitted by the respondents that the relief sought in this respect is not in furtherance of any relief sought in the statement of claim in the proceeding. That may be accepted, but it is not an insuperable obstacle to my granting this relief on an interlocutory basis in circumstances where Mr White's evidence before me was that because he has neither the password nor access to the telephone number ending in "00", he cannot deal appropriately with the Crafers Engineering software. The subject matter of the application is closely associated with the subject matter of the proceeding. The statement of claim can be amended in due course if it is necessary; this interlocutory relief may well have final effect.

[71] I am therefore prepared to make an order of the type sought. I think Mr Heywood ought to be ordered to produce the password, or swear that he does not have it. Some thought will have to be given to the mechanics of the remainder of the order. While it is possible for Mr White to cause the Crafers Engineering software to generate a code to be sent to the phone number ending in "00", that code is not effective for long, so that it will have to be promptly recorded and reported back to the applicant. It seems to me that the most appropriate order would be one which compelled Mr Heywood to surrender his phone, and any code necessary to access it, to his solicitors at a particular time when those solicitors were in a meeting with the applicant's solicitors. Mr White could then cause a code to be generated and sent to the phone and, if it was received on Mr Heywood's telephone, it could be recorded and sent to Mr White by his solicitors. Again I will ask the parties to bring in a draft.

Costs and Remitter

[72] I will hear the parties as to costs, and as to why this proceeding should not be remitted to the District Court.