SUPREME COURT OF QUEENSLAND

CITATION:	*Buckby & Anor v Wharton & Anor* [2012] QSC 416
PARTIES:	**RICHARD WILLIAM BUCKBY and ROBERT WILLIAM HUTSON** **(applicants)** **v** **JOHN MACARTHUR WHARTON and ELIZABETH MARY WHARTON** **(respondents)**
FILE NO:	BS3760 of 2012
DIVISION:	Trial Division
PROCEEDING:	Application for punishment for contempt
DELIVERED ON:	20 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	6,7 and 10 December 2012
JUDGE:	Mullins J
ORDER:	**1. It is declared that John Macarthur Wharton committed contempt by failing to comply with the order of P Lyons J made on 4 May 2012 in this proceeding, as particularised in charges 2, 3 and 4 in the second further amended application filed on 13 December 2012.** **2. John Macarthur Wharton is fined $5,000 for the contempt.** **3. The fine is to be paid within three months of the date of this order and, in default of payment within that time, the non-payment of the fine must be referred by the Sheriff to SPER (State Penalties Enforcement Registry).**
CATCHWORDS:	PROCEDURE – CONTEMPT, ATTACHMENT AND SEQUESTRATION – CONTEMPT – WHAT CONSTITUTES – DISOBEDIENCE OF ORDERS OF COURT – where the mortgagee of the respondent's grazing properties and livestock appointed receivers and managers to the secured property and livestock – where the receivers attempted to remove livestock, but were stopped by the respondent – where the receivers obtained a court order restraining the respondent from interfering with the receivers' use, entitlement to and possession of the secured properties and livestock – where the order included a notice that if the respondent did not obey the order he would be liable for contempt – where the receivers directed the respondent to vacate the property on which the respondent resided by a specified date – where the respondent engaged security

guards to prevent the receivers from entering the secured properties – whether the respondent knew that the conduct in preventing the receivers from entering and taking possession of the secured properties and livestock was in contempt of the court order

PROCEDURE – CONTEMPT, ATTACHMENT AND SEQUESTRATION – POWER OF COURT TO PUNISH FOR CONTEMPT – IN GENERAL – whether the court should exercise the discretion not to punish for contempt – where personal deterrence is not required – where general deterrence is required – what punishment is appropriate for the contempt and the circumstances of the contemnor

Uniform Civil Procedures Rules 1999, r 930

Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd (1986) 161 CLR 98, considered
Australian Securities and Investments Commission v Michalik (2004) 52 ACSR 115, considered
Lade v Co Pty Ltd v Black [2006] 2 Qd R 531, followed
In re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement [1966] 1 WLR 1137, considered
Paroz v Paroz [2010] QSC 488, considered

COUNSEL: B D O'Donnell QC and D de Jersey for the applicants
D G Clothier SC and S Webster for the respondent
John Macarthur Wharton

SOLICITORS: Gadens Lawyers for the applicants
Levitt Robinson for the respondent John Macarthur Wharton

[1] The respondents had loans from the Bank of Western Australia Ltd (BankWest) secured by mortgages to BankWest over their leasehold grazing properties and livestock.

[2] On 15 November 2011 the applicants (who are partners of KordaMentha) were appointed joint and several receivers and managers (receivers) of some of the assets of the respondents by BankWest. These assets included the properties known as Runnymede Station and Red Rock and all the respondents' livestock located on those properties. The applicants had extensive powers under the mortgages, including power to take possession of the assets to which they had been appointed receivers.

[3] Accountant Mr Nolan of KordaMentha in Townsville has, subject to the supervision of the applicants, had the conduct of the file on behalf of the applicants.

[4] The respondents lived at Runnymede in respect of which Mr Wharton was the registered lessee. On 19 April 2012 BankWest gave notice to the respondents' daughter and Mrs Wharton to vacate Runnymede by 20 June 2012 and on 13 April 2012 the solicitors for BankWest (Gadens) gave notice to Mr Wharton to deliver up possession of Runnymede within one month.

[5] On 19 April 2012 Mr Nolan attended Runnymede accompanied by Mr Sciberras (an employee of KordaMentha), a security guard and two police officers for the purpose of removing the cattle from the property. Mr Wharton did not cooperate and accused Mr Nolan of trespassing. Mr Nolan proceeded to organise those under his direction to carry out works to facilitate removing the cattle and the muster commenced on 20 April 2012. The respondents lodged a dispute with the Financial Services Ombudsmen on 20 April 2012 and obtained legal advice from Platinum Lawyers (Platinum) that the applicants must suspend their enforcement action. That advice was set out in a letter dated 21 April 2012 addressed to Gadens, a copy of which was provided by Mr Wharton to Mr Nolan on 21 April 2012. In another conversation about 30 minutes later, Mr Nolan advised Mr Wharton that the applicants' lawyers "disputed the legality" of the Platinum letter. Mr Wharton informed Mr Nolan that there were people coming over to physically remove him from the property. Mr Nolan asked whether Mr Wharton was going to inflict violence to remove the applicants' employees and agents and Mr Wharton responded "Yep. Yep. Because you've been told." Mr Nolan and those working with him left the property without removing the cattle.

[6] This incident on 21 April 2012 was the catalyst for the applicants commencing this proceeding on 24 April 2012 seeking an injunction that the respondents be restrained from interfering with the applicants' use, entitlement to and possession of the property mortgaged to BankWest and to which the applicants had been appointed as receivers. The applicants had the power as a result of the mortgages to take possession of the respondent's relevant assets without seeking the assistance of an order from the court. The court's intervention was required because of the opposition of the respondents on 21 April 2012 to the lawful exercise by the respondents of their powers.

[7] On 4 May 2012 P Lyons J made an order (the subject order) in this proceeding in the following terms:

> "The Respondents by themselves, their agents and employees, are restrained from interfering with the Applicants' use, entitlement to and possession of the Respondents' property which are the subject of security of the Bank of Western Australia Ltd ABN 22 050 494 454 and from dealing in any way with the assets and undertakings of the Respondents which are set out in paragraph 9 of the affidavit of Graham Greentree (being document 5 on the Court file) save as may be permitted or directed by the Applicants."

[8] The order was endorsed with the following notice:

> "NOTICE TO RESPONDENTS: If you do not obey this Order, you will be liable to Court proceedings to compel you to obey it and punishment for contempt."

[9] Mr Nolan attended at Runnymede on 11 May 2012 and served Mr Wharton with a copy of the subject order, a copy of the affidavit of Mr Greentree referred to in the subject order and a letter from Gadens on behalf of the applicants directing Mr Wharton to vacate Runnymede Station and deliver up vacant possession to the applicants by 30 May 2012. It is cumbersome that the subject order did not identify within the order itself the assets and undertakings of the respondents to which the injunction related, as the affidavit of Mr Greentree (with exhibits) is 2.5 cms thick. The subject order would have been self-contained if the contents of

paragraph 9 of Mr Greentree's affidavit were set out in the order. There was no point taken by Mr Wharton about this aspect of the subject order.

The charges

[10] The applicants apply for an order punishing Mr Wharton for contempt for his conduct in "knowingly impeding the administration of justice" by causing the subject order to be thwarted on each of the occasions specified in the charges.

[11] The charges set out in the application are:

> "**[Charge 1**] On Tuesday, 5 June 2012, John Macarthur Wharton, engaged security guards to prevent the Applicants (and their agents or employees) from entering the property known as 'Runnymede Station';
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> Particulars
>
> (i) At approximately 8:00am, he told Mr Gavan Nolan (a representative of the Applicants) by telephone that he had engaged security guards on Runnymede and that he had instructed the security guards to prevent access to Runnymede by Mr Nolan or any people engaged by him or the Applicants.
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> **[Charge 2**] On Thursday, 7 June 2012, a security guard engaged by John Macarthur Wharton and acting upon his instructions prevented Mr Gavan Nolan, a representative of the Applicants, from entering the property known as 'Runnymede Station'
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> (i) At approximately 11:10am Mr Nolan attended at Runnymede Station. He was stopped at the gate to Runnymede Station by a person who identified himself as Ricky Williams, an employee of Sundown Group. Mr Nolan asked Ricky Williams if he was preventing him from accessing Runnymede Station. He replied that he was. Mr Nolan asked Ricky Williams if he was preventing him from accessing Runnymede Station on the instructions of John Wharton. He replied that he was.
>
> [**Charge 3**] On Thursday, 7 June 2012, John Macarthur Wharton, forcibly entered the property known as Red Rock with a security guard for the purpose of attempting to remove the Applicants' employees and contractors from Red Rock.
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> Particulars
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> (i) At approximately 8:18pm, John Macarthur Wharton entered Red Rock with another person who identified himself as a security guard who had been hired by John Macarthur Wharton to get people off the premises;
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> (ii) John Macarthur Wharton cut a rope that was in front of a grid which restricted access to the residence on Red Rock and then drove a vehicle across that grid and entered the residence on Red Rock; and
>
> (iii) John Macarthur Wharton told Mr Victor Sciberras that he would remove him because the court order 'doesn't stand up.'

> [**Charge 4**] On each day between Tuesday, 5 June 2012 and Thursday 14 June 2012, John Macarthur Wharton maintained the engagement of security guards to prevent the Applicants (and their agents or employees) from entering the property known as 'Runnymede Station'."

The issues

[12] The evidence of the conduct alleged against Mr Wharton that forms the basis for the charges is not disputed by Mr Wharton. Mr Wharton accepts that the facts comprising charges 3 and 4 are proved and the constituted breaches of the subject order. Mr Wharton disputes charges 1 and 2 for technical reasons. He also disputes whether the applicants can prove that he did the relevant acts knowing that he was in breach of the subject order.

[13] The issues that have to be determined are:

(a) whether the conduct that is the subject of charge 1 is capable in law of constituting a contempt of the subject order;
(b) whether charge 2 is duplicitous as it is covered by charge 4;
(c) whether Mr Wharton's conduct that amounted to contempt of the subject order was committed by him knowing that it was in breach of the subject order;
(d) what is the relevance to penalty of the advice Mr Wharton was given by his lawyers on and from 4 June 2012 until 14 June 2012.

[14] In order to address the issues, it is necessary to analyse the evidence of the events between 1 and 14 June 2012 and to resolve the factual matters that are relevant to determining Mr Wharton's state of mind when he engaged in the conduct that breached the subject orders.

[15] It is common ground that any finding on Mr Wharton's state of mind at the relevant times must be proved by the applicants beyond reasonable doubt: *Lade v Co Pty Ltd v Black* [2006] 2 Qd R 531 at [65].

The engagement and advice of Kerry Smith Douglas Lawyers

[16] Mr Wharton had been introduced by fellow cattlemen to one Pierre Freeman who told Mr Wharton that he had been an insolvency practitioner in New Zealand and he could help him with documents that would be effective to discharge the debt to BankWest. Among the documents that Mr Wharton signed at Mr Freeman's suggestion were two documents prepared by Freeman each entitled "Bill of Exchange" which were received by BankWest with other letters from Mr Wharton on 25 May 2012 and appear to be a unilateral attempt by Mr Wharton to settle his dispute with BankWest by providing evidence of an unconditional offer to pay a settlement sum of $8m on or before 1 July 2012.

[17] By the weekend of 2 and 3 June 2012, Mr Wharton had terminated the retainer of Platinum and engaged Kerry Smith Douglas Lawyers (KSD) to act on behalf of the respondents to obtain an injunction against the applicant and BankWest. Mr Wharton dealt with the principal legal director, Mr David McIlwraith, who was supported by an employed solicitor Mr Jonathon Songan. KSD retained barrister Ms Pamela Wilson to act on behalf of the respondents. Mr Songan was only

admitted as a lawyer in January 2011 and was not involved in giving advice to Mr Wharton, but acted as the contact for Mr Wharton with KSD and Ms Wilson and provided assistance to Mr McIlwraith under direction. Mr Songan was unable to recall much about his involvement and did not throw any light on the communications between KSD and Mr Wharton.

[18] A dispute with the former principal of KSD resulted in Mr McIlwraith and his employees being locked out of KSD's office in mid July 2012 and the loss of some of the records of KSD. By August KSD had changed its name to Apex Law Pty Ltd. Apex Law Pty Ltd was subpoened in this proceeding to produce its files relating to the respondents' dispute with the applicants. A selection of the subpoened documents comprise exhibit 3. It was patent from the subpoened documents that the records held by Apex Law Pty Ltd were incomplete.

[19] There are significant discrepancies between aspects of the evidence given by Mr Wharton on the timing and details of the advice that he received from KSD and Ms Wilson of counsel and the versions of the same events given by Mr McIlwraith and Ms Wilson of counsel. There are some objective facts that assist in reconciling the discrepancies. I make findings that are necessary on the disputed facts in the course of setting out the chronology of the events that unfolded as Mr Wharton dealt with KSD.

[20] On 3 June 2012 at 1:05pm Mr Wharton forwarded by email to KSD a copy of the subject order and the letter dated 9 May 2012 from Gadens to Mr Wharton. Although Mr Wharton does not concede that this email was sent by him (because his name is not at the end of the email), the terms of the email are consistent only with being generated by Mr Wharton. Mr Wharton made the observation in this email that "The court order is about not interfering with the receivers." He also gave the instruction "We need to focus on the real reason here and that is, that we have paid the bank through the Bills of Exchange Laws." (There does not appear to have been any basis for this assertion in the bill of exchange documents that Mr Wharton also provided to KSD.) The assertion by Mr Wharton to KSD that he had paid off the debt may have affected the advice given by Mr McIlwraith (at Transcript 1-76). Mr McIlwraith was undertaking research to understand the defence based on the bills of exchange and Mr Songan was working with Ms Wilson of counsel to prepare an urgent application to bring before this court on 4 June 2012. Mr Songan forwarded the email from Mr Wharton to Ms Wilson with the attachments and a draft affidavit provided by Mr Wharton.

[21] Ms Wilson provided advice to Mr Songan by email sent at 2:52pm as to what was required to obtain an injunction, including advising "the other side" of the intention to apply for an injunction.

[22] At 7:06pm on 3 June 2012 KSD sent an email to Mr Pennicott of Gadens that attached a letter foreshadowing an application by Mr Wharton for an injunction to prevent the receivers from acquiring possession of Mr Wharton's property. The letter alleged that Mr Wharton had settled his debt on 25 May 2012 when BankWest accepted a bill of exchange from Mr Wharton and referred to a written agreement that proposed payment in full of what was described as the "settlement amount."

[23] Mr Wharton signed an affidavit on 4 June 2012. That affidavit attached copies of the two bills of exchange which Mr Wharton asserted that he "sincerely" knew

satisfied the debt to the bank "after wise study of several Commonwealth statutes in accordance to the proper interpretation of the law." Mr Wharton also asserted that the receivers were not allowing him any time to get his affairs in order "despite the written agreement allowing me until the 1st of July 2012." Mr Wharton therefore asked the court for a four week stay in proceedings to allow him to properly file his substantial claim against the receivers and BankWest. Mr Wharton neither referred to the subject order in his affidavit nor exhibited a copy of the subject order to his affidavit. Mr Wharton concedes (at Transcript 2-53) that he had been served with the subject order, understood its terms and knew that if he disobeyed the subject order, he might be liable for contempt of court.

[24] The application that was prepared named BankWest and the receivers as respondents and purported to be an originating application and was therefore not filed in this proceeding.

[25] Mr Songan sent an email to Mr Pennicott at 8:27am on 4 June 2012 attaching a copy of mortgage no 711928314, a draft of the affidavit of Mr Wharton and a draft of the originating application.

[26] Another email was received by Mr Pennicott from KSD at 10:41am on 4 June 2012 that attached a letter signed by Mr McIlwraith that stated unless they had Gadens' response by 10:30am, Pamela Wilson of counsel would be approaching the court for an injunction.

[27] Mr Pennicott responded to KSD by email sent at 10:59am on 4 June 2012 advising that Gadens acted on behalf of both BankWest and the receivers and that they "will require an opportunity to be heard on any application to which they are made a party" and requested that KSD ensure that they advise the court that BankWest and the receivers wish to be heard by the court before any such order is made on the application of Mr and Mrs Wharton.

[28] Ms Wilson instructed by Mr Songan attended before Boddice J at 11:08am on 4 June 2012 and filed by leave the originating application (unsigned and incomplete) and a facsimile of Mr Wharton's affidavit. The filing fee was not paid by KSD and as a result no new file was created in the court. The documents that were before Boddice J, including the court order sheet, comprise exhibit 5 on this application. They include a copy of the subject order and the letter emailed by KSD to Gadens at 10:41am on 4 June 2012. Boddice J adjourned the application to a date to be fixed to be brought on on the giving of 24 hours written notice to the other party and costs were reserved.

[29] Ms Wilson returned to KSD's office with Mr Songan and a telephone call on loud speaker was made to Mr Wharton in which Ms Wilson informed Mr Wharton of the order that had been made by Boddice J. Mr Wharton accepts (at Transcript 2-55) that he understood that the court had not granted the injunction he was seeking against the receivers and that the subject order was still binding on him.

[30] KSD sent an email to Mr Pennicott at 12:36pm on 4 June 2012 that attached a letter that included the following:

> "The application was adjourned to a date to be fixed, on the giving of 24 hours notice with no orders as to costs. Therefore we consider your clients are restrained from entering onto or taking possession of

> our client's property. We also note your advice to us that your clients wish to be heard by the Court before any order is made.
>
> We are preparing a further affidavit setting out our client's claim to accord and satisfaction of the alleged debt, giving rise to a receiver being appointed. The basis of our client's position is that your client executed this bill of exchange satisfying the debt."

[31] Apart from the fact that what KSD considered was the outcome of the hearing before Boddice J was irrelevant if it did not reflect the actual outcome, the suggestion that the applicants were restrained from entering onto or taking possession of Runnymede when the subject order remained extant was clearly wrong. The so-called bills of exchange that were exhibited to Mr Wharton's affidavit were not executed by BankWest, so the assertion in the letter that the bill of exchange had been executed by BankWest was also clearly wrong.

[32] At 1:47pm on 4 June 2012 Mr Songan sent an email to Mr Wharton attaching the letter of 4 June 2012 addressed to Mr Pennicott. The email stated "If anybody were to approach your property to take possession please show them this particular letter for now."

[33] Mr Pennicott responded to the letter of 4 June 2012 by email sent to KSD at 2:35pm on that date. The email recited the timetable of recent communications and noted that if no substantive order had been made by Boddice J that "it is nonsense to assert that our clients are restrained from entering or taking possession of your clients' property." The email referred to the court order in favour of the applicants and confirmed that the applicants required the respondents' strict compliance with the terms of that order and requested confirmation that "as directed by the receivers, your clients have now vacated the property."

[34] In paragraphs 23 and 24 of Mr Wharton's affidavit filed on 20 September 2012 (Mr Wharton's first affidavit), Mr Wharton sets out what he says he was told by Ms Wilson and Mr McIlwraith respectively in a conference telephone call involving Mr McIlwraith, Ms Wilson and Mr Songan. Mr Wharton relies on the entry that he made in his diary for 4 June 2012 to support his recollection of that conference call:

> "Spoken to Jonathon Songan, David McIlwraith and Pamela Wilson (barrister) today about injunctions and security guards."

[35] What Mr Wharton attributed to Ms Wilson in the conference call was:

> "We appeared this morning before Justice Boddice. The application was adjourned.
>
> We will file a fresh application on your behalf for an urgent injunction soon and either party can apply to the Court on 24 hours' notice to the other. We will redo your application in a couple of days. We believe that the Receivers can't enter onto your land or take possession of your property before the Court has had the opportunity to determine your application, as for the Receivers to do so would be to act as if the Court had already decided the matter in the Receivers' favour.

> We have received advice from a Silk that you should hire licensed and trained security guards to protect your properties until we have had a decision from the Court on the urgent injunction which we are going to seek on your behalf."

[36] Paragraph 24 of Mr Wharton's first affidavit then stated:

> "The name of the silk was not mentioned, I have a distinct recollection of emphasis being placed on the fact that the security guard needed to be registered and trained.
> Later in the same conversation, David Mcllwraith said words to the effect:
> *'We do not believe that the Court Order of 4 May will stand up after our urgent application has been heard'."*

[37] The evidence of Ms Wilson and Mr McIlwraith does not support one conversation only on 4 June 2012, as suggested by Mr Wharton's first affidavit. It is likely that there was one telephone call involving at least Mr Songan and Ms Wilson on their return to the office of KSD after the unsuccessful application before Boddice J and one or more telephone calls later in the afternoon (and possibly on 5 June 2012) between at least Mr McIlwraith and Mr Wharton. I therefore find that paragraphs 23 and 24 of Mr Wharton's first affidavit conflate more than one telephone call, and it is likely that advice was given by telephone to Mr Wharton on 4 June 2012 at the least to the effect that the receivers could not enter onto the property before the court had determined his application, as that was consistent with the view expressed by KSD in the letter of 4 June 2012 addressed to Mr Pennicott that had also been provided to Mr Wharton.

[38] Mr McIlwraith did not have a clear recollection of the advice that he gave Mr Wharton on 4 June 2012. When purporting to repeat the advice that he gave to Mr Wharton after the unsuccessful application to court on 4 June 2012, he suggested (at Transcript 1-75) that it was in these terms:

> "The barristers are of the view that, if you've got a strong case, you should stand your ground and – and employ security guards for that purpose, but you'd need to get your material on to the Court so they understand why you would be in breach of that Court order."

[39] Mr McIlwraith then resiled from having given advice in those terms and specifically mentioning to Mr Wharton that he would be in breach of the court order. It is noteworthy, however, that what Mr Wharton attributed to his lawyers in paragraphs 23 and 24 of his first affidavit about hiring security guards and that the subject order would not "stand up" after Mr Wharton's application had been heard echoes some of what Mr McIlwraith initially said was his advice to Mr Wharton. There was a common theme from both Mr McIlwraith and Mr Wharton about the content of the advice on 4 June 2012 that Mr Wharton had to seek the court's assistance.

[40] There were two women who were helping the respondents pack up Runnymede on 4 June 2012. They were Ms Stafford and Ms Anning. Neither were required for cross-examination. Ms Stafford remembers that the day of the events that she deals with in her affidavit was 4 June 2012, because it was her daughter's birthday. Ms Anning can recall being in the living area of the house when Mr Wharton was on the telephone and overheard him saying "great, we can do that" and that when he got off the telephone he said that they were within their rights to get security guards

to protect their property and that applied to Red Rock too. Ms Anning said that Mr Wharton said words to the effect that his lawyers had got advice from a silk that he could get security guards. Ms Anning gave Mr Wharton the mobile telephone number of Mr Tom Holden who she knew had a firm of security guards. Ms Stafford recalls Ms Anning mentioning the name of Mr Holden whose name she also recognised. Mr Holden received a telephone message on his mobile from Mr Wharton on the evening of 4 June 2012 and the message stated that he wished to have security guards on his property at Runnymede.

[41] A telephone conversation took place between Mr McIlwraith and Mr Pennicott at about 4:45pm on 4 June 2012. Mr McIlwraith recalls that he was endeavouring to procure an undertaking from the applicants not to take possession of the secured property, while Mr Wharton's materials for making a further application to the court were being prepared. Mr Pennicott was not required for cross-examination and his record of the contents of that conversation included that Mr McIlwraith confirmed that he had received Mr Pennicott's email sent at 2:35pm and the application before Boddice J was adjourned and could be brought by 24 hours' notice, Mr McIlwraith proposed to bring the matter back on before Boddice J the next day, and Mr McIlwraith acknowledged that there was no order made restraining the receivers and that he had advised Mr Wharton that there was no injunction in place. (Although an objection was taken on behalf of Mr Wharton to Mr Pennicott's references to what Mr McIlwraith said he told Mr Wharton on the basis that it is hearsay, those statements are admissible as what Mr McIlwraith informed Mr Pennicott that he had done and not as the truth of what he said he had stated to Mr Wharton.)

[42] Mr McIlwraith sent a letter by email to Mr Pennicott at 7pm on 4 June 2012 that referred to that telephone conversation and included the following statements:

> "We undertake to provide you with documentation and material upon which we intent (*sic*) to rely 24 hours prior making an application for an injunction refraining the receivers from entering our clients' property.
>
> We require your undertaking to cause the receiver to refrain from attempting to take possession of our clients' stock or property without first providing us 24 hours notice of the intention to do so.
>
> We further undertake to settle the material on which we rely within 7 days of today's date.
>
> Kindly confirm that BankWest will not instruct the receiver accordingly.
>
> We are instructed by our client that he does not authorise the receiver's entry onto his property or to access stock for their removal until such time as this matter will be heard before the Court."

[43] Mr Pennicott responded to KSD by email sent at 7:27pm on 4 June 2012 which included:

> "Finally you have requested that the Receivers undertake not to take any further action in relation to the properties until the application which has not as yet been served upon us is determined by the Court.

> The Receivers are not prepared to provide that undertaking. The Receivers have the benefit of a final order from the Court made 4 May, 2012. Your clients are by terms of that order restrained from interfering with the Receivers' use, entitlement to and possession of the Runnymede and Redrock properties and the stock depastured thereon save as may be permitted or directed by the Receivers. The Receivers require your clients' strict compliance with the terms of that order."

[44] Despite the clear terms of this email, Mr McIlwraith does not recall (at Transcript 1-91) whether he personally passed Mr Pennicott's advice as to the applicants' position on strict compliance with the subject order to Mr Wharton. Mr McIlwraith does not recall that he even informed Mr Wharton that he was seeking an undertaking from the applicants not to take possession of the respondents' properties and did not inform Mr Wharton that the applicants refused to provide the undertaking.

[45] Mr Wharton sent an email to KSD on 5 June 2012 at 8:02am that addressed Mr Songan and included the following instruction and advice:

> "Please inform Pamela and David that Bill Buckby (receiver) has been on the radio across Queensland ABC Country Hour yesterday, saying that they will be entering our property Runnymede, and mustering our cattle and selling them, and that Runnymede will be sold in a few months. The ABC have asked me to respond, but I have refused at this stage. We need this legal process to be in this morning urgently. If they enter our property before the legal paperwork is in place, I will be physically removing them, and I am within my rights until our case has been heard in a court. I have a group of people from all over the region prepared to back me on this, by turning up here at Runnymede to help remove them, as they are also aware of the banks corrupt practise, that has put us in this position, and are ready to fight this case all the way to the High Court if necessary."

[46] Mr Wharton concedes (at Transcript 2-64) that his reference in this email to "the legal paperwork is in place" was to the anticipated court order that KSD would obtain on his behalf that would set aside (or stay) the subject order. The tenor of this email is consistent with Mr Wharton implementing the advice that he attributed to his lawyers in paragraphs 23 and 24 of his first affidavit.

[47] Ms Wilson telephoned Mr Harrison QC (who made a note of the date and time of the call) at about 8.40am on 5 June 2012, asking for help or advice in relation to a matter involving Mr Wharton. Ms Wilson told Mr Harrison that there had been an unsuccessful application before Boddice J on 4 June 2012 for an injunction to restrain the receivers from taking certain actions, but Ms Wilson did not tell Mr Harrison about the subject order. During the conversation Mr Harrison offered to send Ms Wilson some precedent defences that might indicate lines of enquiry that she might take in challenging the validity of the appointment of the receivers and Ms Wilson accepted the offer. Mr Harrison also said that Mr Wharton should engage security guards to keep the receivers out, since if they were kept out, and they applied to the court to be allowed to enter, Mr Wharton could argue against making such orders, as such orders would disturb rather than preserve the status quo.

[48] On 5 June 2012 at 8:58am Mr Harrison sent an email to Ms Wilson attaching pleadings that he had prepared in other matters and referred Ms Wilson to the judgment in one of the cases for which he provided the defence and counterclaim where summary judgment was successfully resisted by the bank customer. Mr Harrison stated in the email:

> "I tell my clients in these cases to get armed guards to keep out the receiver. Then the receiver has to go to court and has the onus."

[49] Ms Wilson informed Mr McIlwraith of the content of the email from Mr Harrison and forwarded the email to Mr McIlwraith. Ms Wilson did not inform Mr McIlwraith that she had not told Mr Harrison about the subject order. It should have been apparent to both Ms Wilson and Mr McIlwraith that Mr Harrison's advice was not appropriate for Mr Wharton, when the status quo was that the applicants had the benefit of the subject order.

[50] A barrister's advice is only as good as the brief that is given to him or her. Mr Harrison had not been formally briefed by KSD at the time he sent the email on 5 June 2012. He responded to a colleague's enquiry and provided the email of 5 June 2012 by way of assistance. Mr McIlwraith and Ms Wilson were the lawyers retained at that time to act on behalf of Mr Wharton. Any competent lawyer with knowledge of the subject order would not have given advice to Mr Wharton to engage in conduct that was in breach of the subject order.

[51] Mr Holden had a telephone conversation with Mr Wharton between 9am and 10am on 5 June 2012, as a result of which Mr Holden agreed to Mr Wharton's request to send a security guard to Runnymede for protection of the property. Mr Holden said that Mr Wharton told him the receivers were coming to the property and he had been advised by his lawyers that he should get security guards to stop people coming to the property while waiting on "some sort of decision." Mr Holden organised for a security guard to travel on 5 June 2012 from Townsville to Hughenden and from Hughenden to Runnymede which took all day. The security guard arrived at Runnymede on the evening of 5 June 2012.

[52] The applicants focused on the fact that Mr Wharton had contacted Mr Holden on 4 June 2012 to arrange security guards, when the suggestion of security guards in Mr Harrison's email was not made until 5 June 2012. The applicants argue that Mr Wharton made the decision himself to engage security guards and was not acting on legal advice. Implicit in this suggestion is that Mr Harrison was the only possible source for the suggestion of security guards to KSD. The deployment of security guards to keep the receivers out of the property was not such a novel proposition that it could come only from someone with Mr Harrison's experience. (It may be that Mr Wharton was told about a possible approach to a silk on 4 June 2012.) There is no doubt that the general advice in Mr Harrison's email of 5 June 2012 (given without the context of the subject order) was passed onto Mr Wharton. Mr Wharton's diary entry for 4 June 2012, what he told Mr Holden on the morning of 5 June 2012, and the evidence of Ms Stafford and Ms Anning is sufficient to preclude the applicants from excluding beyond reasonable doubt that Mr Wharton did not get advice and/or support from Mr McIlwraith in a telephone call on 4 June 2012 for the strategy of engaging security guards to protect Runnymede and Red Rock.

[53] Mr Nolan telephoned Mr Wharton at about 11:15am on 5 June 2012 and was informed by Mr Wharton that he was still at Runnymede and that he would not be

leaving until "the matter goes to trial." By the time of the telephone call, I infer that Mr Wharton had decided to pursue the strategy of engaging security guards to keep the applicants out of Runnymede. Whatever confirmation Mr Wharton had been seeking from KSD had been obtained by then which is likely to have been advice erroneously based on Mr Harrison's email.

[54] On 5 June 2012 KSD sent a letter to Mr Wharton by email, although Mr Wharton does not recall reading that letter until 10 June 2012. The letter stated:

> "We enclosed (*sic*) a copy of the order dated 4 May 2012 and you must abide by this court order.
>
> Despite the court order, we believe that the receivers have a duty to provide you with reasonable notice to access your property.
>
> As instructed we have appeared before The Honourable Justice Boddice on 4 June 2012 and will provide the legal representatives of Bank West and the receivers 24 hours notice of an application for an injunction against the receivers from removing any of your property."

[55] The time the email was sent to Mr Wharton by KSD cannot be verified because of the loss of electronic records by both KSD and Mr Wharton. It must have been sent prior to 12:31pm, as at that time on 5 June 2012 KSD sent an email to Mr Pennicott attaching the letter sent to Mr Wharton on 5 June 2012.

[56] Mr Pennicott responded by email to KSD at 2:23pm on 5 June 2012 pointing out that the letter of 5 June 2012 to Mr Wharton misstated the effect of the subject order and invited KSD to correct that misstatement by further email to Mr Wharton. Mr Pennicott referred to the advice that Mr Wharton had given Mr Nolan about not vacating the property until the matter went to trial and Mr Pennicott stated:

> "Mr Wharton's refusal to vacate the Property is a deliberate and ongoing breach of the order made 4 May, 2012 and as such amounts to contempt of Court. We hold instructions to take such steps as may be required to compel compliance by Mr Wharton with the Order of the Court."

[57] Despite Mr Pennicott giving the clearest indication in this email of the applicants' instructions to bring proceedings for contempt of the subject order in respect of Mr Wharton's refusal to vacate Runnymede, there does not appear to have been any similar unequivocal written advice from KSD to Mr Wharton about the applicants' intention.

[58] Mr Wharton was interviewed by a journalist for the Townsville Bulletin who published an article on 6 June 2012 that foreshadowed that Mr Wharton would seek an injunction to stop the receivers from mustering his cattle and putting the property on the market and stated:

> "Under the recommendation from his lawyers, the iconic grazier has also employed a security guard to block anyone getting on to the property. The move has caught KordaMentha by complete surprise after it expected Mr Wharton to be out by Monday.

> The news comes after the Supreme Court last month ruled that KordaMentha was acting within its rights to seize the property and made the order preventing Mr Wharton from interfering with the process."

[59] The fact that Mr Wharton informed the journalist that he was acting on "the recommendation from his lawyers" to employ the security guard to keep the receivers from his property also supports Mr Wharton's evidence that he was acting on his lawyers' advice in engaging security guards.

[60] The journalist also contacted Mr McIlwraith and the newspaper article set out the following quotes from him:

> "'We believe Mr Wharton has a strong case against the bank,' he said.
>
> 'We want this mortgage set aside (for) being misleading and deceptive,' he said."

[61] The newspaper article also set out what one of the applicants was reported as saying:

> "Mr Buckby said Mr Wharton's hiring of a security guard wasn't of much concern to KordaMentha.
>
> 'If Mr Wharton chooses to (not let us come in) he will be in contempt of court,' he said."

[62] Mr Wharton read the article in the Townsville Bulletin on the day it was published on 6 June 2012.

[63] Mr Nolan telephoned Mr Wharton at about 8am on 7 June 2012 and was told by him that he had engaged security guards on Runnymede on the advice of his lawyers and that he had given instructions to the security guards to prevent the receivers' access to Runnymede.

[64] On 7 June 2012 at about 11:10am Mr Nolan attended at Runnymede, but was stopped at the gate by a security guard who said he was preventing him from accessing Runnymede on the instructions of Mr Wharton.

[65] Mr Sciberras was at the residence at Red Rock on 7 June 2012 at about 8pm for the purpose of mustering the cattle when Mr Wharton and a security guard arrived. The security guard told Mr Sciberras that he was hired by Mr Wharton to get people off the premises. Mr Wharton said to Mr Sciberras that he would ring the police to remove him, as the subject order "doesn't stand up." Mr Wharton entered the house on Red Rock for the purpose of telephoning Ms Wilson using the land line telephone, but found that there was no telephone in the house and left to locate a good mobile telephone reception in order to telephone Ms Wilson. Mr Sciberras contacted the police and, as a result, Inspector Straatemeier arrived at Red Rock at 9:50pm. After a conversation with Mr Sciberras, Inspector Straatemeier drove to the road where Mr Wharton was waiting with the security guard. Mr Wharton asked Inspector Straatemeier to speak on his mobile telephone to Ms Wilson. Inspector Straatemeier recorded in his notebook what he was told by her that there would be proceedings in the Supreme Court "very shortly". He then spoke on the

telephone to Mr McIlwraith. Inspector Straatemeier recorded that Mr McIlwraith told him that the receivers should have given Mr Wharton due notice prior to taking any action and that there was another order in respect of that notice. Mr McIlwraith recalls referring the inspector to the subject order, but advising that he was hopeful by 12 June 2012 that Mr Wharton's application should be on before the court to sort the problem out. The advice given by both Ms Wilson and Mr McIlwraith to Inspector Straatemeier about the proposed application to the court is consistent with their support of Mr Wharton's course in keeping the applicants out of possession of the properties, until the matter returned to court. Inspector Straatemeier spoke to both Mr Sciberras and Mr Wharton about not taking any further action that night. Mr Wharton camped out on Red Rock that night. Both Mr Sciberras and Mr Wharton attended on Inspector Straatemeier the next day at the old Einasleigh Police Station and Mr Sciberras agreed not to remove any property from Red Rock prior to 15 June 2012 and Mr Wharton agreed not to go on to Red Rock in the meantime.

The application for punishment for contempt

[66] The application for punishment for contempt (the contempt application) in this proceeding was filed on 12 June 2012 at the same time as the originating application in proceeding BS5114 of 2012 was filed by the applicants to obtain an order that the respondents deliver up possession of Runnymede Station and Red Rock to them. The respondents were represented by senior and junior counsel instructed by KSD on 20 June 2012 and did not oppose the order for possession being made against them. They had already vacated Red Rock and completed their removal from Runnymede Station by 21 June 2012. On 20 June 2012 the contempt application against Mr Wharton was adjourned to a date to be fixed.

[67] The contempt application came on for hearing before Atkinson J on 20 September 2012. On that day Mr Wharton's first affidavit was filed by leave, and Mr Clothier of senior counsel on behalf of Mr Wharton informed Atkinson J that his client did not dispute the conduct alleged against him. Because of the content and timing of the advice which Mr Wharton said he was given by KSD and Ms Wilson about hiring security guards to protect his properties pending the decision of the court on the respondents' application against the applicants for an injunction, the applicants obtained an adjournment of the contempt application. The main purpose of the adjournment was to enable the applicants to subpoena KSD's file and to subpoena the lawyers on whose advice Mr Wharton said he acted in hiring security guards.

[68] The costs thrown away by the adjournment of the contempt application were ordered to be the applicants' costs in the cause.

Whether charge 1 is defective

[69] The conduct that is the subject of charge 1 is the engagement by Mr Wharton of security guards for the purpose of preventing the applicants from entering Runnymede. The particulars that are provided refer to a telephone call to Mr Nolan at 8am on 5 June 2012 (of which no evidence was given and which appears to have been relevant to charge 1 when it related to 7 June 2012 before it was amended) in which it is said that Mr Wharton advised Mr Nolan that he had engaged security guards and instructed them to prevent access to Runnymede by the applicants but which was at a time when no security guard was present at Runnymede. It is

submitted on behalf of Mr Wharton that charge 1 deals with an act in preparation of committing a breach of the subject order and, as such, does not amount to an actual breach of the subject order.

[70] Actual disobedience of a court order is the gist of contempt: *Lade* at [63]. The engagement of the security guards to prevent the applicants' from entering Runnymede on 5 June 2012 did not itself prevent the access of the applicants to Runnymede, before a security guard arrived at the property. Charge 1 therefore fails, as the conduct that is the subject of the charge did not breach the subject order.

Whether charge 2 is covered by charge 4

[71] Although Mr Wharton concedes that he committed the conduct that is the subject of charge 2, it is said on his behalf that the specific conduct that is made the subject of charge 2 is encompassed by charge 4 and that it is duplicitous for the applicants to prosecute both charges against Mr Wharton.

[72] Charge 2 is concerned with the specific incident that occurred on 7 June 2012 when Mr Nolan was prevented by the security guard from gaining access to Runnymede. Apart from that specific incident on 7 June 2012, charge 4 deals with the maintenance by Mr Wharton of security guards to prevent the applicants and their agents or employees from entering the property Runnymede. That charge extends to conduct on the part of Mr Wharton that is additional to that which is covered by charge 2, including conduct that was committed on 7 June 2012 by the continuous presence of a security guard on Runnymede that is not covered by the specific incident that is the subject of charge 2.

Did Mr Wharton know that he was in breach of the subject order?

[73] Even though Mr Wharton concedes that he committed the conduct that amounts to contempt of the subject order, the charges against him are framed to allege the aggravating circumstance that he committed that conduct "knowingly."

[74] Although proof of contempt does not require proof of knowing intent or wilfulness in doing the acts that amount to breach of the subject order, the applicants have endeavoured to prove that mental element, as it may affect the consideration of penalty.

[75] Mr Wharton asserted in paragraph 55 of his first affidavit that at the time he breached the subject order he "did not believe that I was doing anything unlawful." That is a conclusion that is inconsistent with admissions conceded by Mr Wharton. These admissions are that Mr Wharton knew the effect of the subject order and that the attempt of KSD on his behalf to obtain a stay of the subject order had not succeeded on 4 June 2012. Even the poor advice given to him by KSD was couched in terms that depended on Mr Wharton returning to court in order to displace the effect of the subject order. Although I find that the legal advice and/or support from KSD and Ms Wilson of counsel encouraged Mr Wharton's engagement of security guards to keep the applicants out of the properties, that course was embarked on by Mr Wharton with knowledge that what he was doing was in breach of the subject order. He took the risk that the court may have looked favourably on a subsequent application by him to stay the subject order, but he knew that application had not been made on 5 June 2012 and on each of the days that he remained in breach of the subject order. I infer that is why he did not desist

from his conduct when the Townsville Bulletin article reported the applicants' observation that Mr Wharton was in contempt of the subject order.

[76] It is common ground that, in any case, conduct that is in breach of a court order that is based on legal advice is nevertheless contempt: *In re Mileage Conference Group of the Tyre Manufacturers' Conference Ltd's Agreement* [1966] 1 WLR 1137, 1162.

[77] I am satisfied that the applicants have proved beyond reasonable doubt the aggravating circumstance and find that Mr Wharton knowingly impeded the administration of justice by failing to comply with the subject order as particularised in charges 2, 3 and 4.

[78] In the written submissions made on behalf of Mr Wharton, the court was urged to exercise the discretion to decide not to find Mr Wharton guilty of contempt. In view of the finding I have made that Mr Wharton knew that he was in breach of the subject order at the time that he committed the conduct that amounted to contempt of the subject order, it is not appropriate to decline to make the finding of contempt.

Relevant factors on the issue of penalty

[79] Rule 930 of the *UCPR* applies if the court decides that a respondent has committed contempt. Where the respondent is an individual, r 930(2) confers discretion on the court to punish the person by making an order that may be made under the *Penalties & Sentences Act* 1992. The benefit of this regime was the subject of observation by Keane JA in *Lade* at [71]:

> "Indeed, a real benefit of r 930 of the UCPR is that it enables the court to come to a view of the nature of a contemnor's conduct and the sanction appropriate for that conduct without having to mediate those considerations through indeterminate formulae, such as 'casual, accidental or unintentional'. Under r 930 of the UCPR, a court may deal with contempt on a case-by-case basis according, *inter alia*, to the degree of personal fault revealed by the circumstances of the case."

[80] Although the contempt that was the subject of *Australian Securities and Investments Commission v Michalik* (2004) 52 ACSR 115 was much more serious than in Mr Wharton's case, Palmer J usefully summarised at [29] the relevant factors to be considered in determining what punishment is appropriate for a contempt of court.

> "(i) the seriousness of the contempt proved;
> (ii) whether the contemnor was aware of the consequences to himself of what he proposed to do;
> (iii) the actual or potential consequences of the contempt on the proceedings in which the contempt was committed;
> (iv) whether the contempt was committed in the context of a proceeding alleging crime or conduct seriously prejudicial to the public interest: see, for example, *Von Doussa v Owens (No 3)* (1982) 31 SASR 116;
> (v) the reason or motive for the contempt;
> (vi) whether the contemnor has received, or sought to receive, a benefit or gain from the contempt;
> (vii) whether there has been any expression of genuine contrition by the contemnor;

(viii) the character and antecedents of the contemnor;
(ix) what punishment is required to deter the contemnor and others of like mind from similar disobedience to the orders of the court;
(x) what punishment is required to express the court's denunciation of the contempt."

[81] Mr Wharton's breach of the subject order in respect of Runnymede was sustained in that it continued over a period of about 10 days. It is an aggravating aspect of the breach that Mr Wharton promoted his breaching conduct by attracting media publicity for his use of security guards to prevent the applicants from gaining access to Runnymede. That has to be balanced against the fact that he did not return to Red Rock after 8 June 2012 and completely vacated Runnymede by 21 June 2012.

[82] The applicants were driven to obtain the subject order, as a result of Mr Wharton's conduct in resisting the attempts by the applicants to remove lawfully the livestock from Runnymede between 19 and 21 April 2012. The subject order was properly served on Mr Wharton and his failure to comply with the terms of the subject order was serious. The civil justice system depends on parties' complying with orders made by the court to support the exercise of lawful rights. Mr Wharton acted wishfully on the dubious advice he obtained from Freeman about the effect of the documents that purported to be bills of exchange had on the respondents' debt to BankWest and was prepared to take the risk of not complying with the subject order when he well knew from the subject order what the potential consequences of breach of the subject order could be.

[83] The contempt was not in the category of conduct that affected the course of the applicants' proceedings against the respondents and was not committed in the context of a proceeding alleging crime or conduct prejudicial to the public interest.

[84] The motive for the contempt was financial pressure, the grievances which Mr Wharton held against BankWest and despair. Runnymede had been in Mr Wharton's family since 1916 and he had hoped that his son would inherit the property from him.

[85] Mr Wharton changed solicitors from KSD to his current solicitors in August 2012. His current solicitors were therefore involved in the preparation of Mr Wharton's first affidavit which relevantly includes at paragraph 55:

> "I have had explained to me the consequences of my actions in relation to the 4 May 2012 order. I would not knowingly contravene an order of the Court and at the time did not believe that I was doing anything unlawful. I believed, based upon my advice, that I was acting lawfully to protect my rights, I deeply regret having contravened an order of the Court and I unreservedly apologise to the Court for having contravened its order. I recognise that there is no excuse for disobeying an order of the Court, and that it is a very serious matter."

[86] The findings that I have made about Mr Wharton's knowledge at the time he committed the conduct in breach of the order mean that I reject the assertion in this affidavit that he did not believe that he was doing anything unlawful. He clutched onto the poor legal advice that he was given by KSD that supported the course he

embarked on of engaging security guards to keep out the applicants from Runnymede and Red Rock in anticipation of further court proceedings against the applicants and BankWest. The fact that he acted on legal advice is not irrelevant on the issue of penalty, but its significance is reduced, when he otherwise knew that his conduct was in breach of the subject order.

[87] The added expression of regret in paragraph 55 of Mr Wharton's first affidavit indicates some contrition by Mr Wharton that was also reflected by his instructions at the hearing on 20 September 2012 that he did not dispute the conduct alleged against him. That contrition was undermined, however, to some extent by the email (exhibit 14) that Mr Wharton circulated to his supporters on 11 November 2012 in anticipation of the hearing of the contempt application encouraging supporters to attend the hearing, because "Stewart Levitt has informed us that there is no doubt that a good crowd will have an unsettling effect on the Judge …".

[88] I made the observation during the hearing of the contempt application that it takes a lot more to unsettle a judge than supporters in the back of the court. The presence of supporters in court is a common occurrence in matters in both the civil and criminal jurisdictions of the court where a person's liberty, livelihood or reputation may be affected by the outcome of the proceeding. It was naïve for anyone to suggest that the presence of Mr Wharton's supporters may influence the judge or have a beneficial effect on the outcome of the proceeding for Mr Wharton. The presence of supporters for persons who are involved in court proceedings is welcomed by the court, as at least the persons present in court have a first hand appreciation of the court process. Mr Wharton was sufficiently embarrassed by the content of this email to apologise for it when giving his evidence.

[89] Mr Wharton has been the Mayor of Richmond since 1997. He was awarded the Centenary Medal for distinguished service to local government in 2011. He was made a Member of the Order of Australia on 11 June 2007 for service to the community of north-west Queensland through local government, regional development, natural resource management and primary industry organisations.

[90] It is submitted that it is relevant to take into account that Mr Wharton has suffered in a real and substantial way through having to defend himself in the contempt application in a public forum and incur the substantial cost of doing so. Although any orders for costs will not be made until after these reasons are published, it is relevant as the respondent to the contempt application where the contempt has been proved that Mr Wharton is likely to have to bear at least his costs of a hearing that took three days in this court and has the potential to be liable for some or all of the applicants' costs.

[91] As Mr Wharton did not return to Red Rock after 8 June 2012 and vacated Runnymede by 21 June 2012, punishment is not required for the purpose of obtaining compliance with the subject order. In fact, Runnymede and Red Rock went to auction on 7 September 2012 and, although passed in, both have subsequently been sold.

[92] I accept that Mr Wharton now has a full appreciation of his foolishness in failing to comply strictly with the terms of the subject order and personal deterrence is therefore not a necessary part of the punishment for the contempt. General deterrence remains a relevant consideration. In difficult economic times, there are

many persons who find themselves in a similar position to the respondents where default has occurred in respect of loan repayments and the lender seeks to enforce the security by the appointment of receivers to the secured property. It is important that others in the position of Mr Wharton understand that an order of the court made in civil proceedings initiated by receivers appointed by a mortgagee is an order that must be observed. As was observed in *Australasian Meat Industry Employees Union v Mudginberri Station Pty Ltd* (1986) 161 CLR 98, 107, one of the purposes of punishment for contempt is to "to protect the effective administration of justice by demonstrating that the court's orders will be enforced." There is a public interest in the vindication of the authority of the court: *Lade* at [60].

[93] It is submitted on behalf of Mr Wharton that a course that is open to the court is to find the contempt proved, but to exercise the discretion to impose no penalty. Taking into account all the factors relevant to Mr Wharton's contempt and circumstances, I am not satisfied that it would be an appropriate exercise of the discretion conferred by r 930(2) of the *UCPR* to decide against imposing a penalty on Mr Wharton for the contempt that has been proved.

Punishment

[94] The submission on penalty that was ultimately made by the applicants was that a suspended term of 10 days' imprisonment (corresponding with the period over which the breach of the subject order occurred) should be imposed on Mr Wharton together with a fine of $5,000.

[95] The manner in which the applicants have arrived at the suggested term of imprisonment of 10 days suggests it is a symbolic punishment rather than appropriate punishment for the conduct that amounted to contempt.

[96] I am not satisfied that a term of imprisonment (whether suspended or not) is now required to punish Mr Wharton for the proved contempt, in light of the factors in his favour. The contempt is serious enough, however, to warrant more than a nominal fine. A fine of $500 for breach of an undertaking given to the court was imposed in *Lade* for a contempt that was much less serious than Mr Wharton's conduct. There were numerous charges of contempt in *Paroz v Paroz* [2010] QSC 488 which made the offending conduct overall more serious than that committed by Mr Wharton. In respect of the first eleven acts of contempt, Mr Paroz was fined $3,000 for each act making a total of $33,000.

[97] One fine of $5,000 to cover charges 2, 3 and 4 is an appropriate punishment in all the circumstances. It is relevant that if Mr Wharton's financial position makes payment of the fine a hardship, there are means for dealing with that under the *State Penalties Enforcement Act* 1999.

[98] I propose making the following orders:

1. It is declared that John Macarthur Wharton committed contempt by failing to comply with the order of P Lyons J made on 4 May 2012 in this proceeding, as particularised in charges 2, 3 and 4 in the second further amended application filed on 13 December 2012.
2. John Macarthur Wharton is fined $5,000 for the contempt.
3. The fine is to be paid within three months of the date of this order and, in default of payment within that time, the non-payment of the fine must be referred by the Sheriff to SPER (State Penalties Enforcement Registry).

[99] I will hear submissions from the parties on the costs of the contempt application.