SUPREME COURT OF QUEENSLAND

CITATION:	*Tailored Projects P/L v Jedfire P/L* [2009] QSC 32
PARTIES:	**TAILORED PROJECTS PTY LTD (ACN 111 819 722)** (applicant) v **JEDFIRE PTY LTD (ACN 050 414 232)** (respondent)
FILE NO:	BS7539/2008
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court, Brisbane
DELIVERED ON:	6 March 2009
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATE:	22 October 2008
JUDGE:	Douglas J
ORDER:	**Application dismissed.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PROGRESS PAYMENTS – PAYMENT CLAIM – VALIDITY – SERVICE OF MULTIPLE PAYMENT CLAIMS IN RELATION TO ONE REFERENCE DATE – Whether contract requires a time for service of a payment schedule different from the 10 business days allowed statutorily – Whether estoppel by convention varying time required for service of notice under contract or statutory payment schedule – Whether unconscionable to insist on 5 day period under contract – Whether a fixed price contract or one containing provisional sums or prime cost items *Trade Practices Act* 1974 (Cth) s. 87 *Building and Construction Industry Payments Act* 2004, s. 10 s.18, s.17(4) and (5), s.14(4), s.18(4), s. 100 *Abigroup Contractors Pty Ltd v River Street Developments Pty Ltd* [2006] VSC 425 referred *Alan Connolly and Co v Commercial Indemnity* [2005] NSWSC 339 applied *Clarence St Pty Ltd v ISIS Projects Pty Ltd* [2005] NSWCA 391 referred

Daysea Pty Ltd v Watpac Aust Pty Ltd [2001] QCA 49 referred
Doolan v Rubikcon (Qld) Pty Ltd [2008] 2 Qd R 117 referred
Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd [2003] NSWSC 903 referred
F K Gardiner & Sons Pty Ltd v Dimin Pty Ltd [2007] 1 Qd R 10, 15 applied
G W Enterprises Pty Ltd v Xentex Industries Pty Ltd [2006] QSC 399 referred
Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd [2007] QSC 333 referred
Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140 referred
Queensland Industrial Wholesalers Ltd v Coutts Townsville Pty Ltd [1989] 2 Qd R 40, 44-45 referred
Ryledar Pty Ltd v Euphoric Pty Ltd (2007} 69 NSWLR 603, 644-648 referred
Thiess Pty Ltd v Lane Cove Tunnel Nominee Company Pty Ltd [2008] NSWSC 729 considered
Walter Construction Group Ltd v. CPL (Surry Hills) Pty Ltd [2003] NSWSC 266 referred

COUNSEL: S. Armitage for the applicant
R. M. Derrington SC with M. Ambrose for the respondent

SOLICITORS: Northside Solicitors Pty Ltd for the applicant
Holding Redlich for the respondent

[1] **Douglas J**: This is a claim under the *Building and Construction Industry Payments Act* 2004 to recover $956,106.80 with interest or, alternatively, for an order for the payment of $1,066,106.87 as a debt arising out of a building contract and the service of a payment claim purportedly under s. 18 of the Act on 29 July 2008.

Background

[2] The contract provided for the submission of monthly progress claims on the last day of the month in cl. 14(a). Clause 14(c) provided that, on the submission of a payment claim by the contractor under cl. 14(a), if the proprietor disputed the claim, it was to give the contractor a written notice setting out the amount in dispute and the details of the dispute by the time stated in the schedule for payment or the date 10 business days after the submission date, whichever was the earlier. The time stated in the schedule was five days.

[3] The applicant did not always require a response within five days and, until the claim relevant to this application, appears to have accepted responses made outside the five day period. Most of the respondent's responses were made within about 10 business days, the period allowed for the service of a payment schedule under s. 18 of the Act. Many of the claims allowed seven or 15 calendar days for a response.

[4] Clause 14 was said by the applicant to set up a contractual regime similar in effect to the statutory regime; see *Daysea Pty Ltd v Watpac Aust Pty Ltd*.[1] The full terms of cl. 14 were:

> "'14. PAYMENT
>
> (a) The Contractor shall submit payment claims to the Proprietor by the following reference dates:
>
> (i) the times stated in the Schedule (or, if any time stated in the Schedule is not a Business Day, the next Business day) or the last Business Day of each month, whichever is the earlier; and
>
> (ii) on the Works reaching Practical Completion.
>
> (b) A payment claim shall set out:
>
> (i) details of:
>
> (A) the work carried out by the Contractor to which the payment claim relates;
>
> (B) the amount that the Contractor claims for payment by the Proprietor for that work; and
>
> (C) any other amount arising out of, or in connection with, the Contract that the Contractor claims for payment by the Proprietor; and
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> (ii) the total amount that the Contractor claims for payment by the Proprietor.
>
> (c) On the submission of a payment claim under Clause 14(a), or the final claim under Clause 25(a), the Proprietor shall:
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> (i) pay to the Contractor the total amount of the payment claim, or the final claim, by the time stated in the Schedule for payment or the date 15 Business Days after the Submission Date, whichever is the earlier; or
>
> (ii) if the Proprietor disputes all or any part of the total amount of the payment claim, or the final claim:
>
> (A) give the Contractor a written notice setting out the amount in dispute and details of the dispute by the time stated in the Schedule for payment or the date 10 Business Days after the Submission Date, whichever is the earlier; and
>
> (B) pay the Contractor the amount of the payment claim, or the final claim, that is not disputed by the Proprietor by the time stated in the Schedule for payment or the date 15 Business Days after the Submission Date, whichever is the earlier.
>
> (d) If the Proprietor fails to give the Contractor a notice under Clause 14(c)(ii)(A) by the time required under Clause 14(c)(ii)(A), the Proprietor shall pay to the Contractor, under Clause 14(c)(i), the total amount of the payment claim, or the final claim, without any deduction.

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1 [2001] QCA 49 at [17]-[19].

(e) The Proprietor shall pay interest, calculated on a daily basis, to the Contractor on any overdue amount under this Clause, including any part of the amount of a payment claim, or the final claim, wrongly withheld by the Proprietor, up to and including the date on which the overdue amount is paid by the Proprietor at the rate stated in the Schedule or the rate comprising the annual rate, as published from time to time by the Reserve Bank of Australia for 90 days bills plus 10%, whichever is the higher.

(f) Payment, other than payment of the Contractor's final claim, is payment on account only.

(g) Subject to Clause 15(a), the Proprietor is not entitled to set-off against, or in reduction of, any amount due to the Contractor under this Clause any claim, including any claim for an amount due by the Contractor to the Proprietor under the Contract, that the Proprietor may have against the Contractor for any amount.'"

[5] The claim on which this application was based did require payment within "the five days stated in the contract" as appears from the applicant's solicitor's letter dated 8 July 2008. The respondent served a schedule challenging the claim within 10 business days but after the five days stated in the contract. The applicant then elected to seek payment under the contract and the Act rather than making an adjudication application under the Act.

[6] The respondent resists the claim for a number of reasons. First, in respect of the statutory claim, it argues that more than one payment claim has been made in respect of the relevant reference date contrary to s. 17(5) of the Act.[2] Secondly, it submits that part of the claim is not for "construction work" as defined by the Act, something which, for present purposes, was accepted by the applicant. Thirdly, it contends that the parties did not agree to replace the 10 business day period for responding to a payment claim with a payment schedule under the Act by the five calendar day period for the giving of notice under cl. 14(c)(ii)(A) of the contract because of differences between the contractual and statutory regimes. The consequence is, it argues, that its schedule was delivered in time. Finally, in this context, it argues that an estoppel or a right to seek relief under s. 87 of the *Trade Practices Act* 1974 (Cth) has been created to the effect that the contract should be varied ab initio to give the respondent 10 business days to deliver a notice of dispute.

[7] In respect of the contractual claim, the respondent argues that a triable issue exists. It says that the contract was a "fixed price" contract where the applicant has already been paid that price. The claim made on 28 July 2008 was for an amount including items described as:

"Prime Cost Joinery and Bar Works …
Price Cost Signage Works …
Prime Cost Demolition Works …

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2 See *Doolan v Rubikcon (Qld) Pty Ltd* [2008] 2 Qd R 117.

> Prime Cost Stormwater and Hydraulic Works
> and Prime Cost Electrical Works."

[8] The contract provided that if the actual cost to the contractor for a prime cost item was greater than the estimate the difference should be added to the contract sum; see cl. 16(c). There is a contest between the parties, however, as to whether the contract included any provisional sums or prime cost items. The scope and extent of the work referred to in schedule A of the contract includes "PC sums listed in tender letter." That letter, dated 23 July 2007, lists items bearing the descriptions "Demolition, Stormwater & Hydraulic Services, Electrical Services, Signage and Joinery & Bar" but does not explicitly describe them as "PC sums". In the same list there was also an item for "Structure & Fitout" treated by the applicant as a fixed price item although it was not distinguished from the other items in the list in any particular fashion.

[9] There was correspondence between the parties about the provisional sum margins being drawn back to 10 per cent, however, and there may be other extrinsic evidence which may touch on this issue, whether the contract should be construed or rectified to provide that those items are provisional sums or prime cost items. Accordingly, because of the form of the contract and the correspondence, the respondent argued that these were not claims arising out of or in connection with the contract. The other evidence suggests that is an issue that must be determined at a trial rather than in an application for judgment.

[10] The respondent also says that an estoppel by convention or a right to seek a variation of the agreement under s. 87 of the *Trade Practices Act* exists in respect of the date by which it was entitled to give notice of the dispute under cl. 14(c)(ii)(A) of the contract. Finally, in respect of the contractual claim, it says that the claim was not made on one of the monthly reference days under the contract, nor was it a payment claim in respect of practical completion. Rather, it argues it purports to be a second claim made on practical competition for which there is no entitlement under the contract. It says that because an earlier claim was made on 26 May 2008, 14 days after practical completion on 12 May 2008.

Statutory claims

More than one payment claim

[11] The respondent's submission is that more than one payment claim was made. It has two reasons for advancing that argument. The first is because of the claim made dated 26 May 2008, after practical completion on 12 May 2008, for a number of variations totalling $48,199.80. The later claim, relied on by the applicant as its statutory claim and attached to its solicitor's letter dated 28 July 2008 served on 29 July 2008, consisted of a claim for $1,066,106.87. That claim was listed on a document dated 31 July 2008 which referred to a number of invoices and described itself as a payment claim made under the Act. Those invoices were also included separately, each dated 31 July 2008 and each also endorsed: "This payment claim is made under the *Building and Construction Industry Payments Act 2004 (Qld)*". They included an invoice for $100,000.00 described as an "incentive payment" argued by the respondent not to be "construction work" under the Act because it does not fall within the definition under s. 10. As I have said that argument was accepted for present purposes by the applicant.

[12] To appreciate the arguments on this issue it is desirable to set out the terms of s. 17(4) and s. 17(5). They are:

> "(4) A payment claim may be served only within the later of —
>
> (a) the period worked out under the construction contract;
>
> or
>
> (b) the period of 12 months after the construction work to which the claim relates was last carried out or the related goods and services to which the claim relates were last supplied.
>
> (5) A claimant can not serve more than 1 payment claim in relation to each reference date under the construction contract."

[13] A "reference date" is also defined in Schedule 2 in these terms:

> "***reference date***, under a construction contract, means —
>
> (a) a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, under the contract; or
>
> (b) if the contract does not provide for the matter —
>
> (i) the last day of the named month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and
>
> (ii) the last day of each later named month."

[14] The respondent's submission was that the reference date could be any day in the month in question in the period leading up to practical completion and that, where more than one payment claim issues for a reference date, the first must be considered to be the payment claim for the reference period so that any subsequent claims for that reference period are invalid. If the claim dated 26 May 2008 is in relation to the same reference date as that made dated 31 July 2008 then that conclusion should follow.

[15] Clause 14(a)(ii) of the contract required the applicant to submit payment claims to the proprietor on a reference date described in the contract as "on the Works reaching Practical Completion." The evidence is that practical completion occurred on 12 May 2008. Prima facie, the claim made by the invoice dated 26 May 2008 was referable to that date. That reference date would also apply for the purposes of the Act by virtue of its definition of "reference date."

[16] The applicant submitted, however, that s. 17(4) permitted payment claims to be served within the later of the period worked out under the construction contract or the period of 12 months after the construction work to which the claim related was

last carried out so that the claims dated 26 May 2008 and 31 July 2008 could be treated as ones made for different reference dates under the Act.

[17] It seems to me, however, that s. 17(4)(b) of the Act should not be used to justify such an approach. Although that subsection permits service of a claim within the periods described, the respondent submitted that it did not overcome the problem that the only relevant reference dates were the date for practical completion and then the final claim authorised by cl. 25 of the contract after the defects liability period. That is a submission which, in my view, is correct, with the result that the claim made in reliance on the Act fails as more than one payment claim was made in relation to the reference date for practical completion under the contract.

[18] The second argument, that 19 separate claims were made dated 31 July 2008, is less persuasive. The claims were delivered together in a form where the first document describing itself as a payment claim under the Act contained internal references to the other 18 invoices which made monetary claims by setting out the invoice numbers in a column. Those invoices, with their supporting documents, were then attached behind the covering document. That each invoice also bore the words describing it as a claim made under the Act should not lead to the conclusion that the delivery of these documents at the one time amounted to the service of more than one payment claim. To conclude otherwise would require the triumph of form over substance, even in an area where adherence to form and strict compliance with the Act is important.[3]

[19] That approach is also consistent with the decision in *Alan Connolly and Co v Commercial Indemnity*.[4] To use the language of that decision, "the person receiving the payment plan would be immediately aware, on receipt of all documents, that the contractor was claiming the total of the amount shown in the document." That was doubly clear here because of the form of the first document described as a claim under the Act; it was itself a summary of the following documents.

The inclusion of claims which are not for construction work

[20] That one of the claims was for an incentive payment not fitting obviously within the definition of "construction work" under the Act does not lead to the necessary rejection of the other components of the claim. The applicant recognised that there was an issue whether that claim was one for construction work and amended its claim under the Act accordingly to reduce it by $110.000.00.

Was a response to the claim under the Act required within five days or 10 days?

[21] The respondent's argument was that the regime for making claims under cl. 14 of the contract differed significantly from that set up under the Act so that s. 18 of the Act applied to allow service of its payment schedule within 10 business days, something it had done. The submission was that cl. 14 of the contract does not refer expressly to the requirements of the Act or prescribe that its provisions are to override the obligations imposed by the Act. A claim under the contract, it argued, was not required to indicate that it was also made under the Act or to be taken to be such a claim. Nor was the notice to be given by the proprietor to the contractor in response to a claim described by reference to the statutory language, "payment

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3 See *F K Gardiner & Sons Pty Ltd v Dimin Pty Ltd* [2007] 1 Qd R 10, 15 at [24].

4 [2005] NSWSC 339 at [14]-[23], especially at [22].

schedule". Nor was there any explicit substitution of the period of five days for the statutory 10 business day period allowed by s. 18(4)(b)(ii) of the Act for the service of a payment schedule. As the respondent submitted it would have been easy to do that if it were intended. In relying on the decision in *Thiess Pty Ltd v Lane Cove Tunnel Nominee Company Pty Ltd*[5] the respondent said in its written submissions:[6]

> "35. In *Thiess*[7] Hammerschlag J identified as being relevant to the determination that there was no intention to supplant the time period provided for in the act for the delivery of a payment schedule that the parties did not rely upon the same unit of time for the calculation of the relevant period. There the expression 'business day' in the contract was defined differently to the expression 'business day' in the relevant Act. Hammerschlag J thereupon said:
>
> > '[21] The test is thus whether there is clear contextual support for a necessary implication that the Contract has supplanted the ten-day period in s 14(4)(b)(ii) with the four business day period in c114.3 A.'
>
> 36. In the present case the expression 'business day' is defined in substantially the same manner in both the Act and the contract. In the Act it is defined in the following terms:
>
> > '**business day** has the meaning given in the Acts Interpretation Act 1954, section 36 but does not include 27, 28, 29, 30 or 31 December.'
>
> 37. However, the contract also has an expression 'Day' which is defined to mean 'Calendar day' and it is this expression which is used in clause 14 to define the period in which there may be a response to the payment claim. Consequently, by clause 14(c) the notice of dispute in response to a claim by the builder must be given within 5 calendar days.
>
> 38. In terms of the test propounded by Hammerschlag J the question is whether there is a clear contextual support for a necessary implication that the contract has supplanted the ten-business-day period in s.18(4)(b)(ii) with the five day period in clause 14(c)(ii)(A)? When the test is so stated it is not likely that the parties intended that a complex payment claim in a commercial building contract might be properly dealt with to the extent required by the *BCIPA* in a period which might involve only three business days. In addition, when consideration is given to the different terms of the requirements of the Act and the requirements of the contract it can be seen that s.18(4)(b)(ii) of the *BCIPA* is dealing with a different document than that under consideration in clause 14(c)(ii)(A) of the contract.

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5 [2008] NSWSC 729 at [21]

6 Footnotes included

7 [2008] NSWSC 729.

39. Under clause 14(c) of the contract all that the proprietor is required to do is:

    (a) give a notice in writing;
    (b) have the written notice set out the amount in dispute and details of the dispute.

40. It follows that the requirements of the notice under the contract are fairly general and a valid notice might be given in the broadest terms by simply saying that all claims are in dispute and that the proprietor denies that any amount is owing to the claimant at all.

41. The Payment Schedule under the *BCIPA* is substantially more prescriptive. In order for there to be a valid payment schedule the document purporting to be the same:

    (a) must identify the payment claim to which it relates; and

    (b) must state the amount of the payment, if any, that the respondent proposes to make (the **scheduled amount**).

42. Additionally, in order for a document to be a valid payment schedule under the BCIPA, if the scheduled amount is less than the claimed amount, the schedule must state why the scheduled amount is less and, if it is less because the respondent is withholding payment for any reason, *the respondent's reasons for withholding payment*.

43. Therefore, in the present matter, two separate regimes are created; that is being the contractual regime on the one hand and the statutory regime on the other. The requirements of the contractual regime are not as strict as the statutory regime and necessarily so given the drastic consequences of the failure to comply with the requirements of the Act being that the person claiming will be entitled to the payment of money to which they are not entitled in law or in fact.

44. It has been noted and with some degree of force that the statutory regime requires 'strict compliance' in order for a liability to arise. In this respect in F.*K. Gardner & Sons Pty Ltd v. Dimin Pty Ltd*[8] Lyons J said:

> '[24] The Act sets up a statutory regime for the recovery of progress claims and it is dependent on a series of steps being completed. There must be a valid statutory entitlement to a progress payment before a payment claim can be made and then if a payment schedule does not

[8] [2007] 1 Qd R 10.

> issue within time the unpaid portion of the claim becomes a debt. Such a statutory regime depends on strict compliance with the provisions in the Act.'[9]

45. It is to be remembered that in order for a payment schedule to be one which can be relied upon in any adjudication proceedings it must be one which sets out in detail the grounds on which the person receiving the payment claims asserts that the amount claimed is not payable. If a ground is not asserted in a payment schedule it is not possible to raise that ground before an adjudicator and an adjudicator cannot consider any other ground.[10] In this respect, the substance of a payment schedule under the Act must have a degree of precision about it to reveal the reasons for the denial of payment. As was said in *Multiplex Constructions Pty Ltd v Luikens*[11] by Palmer J in relation to the degree of detail required of a payment schedule.

> 'Nevertheless, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute ....
> [78] Section 14(3) of the Act, in requiring a respondent to 'indicate' its reasons for withholding payment, does not require that a payment schedule give full particulars of those reasons. The use of the word 'indicate' rather than 'state', 'specify' or 'set out', conveys an impression that some want of precision and particularity is permissible as long as the essence of 'the reason' for withholding payment is made known sufficiently to enable the claimant to make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication.'

46. It has also been noted that the requirement of the payment schedule is that it be detailed so that it would be sufficient to identify the area of dispute between the parties as it set the parameters for the matters which might be considered by an adjudicator.[12]"

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9 (emphasis added) See also the comments in *Emag Constructions Pty Ltd v Highrise Concrete Contractors (Aust) Pty Ltd* [2003] NSWSC 903 at [59] and *Walter Construction Group Ltd v. CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266 at [59].

10 *G W Enterprises Pty Ltd v Xentex Industries Pty Ltd* [2006] QSC 399; [37] to the effect that, "it is imperative that any reasons for withholding payment must be raised in the payment schedule or they cannot be raised at all."

11 [2003] NSWSC 1140; cited with approval by McDougall J in *Barclay Mowlem v Tesrol Walsh Bay* [2004] NSWSC 1232.

12 *Clarence St Pty Ltd v ISIS Projects Pty Ltd* [2005] NSWCA 391 at [30] per Mason P, with whom Giles JA and Santow JA agreed cited with approval in *Abigroup Contractors Pty Ltd v River Street Developments Pty Ltd* [2006] VSC 425; [72].

[22] See also the summary of the requirements of a valid payment schedule by Chesterman J in *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd*.[13]

[23] The differences highlighted in those submissions between the payment schedule described in the Act and the notice under the contract are correct, in my view, and lead to the conclusion that the statutory requirement for service of a payment schedule within 10 business days has been met so that, for this reason also, the claim for judgment under the Act must fail.

Estoppel by convention, variation or relief under s. 87 of the Trade Practices Act

[24] This issue is one which it is unnecessary for me to decide. The factual basis for the claim that there had been a variation of the contract arising from an estoppel by convention is said to be in dispute although little evidence was led to controvert the respondent's reliance on the inferences available from the times set out in the invoices and the dates of the various responses to payment claims. Ms Armitage, for the applicant, also submitted that the evidence was not sufficient to show some meeting of the minds giving rise to a consensus between the parties as to the time within which payment or notice was required.[14]

[25] Had I taken a different view about the enforceability of the statutory claim I would not have entertained this argument as a reason to refuse relief under the Act. It seems to me to be the type of issue that could have been litigated later, if necessary, under s. 100 of the Act.

Contractual Claim

[26] I have already referred to the factual dispute at the heart of the contractual claim, whether the contract was wholly a fixed price contract or whether it contained some provisional sums or prime cost items. That is an issue which needs to be examined after a consideration of the circumstances surrounding the formation of the contract. Although the applicant argued that cl. 14 of the contract had a similar effect as the Act in entitling it to payment in the absence of the written notice required by cl. 14(c)(ii)(A) within five days, it is here that the dispute about whether the contract had been affected by a conventional estoppel, a variation or was subject to rights to relief under s. 87 of the *Trade Practices Act* becomes important and requires the matter to go to trial. There has been a response by the payment schedule or notice delivered within the extended period relied on by the respondent which, if valid under the contract as notionally varied, would provide an answer to the summary claim by the applicant.

[27] On the view I have taken it is not necessary to decide the respondent's arguments denying the applicant's ability to make more than one payment claim under the contract referable to a single reference date.

Order

[28] Accordingly the application is dismissed.

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13 [2007] QSC 333 at [27], [29].

14 See, e.g., *Queensland Industrial Wholesalers Ltd v Coutts Townsville Pty Ltd* [1989] 2 Qd R 40, 44-45; *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007} 69 NSWLR 603, 644-648 at [194]-[214].