SUPREME COURT OF QUEENSLAND

CITATION:	*Tickner v Teys Australia Biloela Pty Ltd* [2020] QSC 62
PARTIES:	**SHERYL TICKNER** (plaintiff/respondent) **v** **TEYS AUSTRALIA BILOELA PTY LTD** (defendant/applicant)
FILE NO/S:	SC No 66 of 2020
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Rockhampton
DELIVERED ON:	Date of Order (Application): 3 April 2020 Date of Order (Costs): 7 April 2020 Date of Publication of Reasons: 7 April 2020
DELIVERED AT:	Rockhampton
HEARING DATE:	23 March 2020
JUDGE:	Crow J
ORDER:	**Order delivered 3 April 2020:** **1. The application is dismissed.** **Order delivered 7 April 2020:** **2. Costs are reserved.**
CATCHWORDS:	WORKERS' COMPENSATION – PROCEEDINGS TO OBTAIN COMPENSATION – DETERMINATION OF CLAIMS – GENERALLY – construction and interpretation of *damages* under *Workers' Compensation and Rehabilitation Act* 2003 - construction and interpretation of s 270 and s 271 of the *Workers' Compensation and Rehabilitation Act* 2003 - whether in determining appropriate court jurisdiction to hear matter the compulsory reduction under s 270 *Workers' Compensation and Rehabilitation Act* 2003 is included in 'damages sought' under the *District Court of Queensland Act* 1967 COURTS AND JUDGES – COURTS – JURISDICTION AND POWERS – TRANSFER OF PROCEEDINGS TO OR FROM HIGHER COURT AND BETWEEN COURTS – TO A LOWER COURT – where application under s 25(2) *Civil Proceedings Act* 2011 to remit matter to District Court – where District Court has appropriate jurisdiction to hear matter - whether appropriate to exercise discretion in favour

of transfer

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 10, s 270, s 271
Civil Proceedings Act 2011 (Qld), s 25
Uniform Civil Procedure Rules 1999 (Qld), r 135
District Court of Queensland Act 1967 (Qld), s 68

Crown Equipment Pty Ltd v ACN 098 568 702 Pty Ltd & Anor [2013] QSC 24, followed
Fechner v Yerkovich [1993] 1 Qd R 249; [1991] QSCFC 118, cited
Franklin v Rabmusk Pty Ltd [1993] 1 Qd R 258; [1991] QSCFC 162, cited
Lausberg v Burns Philp & Co Ltd [1991] 2 Qd R 642; [1990] QSCFC 76, cited
Meredith v Palmcam Pty Ltd [2001] 1 Qd R 645; [2000] QCA 113, cited
Perfect v MacDonald & Anor [2012] QSC 11, cited
Platinum Investment Group Pty Ltd v Anderson [2019] 3 Qd R 305; [2018] QSC 2, followed

COUNSEL: A M Arnold for the plaintiff/respondent
G C O'Driscoll for the defendant/applicant

SOLICITORS: Rees R & Sydney Jones for the plaintiff/respondent
BT Lawyers for the defendant/applicant

[1] On 20 January 2020 Cheryl Tickner filed a claim in the Supreme Court for "damages for negligence and breach of contract causing personal injury, interest pursuant to the provisions of the *Workers' Compensation and Rehabilitation Act 2003* or alternatively *Civil Proceedings Act 2011* and costs." Paragraph 10 of the statement of claim shows a number of heads of damage particularised in tabulated form, culminating in a subtotal of $843,729.75.

[2] Relevantly, paragraph 10 of the statement of claim provides, *inter alia*:

SUB TOTAL	**$843,729.75**
Less refund to WorkCover	**(185,844.54)**
TOTAL	**$657,885.21**

[3] The statement of claim goes on to say, in paragraph 11: "[f]ull particulars of the plaintiff's loss and damage will be provided in accordance with Chapter 14, Part 2 of the Uniform Civil Procedure Rules". Although paragraph 11 is an inappropriate pleading of damage,[1] no point is taken by the defence in this regard. Rather, Counsel for the defendant, relies on paragraph 10 and a statement of loss and damage which also particularised damages in the same manner as paragraph 10; that is with a gross level of damages at $843,729.75 and a net of $657,885.21.

[4] On 21 February 2020 the defendant filed an application seeking orders that:

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1 *Meredith v Palmcam Pty Ltd* [2001] 1 Qd R 645 at [6].

"(1) Pursuant to rule 25(2) of the *Civil Proceedings Act 2011,* the court transfer the proceedings to the District Court at Rockhampton;

(2) The Plaintiff pay the Defendant's costs of and incidental to the application;

…"

[5] On 26 February 2020 the defendant filed its notice of intention to defend and defence. The defendant ought to have filed its notice of intention to defend prior to filing the application on 21 February 2020; as they failed to do so the defendant is required to, and did, apply for leave to take a step in the proceeding.[2] As it was not opposed leave was granted.

Jurisdiction of the District Court

[6] Pursuant to s 25(2) *Civil Proceedings Act* 2011, the defendant applies for transfer to the District Court as the net amount sought in the plaintiff's statement of claim is an amount for which the District Court has jurisdiction. Mr Arnold, counsel for the plaintiff, argues that the claim as filed is not within the jurisdictional limit of the District Court of Queensland at $750,000. Mr Arnold frames his argument on the basis of the definition of damages as contained in s 10 of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) ("WCRA"). Section 10 provides:

"10 Meaning of *damages*

(1) ***Damages*** is damages for injury sustained by a worker in circumstances creating, independently of this Act, a legal liability in the worker's employer to pay damages to—

(a) the worker; or

(b) if the injury results in the worker's death—a dependant of the deceased worker.

(2) A reference in subsection (1) to the liability of an employer does not include a liability against which the employer is required to provide under—

(a) another Act; or

(b) a law of another State, the Commonwealth or of another country.

(3) Also, a reference in subsection (1) to the liability of an employer does not include a liability to pay damages for loss of consortium resulting from injury sustained by worker."

[7] Mr Arnold argues that the definition of damages in s 10 WCRA does not include a reduction for compensation made pursuant to ss 270 and 271 of the Act. Section 270 and 271 provide:

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2 *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") r 135.

"270 When damages are to be reduced

(1) The amount of damages that an employer is legally liable to pay to a claimant for an injury must be reduced by the total amount paid or payable by an insurer by way of compensation for the injury.

(2) However, subsection (1) applies to compensation paid or payable under chapter 4A only if the damages include treatment, care and support damages.

(3) Also, the amount of damages must not be reduced by an amount paid under section 193.

(4) This section does not limit the reduction of the amount of the damages by any other amount that the insurer or the claimant is legally liable to pay on account of the worker under another law.

271 Assessment by court of total liability for damages

(1) This section applies if—

(a) damages are awarded for an injury; or

(b) damages are to be paid in settlement of a claim for an injury.

(2) To establish the reduction under section 270(1) in damages for compensation paid, the claimant or insurer may apply to—

(a) the court in which the proceeding is brought; or

(b) if a proceeding has not been started— the Industrial Magistrates Court.

(3) The court's decision is binding on the insurer and all persons entitled to payment by the insurer for the injury."

[8] The effect of s 271, is that it requires a court to, firstly, make an assessment as to the damages and then the court must make an assessment of the reduction for the total amount paid or payable by an insurer by way of compensation for injury. That is, the amount of damages needs to be assessed based on the factual findings made by a trial judge applying common law principles as modified by Chapter 5, Part 9 of the WCRA. Following the assessment of damages it is then necessary, using the same factual findings, for the court to establish the reduction with reference to the total amount paid or payable by the insurer to compensate for the injury. The resulting difference is the amount the employer "is legally liable to pay", which will form the judgment amount.

[9] Ordinarily the amount of the reduction under s 270(1) WCRA will be the total of the amount paid by the insurer as established by the tendering, usually by the defendant, of a detailed payments of claim form or other agreed summary of

benefits paid. In *Franklin v Rabmusk Pty Ltd* [1993] 1 Qd R 258, Mackenzie J said:[3]

> "The amount by which damages are to be reduced is to be determined by the court by which damages are awarded upon application by the Board. In practice, this process is usually taken to have been initiated by the introduction into evidence during the proceedings of information from the Workers' Compensation Board of the amounts paid under various categories and the period for which such payments have been made. It is commonly the case that there is no dispute that those amounts are the amount to be deducted pursuant to s.9A.
>
> There is plainly little merit in a submission that a plaintiff, having been paid moneys in good faith from the fund on the basis of a claim for workers' compensation made by him, should not have that sum deducted from the damages awarded to him in the event that he recovers damages but on a basis which indicates that workers' compensation payments should not have been made in the first place. It is likely to be of little assistance to the Board in many cases that it has a right to recover overpayments of compensation by complaint (cl. 26A of Schedule to 1916 Act, s. 716 of 1990 Act), given the risk that the moneys available to satisfy an order may be dissipated before the Board can take the necessary action. However, s.9A compels that conclusion by reason of its wording and leaves the Board to its own devices in attempting to recover moneys which have been paid on a mistaken basis in the situation that became apparent in *Lausberg* and *Fechner*.

[10] Both *Lausberg v Burns Philp & Company Limited* [1991] 2 Qd R 642 and *Fechner v Yerkovich* [1993] 1 Qd R 249 were cases decided under s 9A of the *Workers' Compensation Act* 1916 which are sufficiently similar to the WCRA to allow them to be applied here.

[11] In *Crown Equipment Pty Ltd v ACN 098 568 702 Pty Ltd & Anor* [2013] QSC 24, Lyons J said:[4]

> "[59] I also accept that the purpose of the WCRA is to ensure that there is no duplication or double payment where statutory benefits have been paid and a damages claim is subsequently made. As Bell J said in *Hickson v Goodman Fielder Limited:*
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> > 'The Compensation Act manifests a policy against the receipt of what might be called "double compensation"…In a case such as this, in which a worker recovers, first, compensation and, secondly, damages from a person other than the employer, s 151Z(1)(b) provides that the worker is liable to repay out of those damages the amount of compensation which

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3 *Franklin v Rabmusk Pty Ltd* [1993] 1 Qd R 258 at 262 – 263.

4 *Crown Equipment Pty Ltd v ACN 098 568 702 Pty Ltd & Anor* [2013] QSC 24 at [59], quoting *Hickson v Goodman Fielder Limited* (2009) 237 CLR 130 at 133.

> has been paid in respect of the injury and that the worker is not entitled to any further compensation."
>
> (Footnotes omitted.)

[12] Her Honour, went on to articulate the practical effect of s 270 WCRA, saying:

> "[66] The effect of s 270 WCRA is that any compensation already paid has to be deducted from the damages assessed against the employer of the worker. It is argued that a number of propositions have been established in relation to s 270 and they include:
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> (a) that the correct method to adopt in arriving at the amount for which judgment should be entered where a plaintiff has received workers' compensation benefits and been guilty of contributory negligence is to first assess damages, then to reduce the amount assessed by the appropriate percentage for contributory negligence and from that balance to deduct the total amount paid by way of worker's compensation; and
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> (b) the initial assessment of damages must be made without regard to any statutory limits of the court, so that if an assessment exceeds the jurisdictional limits of the court, but falls within it after the deduction of the damages for contributory negligence."

[13] Accordingly, whilst it is true that under the WCRA damages are properly construed to be the "gross damages", not reduced by the established reduction as required by s 270(1) WCRA, it does not conclude the relevant issue in the plaintiff's favour. The difficulty for the plaintiff is that s 68(1)(a) of the *District Court of Queensland Act* 1967 (Qld) ("*District Court Act*") distinguishes between "damage sought" and "damages" as referred to s 68(1)(a)(iv) of the *District Court Act*. Furthermore, the reference in s 68(1)(a) to an "amount, value or damage sought" and not damages sought, makes it plain that it is the net amount or amount the "employer is legally liable to pay" which is relevant to determine the jurisdictional limit of the District Court.

[14] In the present case, as it is made plain from the statement of claim, the amount of money the employer is legally liable to pay, that is the maximum amount for which judgment could be entered, is $657,885.21. As the amount is within the District Court jurisdictional upper limit of $750,000, I conclude within the terms of s 68 of the *District Court Act* that the District Court has jurisdiction in respect of the plaintiff's claim.

The discretion

[15] Section 25 of the *Civil Proceedings Act* 2011 (Qld) provides:

> **"25 Transfer by Supreme Court – general**

(1) The Supreme Court may order that a proceeding pending in the District Court or a Magistrates Court be transferred to the Supreme Court.

(2) The Supreme Court may order that a proceeding pending in the Supreme Court for which the District Court, or a Magistrates Court, has jurisdiction to be transferred to a court having jurisdiction."

[16] In *Platinum Investment Group Pty Ltd v Anderson* [2019] 3 Qd R 305 Burns J said:[5]

"[7] Before the passing into law of the *Civil Proceedings Act*, ss 82 and 83 of the *District Court of Queensland Act* 1967 (Qld) governed the transfer of proceedings from the District Court to this court. Under s 82, a *plaintiff* could apply to the court for a transfer order where there was 'reasonable ground for supposing that the relief or remedy sought [was] not available in the District Court' and such an order was required to be made if the court was satisfied about that. Section 83 allowed a *defendant* to apply for a transfer order but the court was required to refuse any such application unless satisfied that 'some important question of law or fact [was] likely to arise'.

…

[9] What governs this application is of course s 25(1). In contrast to its immediate statutory predecessors, the discretion conferred on the court by that provision is unfettered. No longer is the exercise of the power dependent on the making of an application by one of the parties; the court can act on its own initiative. Nor is the power confined to cases where a plaintiff was able to establish that the relief or remedy sought was not available in the District Court or, in the case of a defendant, where some important question of law or fact was likely to arise. The only requirement under s 25(1) is that there is a proceeding pending in, relevantly, the District Court. The discretion is therefore a broad one, unconstrained by any other express limitation."

(Original emphasis, footnotes omitted.)

[17] Although said in respect of the discretion under s 25(1) of the *Civil Proceedings Act* 2011 his Honour's reasons are equally applicable to the discretion in s 25(2). Therefore, I consider the approach that I ought take, be the same approach as Burns J, in that:

(1) the discretion conferred on the court by s 25(2) is unfettered;

(2) the discretion is broad one and unconstrained by any other express limitation;

(3) the favourable exercise of the discretion is not simply there for the asking;

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5 *Platinum Investment Group Pty Ltd v Anderson* [2019] 3 Qd R 305 at 308-309.

(4) the discretion must be exercised judicially;

(5) the onus is on the applicant for a transfer to demonstrate to the satisfaction of the court that it is in the interests of justice that the proceeding be transferred; and

(6) all other things being equal, it will usually be in the interests of justice for the proceeding to be transferred, in terms of s 25(2), if that a claim is within the jurisdiction of the inferior court.

[18] The applicant refers to footnote 23 in the judgment of McMeekin J in *Perfect v MacDonald & Anor* [2012] QSC 11, where his Honour said:

> "…In my judgment the matter properly fell in the Magistrates' Court jurisdiction. Irrespective of that, there was no good reason to commence this claim in the Supreme Court. This is not a matter of a litigant's choice. The legislature has sought to strike a balance between the workloads of the various courts. Save and unless good reason is shown proceedings should be commenced in the court of appropriate jurisdiction. There will be costs consequences, and not necessarily just for the litigants, where officers of the Court refuse to comply with these jurisdictional changes."

[19] In *Perfect,* judgment was given for the plaintiff in the sum of $123,813.10. That is a sum less than half the Magistrates Court jurisdictional limit of $250,000. The injury in *Perfect* was damage to the left deltoid muscle which on the plaintiff's case was assessed as a 1% whole person impairment.

[20] In the present case, the statement of claim alleges that the plaintiff suffered the injury in 20 July 2016. The personal injury alleged by the plaintiff in the present case is set out in paragraph 7(g) of the statement of claim, namely that as the result of a machinery failure the plaintiff fell approximately two metres:

> "[7](g) in the fall [the plaintiff] suffered serious personal injury namely –
>
> (i) a closed head injury with traumatic brain damage resulting in neurological impairment including anosmia (loss of smell), cognitive impairment and balance, persistent headaches; and
>
> (ii) a cervical spine injury."

[21] By its defence the defendant admits the head and brain injury pleaded in paragraph 7(g)(i) but denies the cervical spine injury alleged in paragraph 7(g)(ii). The defence denies liability and runs a positive defence in paragraph 7(j)(iv) alleging that the plaintiff's injury was caused by a spontaneous mechanical failure which no reasonable inspection could have detected. The defendant runs a positive case by paragraph 7(d) alleging that it undertook a regular and appropriate system of scheduled maintenance for the hide puller, the machine that failed. The defendant also runs a positive case in paragraph 9(c) of the defence, alleging nine comorbidities which the defence contests would have rendered the plaintiff incapable of working beyond the age of 65. In short the defence admits that the plaintiff has suffered from a brain injury but denies all other matters.

[22] In his affidavit filed 19 March 2020, Mr Houlihan, solicitor for the plaintiff, has set out a timeline of the matter's progression. This timeline includes the delivery of the statement of loss and damage on 24 February 2020 and the delivery of the plaintiff's list of documents on 9 March 2020. The defendant has not yet provided disclosure to the plaintiff. In a case where the defendant's systems of maintenance for its machinery is an issue and the defendant has specifically referred to daily pre-start checks it is anticipated that there will be significant documentation to be discovered by the defendant. There is no indication in the material whether or not expert liability evidence will be called. The pleadings reveal a level of complexity to the litigation which is surprising.

[23] The correspondence attached to the affidavit of Mr Thomas,[6] solicitor for the defendant, reveals that the jurisdictional issue was promptly by Mr Thomas on 29 January 2020.[7] Exhibit BRT-3, is a letter from the plaintiff's solicitors dated 5 February 2020, and explains the plaintiff's position in not consenting to the claim being remitted to the District Court. The letter states, *inter alia*:[8]

> "The Plaintiff has suffered and continues to suffer both personal and financial hardship due to the injuries he sustained in the work incident of 20 July 2016. His instructions are to progress his claim to trial as soon as possible
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> …
>
> There is **no** allocation of civil sittings in the Judge's published calendar in Rockhampton District Court from now until the end of the year.
>
> …
>
> There is currently availability and certainty of trial dates for civil matters in the Rockhampton Supreme Court as opposed to Rockhampton District Court. As such, to transfer the plaintiff's Claim to the Rockhampton District Court would be contrary to the intent of rule 5 of the UCPR.
>
> As the relief contained in the Claim is very close to the Supreme Court jurisdiction, it is reasonable for the claim to be commenced in that jurisdiction. At trial, it would be open to the judge to assess the Plaintiff's damages for an amount higher than the relief sought
>
> …
>
> The decision to transfer a proceeding would solely be at the discretion of the Supreme Court judge and, in the interests of justice, other competing factors must be considered. In this case, the other competing factor is the Plaintiff's ability to get a trial date. As there are availability of trail [sic] dates in the Supreme Court, the Plaintiff's position is that, in the interests of justice, this claim should remain in that Court."
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> (Original emphasis.)

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6 Affidavit of Bruce Richard Thomas filed 21 February 2020.
7 Exhibit BRT-2 to the affidavit of Bruce Richard Thomas filed 21 February 2020.
8 Exhibit BRT-3 to the affidavit of Bruce Richard Thomas filed 21 February 2020.

[24] Ms Kreiger, solicitor for the defendant, sought information from the Registrar of the Supreme and District Courts Rockhampton as to the availability of trial dates in the District Court at Rockhampton. The Registrar's email in reply, dated 7 February 2020, is exhibit BRT-5 and confirms there were no listed civil sittings in the District Court but that the court would "make room in a Criminal sittings should there be a need for a Civil Trial" and that "a Request for Trial date filed today would receive a trial in mid to late June." As noted above, exhibit BRT-5 was sent 7 February 2020, prior to the enactment of measures to combat the spread of COVID-19; much has changed since then.

[25] Due to COVID-19, jury trials are temporarily suspended in the Supreme and District Courts, and as such there is availability in both the Supreme and District Courts for the conduct of this trial in the near future; that is in the next few months. However, there has been no real guidance in the material which has been filed as to when it is likely that this matter would be ready to proceed to trial. I conclude from the limited material available that the trial would not be ready to proceed in the next few months. There is no material available which provides any real guidance as to what is the likely court availability post 1 July 2020. The email from the Registrar, exhibit BRT-5, shows the time pressures which are placed upon the District Court in Rockhampton prior to the COVID-19 issue.

[26] That is, if a civil matter had been certified by both parties as being ready for trial on 7 February 2020, and a request for trial date had been filed, the matter would be set down at a date four months away; sometime in the June sittings. This significant delay persists despite the Rockhampton District Court Judge working in an extremely efficient manner and regularly beyond ordinary court sitting hours. Further, this delay was not alleviated by the planned deployment of additional judges from Brisbane for four weeks. The fact that the delay remains highlights the sheer number of District Court criminal trials in Rockhampton, so much so that, prior to the COVID-19 issues, two additional judges were to sit in Rockhampton to keep in District Court criminal list in good order.

[27] Whilst it cannot be predicted as to when the COVID-19 issue will pass and jury trials recommence, it is certain is that there will be a large back log of criminal trials in the District Court at Rockhampton. Such that the delay between the filing of the request for trial date and the allocated date for a civil trial in the District Court could reasonably be expected to be substantially longer than four months. It is not anticipated that there will be any delay in the Supreme Court, however, if there is any delay, it would be significantly less than what would be experience in the District Court.

[28] In exercising the unfettered, broad and unconstrained discretion referred to in s 25(2) of the *Civil Proceedings Act* 2011 and in determining whether it is in the interests of justice that the proceeding be transferred from the Supreme Court to the District Court at Rockhampton I take into account a number of competing features. The first is that it will usually be in the interests of justice to transfer a proceeding from the Supreme Court to the District Court where the claim is within the jurisdiction of the District Court as the legislature has sought to strike a balance between the workloads of the various courts. That is, in ordinary times, where a proceeding falls within the jurisdiction of the District Court it ought to be heard by the District Court and, if there are no other relevant factors, the discretion to transfer

the matter from the Supreme to the District Court ought to be exercised in favour of the transfer.

[29] The present case however has evolved in times which cannot be said to be ordinary times, and in respect of which there are several factors which militate against the transfer to the District Court, namely:

(i) the proceeding has some degree of complexity;

(ii) the plaintiff has suffered from a serious brain injury;

(iii) the damages claimed in the statement of claim total $843,729.75, however with the reduction required by s 270 WCRA the reduced amount the is currently a sum less than the District Court limit;

(iv) depending upon the conduct of the trial, the amount particularised as the claim is not necessarily the upper amount of an award which could be made in the plaintiff's favour;

(v) when the matter is ready for trial it will receive a trial date in the Rockhampton Supreme Court many months in advance of any availability in the District Court in Rockhampton;

(vi) the plaintiff was injured on 20 July 2016, almost four years ago, and is suffering personal and financial hardship; and

(vii) there are limited adverse costs consequences to the defendant in litigating in the Supreme Court. Section 318 WCRA limits any adverse consequences of costs in a proceeding in the Supreme Court by requiring cost orders to be made in accordance with the District Court scale.

[30] Burns J said in *Platinum Investments Group v Anderson,*[9] that the "onus will be on an applicant for a transfer order to demonstrate to the satisfaction of the court that it is in the interests of justice that the proceeding is transferred". In the present case, I conclude this onus has not been discharged, the applicant has failed to show that it is in the interests of the justice to transfer the proceeding.

[31] The application is dismissed. The parties agree that costs ought to be reserved.

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9 *Platinum Investment Group Pty Ltd v Anderson* [2019] 3 Qd R 305 at 309.