SUPREME COURT OF QUEENSLAND

CITATION:	*Miles v Editshare Asia Pacific Pty Ltd (in liq) & Anor* [2020] QCA 78
PARTIES:	**DAMIAN CARL WALTER MILES** (appellant) **v** **EDITSHARE ASIA PACIFIC PTY LTD** **(IN LIQUIDATION)** ACN 154 348 517 (first respondent) **PETER ANTHONY LUCAS** (second respondent)
FILE NO/S:	Appeal No 1627 of 2019 SC No 615 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – Unreported, 18 January 2019 (Martin J)
DELIVERED ON:	21 April 2020
DELIVERED AT:	Brisbane
HEARING DATE:	2 August 2019
JUDGES:	Fraser JA and Henry and Bradley JJ
ORDERS:	**1. Allow the appeal.** **2. Grant the appellant's application for leave to adduce the amended running balance account statement as evidence in the appeal.** **3. Vary order 1 made in the Trial Division on 18 January 2019 by substituting $95,144.10 for the amount of $177,648.10 as the sum the First Defendant is ordered to pay the First Plaintiff.** **4. Otherwise confirm the orders made in the Trial Division.** **5. The appellant is to pay the respondents' costs of the appeal excluding any costs of the appellant's application to adduce evidence in the appeal.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – GENERALLY – where the respondents alleged that the appellant (a director of the first respondent) contravened s 588G(2) of the *Corporations Act* 2001 (Cth) by failing to prevent the

company from incurring a debt when the company was insolvent and there were reasonable grounds for suspecting that the company was or would become insolvent – where the appellant relied primarily on the defence in s 588H(2) that when the debt was incurred he had reasonable grounds to expect and did expect that the company was solvent and would remain solvent even if it incurred that and any other debts it incurred at that time – where the respondents were given summary judgment for $177,648.10 against the appellant – where the appellant relied primarily on his own affidavit evidence to establish the defence under s 588H(2) – where there were expert reports before the primary judge as to the solvency of the first respondent – whether the primary judge erred in finding that the appellant had no real prospect of defending the claim and there was no need for a trial in respect to the appellant's defence pursuant to s 588H(2) and whether the first respondent was solvent at the relevant times – whether the expert report complied with r 428 and r 429B(1) of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the amount of the judgment should be reduced to account for new evidence the appellant sought to adduce in the appeal

Corporations Act 2001 (Cth), s 588G(2), s 588H(2), s 588M
Uniform Civil Procedure Rules 1999 (Qld), s 428, s 429B, r 667(2)(e)

Campton v Centennial Newstan Pty Ltd (No 1) [2014] NSWSC 304, considered
Chan & Ors v First Strategic Development Corporation Limited (in liq) & Anor [2015] QCA 28, considered
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, cited
Deputy Commissioner of Taxation v Salcedo [2005] 2 Qd R 232; [2005] QCA 227, cited

COUNSEL: The appellant appeared on his own behalf
D T Forbes for the respondents

SOLICITORS: The appellant appeared on his own behalf
Connolly Suthers Lawyers for the respondents

[1] **FRASER JA:** The appellant appeals against an order made by Martin J giving the first respondent summary judgment for $177,648.10 against the appellant.

[2] The first respondent, a company in liquidation, and its liquidator, the second respondent, alleged that the appellant, a director of the first respondent, had contravened subsection 588G(2) of the *Corporations Act* 2001 (Cth)[1] by failing to prevent the company from incurring a debt when the company was insolvent and there were reasonable grounds for suspecting that the company was or would become insolvent. In such a case, s 558M empowers the liquidator of a company being wound up to recover from a director as a debt due to the company an amount equal to the amount of the loss or damage suffered by a creditor in relation to the

[1] References to provisions of that Act are to the Act in force as at 15 November 2012.

debt because of the company's insolvency if the debt was wholly or partly unsecured when the loss or damage was suffered. Before the primary judge the appellant relied primarily on the defence in s 588H(2) for a person who proves that when the debt was incurred the person had reasonable grounds to expect and did expect that the company was solvent and would remain solvent even if it incurred that and any other debts it incurred at that time.

[3] The respondents' amended statement of claim pleaded other claims but the respondents were given summary judgment only upon their insolvent trading claim under s 588M. In the appellant's third further amended defence he did not admit the respondents' allegation that the first respondent incurred a debt of $234,189.03 to the Australian Taxation Office ("ATO") between 30 June 2012 and 7 March 2014 (the date when the first respondent was ordered to be wound up), that the debt was unsecured, and that the ATO had suffered loss and damage as a result of the first respondent's insolvency. The appellant admitted that he was the sole director of the first respondent at the time when the company allegedly incurred a debt to the ATO. The appellant denied that the first respondent was insolvent when the debt to the ATO was allegedly incurred, that there were reasonable grounds for then suspecting that the first respondent was insolvent, and that he reasonably suspected it was insolvent when the debt was incurred. The appellant pleaded that the first respondent was solvent, it "enjoyed the support of the [appellant], the [appellant's] wife and other companies of which the [appellant] was a director who together had sufficient financial resources to support and continue to support the [appellant]" at the relevant time, and the solvency issue "is a matter for expert evidence and the [appellant] reserves his right to plead further following the filing of expert evidence". (In the event the appellant did not seek to plead further after expert reports were exchanged and a joint expert report was produced.)

[4] The primary judge referred to the test for summary judgment articulated in *Deputy Commissioner of Taxation v Salcedo*[2] that the Court must determine whether there is some real prospect of the defendant succeeding at a trial. The primary judge discussed the evidence and the parties' arguments, found that the company became insolvent at the latest by the date with reference to which the quantum of the judgment was calculated, 15 November 2012, and it remained insolvent until the date of the winding up order, and concluded that the appellant had not established that there was any real prospect of him being able to defend the respondents' claim under s 588M.

[5] The appellant relies upon six grounds of appeal.

[6] In the first two grounds the appellant contends that the primary judge erred in finding that the appellant had no real prospect of defending, and there was no need for a trial in relation to, the respondents' claim because the appellant did have a real prospect of defending the claim and there is a need for a trial in respect to (ground 1) the appellant's defence pursuant to s 588H(2) and (ground 2) whether the first respondent was solvent at the relevant times.

[7] Upon the insolvency issue the evidence at the hearing established the following facts. The first respondent was incorporated on 18 November 2011. It was appointed as trustee in respect of a trust which by then had incurred a debt to the Deputy

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2 [2005] 2 Qd R 232.

Commissioner of Taxation exceeding $143,000. In the first year of the first respondent's operations, from 18 November 2011 to 15 November 2012, the debt increased by $172,455.70 to $315,628.33. After the ATO demanded payment on 15 November 2012 the debt continued to increase despite some relatively small payments made by the first respondent. Between 15 November 2012 and 7 March 2014 the first respondent incurred additional debts to the ATO in the total amount for which the summary judgment was given, $177,648.10. The ATO served a creditor's statutory demand upon the first respondent in October 2013. The first respondent was wound up in insolvency on 7 March 2014, its insolvency deemed by its failure to comply with the statutory demand. After 18 November 2011 the first respondent incurred unsecured debts totalling $536,692.85. Any return to the unsecured creditors of the company would be considerably less than 100 cents in the dollar even if the respondents were entirely successful in their claims against the appellant.

[8] In February 2014 the appellant caused the first respondent's business to be transferred to a different company, of which he was sole shareholder, director and secretary, for no consideration other than that the transferee assumed liability to pay outstanding employee benefits with a value of $74,040.[3] This transaction was the basis of an uncommercial transaction claim by the respondents for which summary judgment was refused because of conflicting evidence about the value of the business transferred.

[9] A report dated 10 September 2018 prepared by Ms Anderson (an expert retained for the appellant) upon the value of the business operated by the first respondent annexes unaudited profit and loss statements and balance sheets prepared by the first respondent's management. According to those documents and consistently with Ms Anderson's references to them:

1. Earnings before interest and tax for the financial years ended 2011 and 2012 were $355,515 and $304,395 respectively, but for the financial year ended 2013 and the period from 1 July 2013 to February 2014 the comparable figures were $83,198 and $6,335 respectively.

2. At February 2014 the first respondent owed banks $6,715.

3. There was a deterioration of net assets from $336,351 at 30 June 2011 to $68,105 at 30 June 2013 and $64,265 at February 2014. As the respondents submitted, setting off $92,677 shown in current assets at February 2014 as payments to the ATO against $269,751 categorised as a non-current liability for "NET ATO", the remaining current assets (mostly inventory of $94,353) were insufficient to discharge the current external liabilities of the first respondent, which exceeded $350,000. Discharge of the current external liabilities in that way would leave no substantial asset to defray the non-current liabilities totalling $310,668.

[10] In a joint expert report dated 6 November 2018 upon the value of the business operated by the first respondent:

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[3] The appellant denied in his defence that there was any such transfer but in an affidavit he deposed that "There was no NIL consideration on transfer of the business" and that "Outstanding employee benefits where [sic] transferred to the value of $74040". That is consistent with instructions to Ms Anderson from the appellant's solicitor to which Ms Anderson referred in her report dated 10 September 2018 upon the value of the first respondent's business.

1. Ms Anderson assessed the value of the business at February 2014 as $25,452 and Mr Chubb (an expert retained by the respondents) assessed its value as $59,388.

2. The experts:

   (i) refer to statements by Ms Anderson in her report of 10 September 2018 that there was no formal licence agreement in favour of the respondent granted by Editshare USA (which supplied the product sold by the first respondent) and there were significant risks associated with two consecutive years of trading losses; and

   (ii) record that Mr Chubb was prepared to take that into account together with other factors, including that in each financial year for 2012 and 2013 the business "turned over around $2.5 million" but that "[t]he entity that owned the business in question was itself financially distressed".

[11] A joint expert report on the first respondent's solvency, also dated 6 November 2018, recites that as a result of the experts reviewing each other's reports it was established that Mr Chubb had access to information which originally had not been available to Ms Anderson: accountant produced financial statements for the year ended 30 June 2012, company bank statements from 9 May 2013 to 22 April 2014, a "Report as to Affairs lodged by the Director in the liquidation of the Company", and information from the ATO available to the liquidator of the first respondent as to the ongoing relationship between the ATO and the first respondent. Those documents had since been provided. The joint report concludes that Mr Chubb considered that the date of the first respondent's insolvency was 30 June 2012 whereas the expert retained for the appellant, Ms Anderson, considered that the first respondent may have been insolvent then "but it was definitely insolvent by 15th November 2012 being the date of the demand for payment of arrears by the ATO and the subsequently demonstrated inability of the Company to meet that debt."

[12] In an undated affidavit the appellant swore:

> "1. At the time when the debt was incurred I had reasonable grounds to expect and did expect the company was solvent and would remain solvent.
>
> 2. The company had support from related entities being.
>
> a. EditShare Asia Pte Ltd
>
> b. EditShare LLC
>
> 3. At the time I had a commercial property for sale and it was sold.
>
> 4. I was able to borrow money and I did so to purchase a commercial property.
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> 5. I had an Accounting firm and book-keeper.
>
> 6. Company had a long list of sales prospects in the pipeline, and significant re-occurring revenue."

[13] The primary judge observed that: the ATO's running balance account ("RBA") established that at no stage between 15 November 2012 and the date of the winding up was the debt owed to the ATO ever satisfied; although some payments were made none of them were sufficient to satisfy the debt, which continued to mount; there was no evidence that the first respondent had any assets upon which it could rely; the basis upon which the appellant claimed that there was consideration for the assignment of the first respondent's business to a third entity involved the assumption of debts owed by the first respondent to employees by way of superannuation, accrued leave and the like, thereby making it reasonable to assume that there were then no assets available to the first respondent; and the first respondent's failure to make any meaningful repayments of its debt to the ATO supported the same conclusion.

[14] The primary judge acknowledged that it was necessary to consider the first respondent's financial position with reference not only to its legal rights and obligations but also to the prospect that it might have funds available to it in respect of which there was no formal agreement or understanding. The primary judge referred to Morrison JA's conclusion in *Chan & Ors v First Strategic Development Corporation Limited (in liq) & Anor*[4] that observations in *Williams (as liquidator of Scholz Motor Group Pty Ltd (in liq)) v Scholz*,[5] *International Cat Manufacturing Pty Ltd (In Liquidation) & Anor v Rodrick & Ors*,[6] and *Lewis v Doran*[7] " reflect the need, in cases where the financial support is from a source which cannot be compelled by legal arrangements, for there to be a degree of assuredness that the financial support will be forthcoming and at such a level that one could say the company was **able** to pay its debts as and when they fall due, rather than being **possibly able** to do so." The primary judge observed that the appellant's evidence did not approach that requirement; his assertion that he had a commercial property was unsupported by any other evidence and there was no evidence as to its value; the fact that he might have been able to borrow money did not assist in the absence of any commitment to borrow and then lend the money to the first respondent; there was no evidence of any provision of financial support by any director; and there was no evidence of any commitment to the continuation of financial support.

[15] The appellant's many arguments do not reveal any error in that analysis.

[16] As the primary judge considered, the fact that the first respondent was insolvent between 15 November 2012 and the date upon which it was wound up in insolvency was proved by the evidence I have summarised in [7] of these reasons. The evidence summarised in [8] – [11] of these reasons is consistent with and in some respects provides further support for the same conclusion.

[17] As to the appellant's evidence, it is not sufficient if, as the appellant argues, he had access to assets to fund payment of the first respondent's debts and he had disclosed documents upon that issue. In some cases summary judgment may be withheld because the evidence will leave open a real issue whether the point has been reached "at which one might conclude that the financial support was of such a degree of commitment that it was likely to continue, and with the result that the company was

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4 [2015] QCA 28 at [43].
5 [2008] QCA 94.
6 [2013] 97 ACSR 200.
7 (2004) 184 FLR 454 at 481; and on appeal at (2005) 219 ALR 555.

able to pay its debts, and therefore that it has sufficient financial support to draw the conclusion of solvency".[8] This is not such a case. The general assertions in the appellant's undated affidavit set out in [12] of these reasons fall a long way short of revealing a real prospect that he might succeed upon this point at a trial. The affidavit does not identify the nature of the suggested support, its monetary value, any commitment or an arrangement of any kind to provide such support or its terms, or the time when such support was to be supplied. There is no evidence of a commitment to supply financial support to the extent necessary to allow the first respondent to pay its debts as they fell due, which of course included the debt to the ATO that remained unpaid.

[18] The appellant relies upon entries in the unaudited profit and loss statements and balance sheets prepared by the first respondent's management which were annexed to Ms Anderson's report dated 10 September 2018. Ms Anderson summarised the profit and loss in a way which suggests, as the appellant argues, that the first respondent had significant sales above the cost of goods sold. That argument does not take into account all of the first respondent's costs of operating the business, which include its liability to the ATO. Furthermore, Ms Anderson's report was expressly based upon an assumption that the financial information was accurate and the report makes it clear that Mr Anderson had not carried out any independent confirmation of that information. After Ms Anderson had been provided with the additional financial information described in the experts' joint report upon solvency dated 6 November 2018, she concluded that the first respondent may have been insolvent as at 30 June 2012 "but it was definitely insolvent by 15th November 2012".

[19] The appellant argues that the financial information (together with what he submits are disclosed documents, which were not in evidence) reveal an error in a submission made by the respondents' solicitor to the primary judge that there was "nothing to support the assertion that the company had a long list of sales prospects and significant revenue … before the court" and no evidence of the first respondent having any assets. The respondents concede that, although the affidavits upon which the appellant relied did not include evidence of any assets, Ms Anderson's report of 10 September 2018 recorded total assets as at 30 June 2014 of $283,586. When answering the primary judge's question whether there was any evidence of the first respondent having any assets, the respondents' solicitor should have ensured that the answer was accurate. The solicitor therefore should have referred to the assets recorded in the profit and loss statement and consolidated balance sheet.[9] For the reasons already given, however, there was no error in the primary judge's conclusion that there was no evidence that the first respondent had any assets "upon which it could rely" to pay its debts as and when they fell due.

[20] The RBA was an exhibit to an affidavit sworn by the second respondent. He deposed that it was a true copy of the ATO running balance account in respect of the first respondent. He analysed the RBA and derived from it the calculation of the amount of $177,648.48 for which summary judgment was given. The appellant now submits that the RBA is not admissible evidence of the date the debts to the ATO were incurred because the RBA does not identify itself as a document created

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8 *Chan & Ors v First Strategic Development Corporation Limited (in liq) & Anor* [2015] QCA 28 at [43] (Morrison JA, Gotterson JA and Boddice J agreeing).

9 See *Pamamull v Albrizzi (Sales) Pty Ltd (No 2)* [2011] VSCA 260 at [111].

by the ATO, it appears to be a print out of a spreadsheet, it does not refer to the first respondent's tax file number or address, and it is not signed by the Commissioner of Taxation or the Deputy Commissioner of Taxation.

[21] In an appeal parties to the litigation are generally bound by their conduct of the proceedings at first instance.[10] An example of that general rule is that in a civil appeal a party generally should not be permitted to contend for the first time on appeal that evidence admitted without objection was inadmissible.[11] At the hearing before the primary judge the appellant, who, as the first respondent's sole director, secretary and shareholder, should be assumed to have known the details of the first respondent's debt to the ATO, did not object to the admission of the RBA. The proceeding in the Trial Division may have taken a different course if the appellant had made the objection he now seeks to make; for example, the respondents might readily have been able to produce a copy of the RBA which rectified the suggested defects. I would reject the appellant's argument about the admissibility of the RBA.

[22] In relation to the defence under s 588H(2) which is the subject of ground 1, the appellant submitted that the basis upon which he had reasonable grounds to believe that the first respondent was and would remain solvent included the matters set out in his undated affidavit. He also submitted that the first respondent had the support of related entities and the appellant himself. The appellant submitted that the first respondent had a "strong dealer network throughout Asia Pacific, with regular sales", but the evidence which arguably supplied some support for this proposition appears to be derived only from the first respondent's own financial records. The appellant submitted that the first respondent had "annual support contracts" renewed annually by a "growing customer base of at least 200 large customers". He did not adduce evidence to that effect. He submitted that the first respondent had a "very strong sales pipeline with increasing support from Editshare LLC". He did not adduce evidence that any such support was increasing and there was no evidence of the strength of the sales, other than what might be derived from Ms Anderson's valuation report.

[23] The deficiencies in the evidence upon which the appellant relies are manifest: see [14] – [18] of these reasons. In particular, there is nothing in the evidence to contradict the inference that, as the primary judge noted, the appellant must have been aware that the first respondent was not repaying its debt to the ATO. If the appellant held any expectation between 15 November 2012 and 7 March 2014 that the first respondent was and would remain solvent despite incurring its debts to the ATO in that period, that expectation could not have been based upon reasonable grounds. No triable issue arose about the defence in s 588H(2).

[24] Ground 3 contends that the primary judge erred in finding that there was evidence that the first respondent was insolvent at the relevant times "because the expert evidence before the … primary … judge relating to solvency did not comply with rule 428 of the *Uniform Civil Procedure Rules* 1999." The appellant argued that it followed that the joint expert report upon the solvency of the first respondent was inadmissible. The respondents rely upon r 429B(1) of the UCPR, which provides that the Court may "direct experts to meet and … identify the matters on which they agree … identify the matters on which they disagree and the reasons why; and …

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10 *Coulton v Holcombe* (1986) 162 CLR 1 at 8 – 9; *Whisprun v Dixon* [2003] HCA 48 at [51] – [52].

11 See *National Mutual Life Association of Australasia Ltd v Godrich* (1909) 10 CLR 1 at 39.

attempt to resolve any disagreement". After each side had exchanged expert reports upon the solvency issue, Henry J ordered pursuant to r 429B that the experts confer and in a joint written report to the Court identify the matters upon which they agreed and disagreed and, in respect to each matter of disagreement, the issues or issues of contention which needed to be resolved. The order made by Henry J and the joint expert report together make it clear that the parties had exchanged expert reports which expressed different opinions.

[25] The joint expert report complies with the requirements of the order made by Henry J, which itself reflects the empowering provision in r 429B. In *Campton v Centennial Newstan Pty Ltd (No 1)*[12] it was held that r 31.24(1)(c) and r 31.26(2) of the *Uniform Civil Procedure Rules* 2005 (NSW) excluded the application to a report of a conclave of experts (which is equivalent to a joint expert report) of provisions of the New South Wales UCPR which apply to a report by an individual expert. In this respect there is no material distinction between the New South Wales UCPR and the Queensland UCPR. The text and purpose of r 429B are inimical to the idea that a joint expert report about the results of the experts' meeting should include all of the detailed information required to be included in the preceding reports by each expert. In the absence of any direction by Henry J about the form of the report to the Court about the meeting of the experts, and given that the joint expert report was designed to be read together with the preceding reports of each expert, it was sufficient for the joint expert report to comply with the requirements of r 429B, which were incorporated in the order of Henry J. Ground 3 fails for that reason. It fails also because the appellant should not be permitted for the first time on appeal to contend that the joint expert report was not admissible in evidence.

[26] Ground 4 contends that the primary judge erred by failing to have regard to the appellant's further and better particulars dated 20 February 2017 and 28 August 2017. Each of those documents gives particulars of the appellant's denial in his third further amended defence of the allegation in the respondents' statement of claim that the ATO debt was incurred at a time when the first respondent was insolvent. Subject to any further order, the effect of those particulars was to confine that part of the appellant's case at the trial to the case described in the particulars. It remained open to the appellant to defend the summary judgment application, as he did defend it, by adducing affidavit evidence to support that case, but the particulars are not themselves evidence. The primary judge referred to the evidence the appellant adduced. It was not necessary for him to refer to the particulars.

[27] Ground 5 contends that the primary judge erred because the respondents' solicitors failed to notify the primary judge that the appellant had disclosed to the respondents in accordance with the UCPR documentation evidencing the appellant's sufficient financial resources as referred to in paragraph 19 of the further amended defence. Paragraphs [17] and [19] of these reasons explain why I would not uphold this ground.

[28] Ground 6 contends that the primary judge erred "by failing to find that the weight of the evidence before him was such as to justify an order in respect of the respondents". This ground was intended to convey that the primary judge erred by finding that the evidence justified the order for summary judgment. The reasons

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12 [2014] NSWSC 304 at [163] (Hall J).

already given explain my conclusion that the evidence justified summary judgment being given against the appellant.

[29] On 24 July 2019 the appellant applied to adduce as new evidence in the appeal an amended RBA statement by the ATO. The appellant argues that the new evidence shows that, if the appeal otherwise fails, the amount of the judgment should be reduced. The amended RBA contains entries added after judgment was entered in the Trial Division. Many of the new entries include credits and debits in the same amount. The only significant amendments are entries on 20 May 2019 crediting $108,431 and debiting $25,927, in each case on account of PAYG tax withheld for the period ended 30 June 2013. The effect of the amendments is to reduce the amount for which judgment should have been given to $95,144.10.

[30] Before the hearing of the appeal the respondents offered to consent to a variation of the judgment pursuant to r 667(2)(e) of the UCPR.[13] The respondents submit that it was then open and it remains open to the appellant to apply in the Trial Division to vary the judgment with the consent of the respondents. They also point out that the grounds of the appeal are confined to liability and the appellant did not apply for leave to amend the notice of appeal. Nevertheless, the respondents properly concede that if the new evidence is properly admissible it is appropriate to vary the judgment to $95,144.10. The Court has power to make that order. It is appropriate to do so given the simplicity of the issue, the absence of any argument about the merits of the proposed variation, and the disadvantage from which the appellant suffers as a result of lacking legal representation. In the circumstances allowing the appeal to that extent only is not a ground for depriving the respondents of their costs of resisting the appeal.

Proposed orders

[31] I consider that the following orders are appropriate:

1. Allow the appeal.
2. Grant the appellant's application for leave to adduce the amended running balance account statement as evidence in the appeal.
3. Vary order 1 made in the Trial Division on 18 January 2019 by substituting $95,144.10 for the amount of $177,648.10 as the sum the First Defendant is ordered to pay the First Plaintiff.
4. Otherwise confirm the orders made in the Trial Division.
5. The appellant is to pay the respondents' costs of the appeal excluding any costs of the appellant's application to adduce evidence in the appeal.

[32] **HENRY J:** I agree with the reasons of Fraser JA and the orders proposed by his Honour.

[33] **BRADLEY J:** I agree with the reasons for judgment of Fraser JA and the orders his Honour proposes.

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13 See *Matton Developments Pty Ltd v CGU Insurance Limited (No 2)* [2016] QCA 285.