SUPREME COURT OF QUEENSLAND

CITATION:	*Tutos v Roman Catholic Trust Corporation* [2020] QCA 171
PARTIES:	**MARIUS LUCIAN TUTOS** (applicant) **v** **THE ROMAN CATHOLIC TRUST CORPORATION FOR THE DIOCESE OF CAIRNS trading as CATHOLIC EDUCATION SERVICES CAIRNS** ABN 42 498 340 094 (respondent)
FILE NO/S:	Appeal No 1100 of 2020 DC No 73 of 2018
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Cairns – [2019] QDC 261 (Fantin DCJ)
DELIVERED ON:	18 August 2020
DELIVERED AT:	Brisbane
HEARING DATE:	9 June 2020
JUDGES:	Sofronoff P and Fraser and Morrison JJA
ORDERS:	**1. The application for extension of time within which to seek leave to appeal is refused.** **2. The applicant pay the respondent's costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – FROM INTERLOCUTORY DECISIONS – LEAVE TO APPEAL – where the applicant was a teacher employed by Catholic Education Services Cairns in 2017 – where after his probationary period, he was allocated a teaching role for 2018 – where the applicant was told he would be teaching technology and design rather than mathematics – where the applicant did not agree with that change – where the applicant was suspended in February 2019 and resigned in May 2019 – where the applicant instituted proceedings alleging that he had been forced out of his employment and claimed damages of $350,000 – where the general basis of the claim was said to be "breach of clauses stipulated in my employment contract, duress, illegality, malice and ill will, negligence, undue influence and estoppel" – where the learned primary District Court judge struck out the applicant's amended claim and amended statement of claim and entered judgment for the

respondent under r 293 *UCPR* – where the applicant challenges that decision – whether leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld) should be granted

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – where the applicant filed his notice of appeal four days late – where the respondent submits that an extension of time should not be granted as it is futile – whether an extension of time should be granted

District Court of Queensland Act 1967 (Qld), s 118(3)
Fair Work Act 2009 (Cth)
Uniform Civil Procedure Rules 1999 (Qld), r 293
Work Health and Safety Act 2011 (Qld), s 267

du Boulay v Worrell & Ors [2009] QCA 63, cited
Goldman Sachs JBWere Services Pty Ltd v Nikolich (2007) 163 FCR 62; [2007] FCAFC 120, distinguished
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Knight v State of Queensland & Ors [2019] QSC 86, applied
Pickering v McArthur [2005] QCA 294, applied
Robertson v Hollings & Ors [2009] QCA 303, applied
Ross v Hallam [2011] QCA 92, cited

COUNSEL: The applicant appeared on his own behalf
P K O'Higgins for the respondent

SOLICITORS: The applicant appeared on his own behalf
Miller Harris Lawyers for the respondent

[1] **SOFRONOFF P:** I agree with Morrison JA.

[2] **FRASER JA:** I agree with the reasons for judgment of Morrison JA and the orders proposed by his Honour.

[3] **MORRISON JA:** The applicant was a teacher employed by Catholic Education Services Cairns in 2017. He taught mathematics at the Good Counsel School at Innisfail. After his six-month probationary period ended in October 2017, he was allocated a teaching role for 2018.

[4] The Acting Principal told the applicant he would be teaching technology and design rather than mathematics. The applicant did not agree with that change. He was suspended on 19 February 2019 and resigned on 31 May 2019.

[5] The applicant instituted proceedings alleging that he had been forced out of his employment and claimed damages of $350,000. The general basis of the claim was said to be "breach of clauses stipulated in my employment contract, duress, illegality, malice and ill will, negligence, undue influence and estoppel".

[6] The respondent twice applied to the learned primary District Court judge to strike out the various versions of the claim and statement of claim, and sought summary judgment under r 293 of the *Uniform Civil Procedure Rules* 1999 (Qld). It

succeeded for the first time on 18 April 2019.[1] The amended statement of claim was struck out with leave to replead, but the application to strike out the claim was adjourned.

[7] After the pleadings were further amended in response to that decision, the respondent applied again, and again succeeded, on 18 December 2019.[2] This time the amended claim and amended statement of claim were struck out and judgment was entered for the respondent under r 293 *UCPR*.

[8] The applicant challenges that decision. He requires leave to appeal pursuant to s 118(3) of the *District Court of Queensland Act* 1967 (Qld).

[9] The grounds of the proposed appeal are that the learned primary judge erred by:

(a) not taking notice of a breach of contract brought to the attention of the court in the amended statement of claim dated 18 June 2019; and

(b) not acknowledging potential breaches of duty of care brought to the attention of the court in the amended statement of claim.

Legal principles – extension of time

[10] The applicant filed his notice of appeal four days late, and therefore seeks an extension of time within which to seek leave to appeal. The respondent accepts that the applicant has attempted to explain his delay but says that an extension of time should not be granted as it is futile.

[11] The principles applicable on an application for an extension of time are well settled. The court may grant an extension of time but only if positively satisfied it is proper to do so. In doing so, it is appropriate to consider the merits of the substantive application and to refuse an extension if the appeal is plainly hopeless.[3]

Legal principles – leave to appeal

[12] The principles to apply on the question of leave to appeal are well settled. In *Pickering v McArthur*[4] this Court said that leave would usually be granted where an appeal is necessary to correct a substantial injustice to the applicant and there is a reasonable argument that there is an error to be corrected. That test has been followed consistently since.[5]

Legal principles – unrepresented litigants

[13] As the applicant is unrepresented, it is as well to note some principles that are applied when that is the case.

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1 *Tutos v Catholic Education Services Cairns* [2019] QDC 57.
2 *Tutos v Catholic Education Services Cairns (No 2)* [2019] QDC 261.
3 *Hunter Valley Developments Pty Ltd v Cohen* [1984] FCA 186; (1984) 3 FCR 344 at 348-349; and *Chapman v State of Qld* [2003] QCA 172 at [3] per de Jersey CJ, White and Atkinson JJ. See also *Ford v La Forrest* [2002] 2 Qd R 44 at 45.
4 *Pickering v McArthur* [2005] QCA 294 at [3].
5 For example: *Wash Investments Pty Ltd v SCK Properties Pty Ltd* [2016] QCA 258; *Ant Projects Pty Ltd v Brooks* [2019] QCA 259.

[14] In *Ross v Hallam*[6] McMurdo P observed, in the context of a strike out application:

> "[13] … The judicial task of ensuring fairness to all parties where one party is self-represented, can be difficult. Judges must be cautious that, in ensuring fairness to self- represented litigants, they do not cause unfairness to represented litigants. Balancing these tensions can be challenging. …"

[15] Muir JA said in *du Boulay v Worrell*:[7]

> "[69] It may be that self-represented litigants should be afforded a degree of indulgence and given appropriate assistance. But if a self-represented person wishes to litigate, he or she is as much bound by the rules of Court as any other litigant. Those rules exist to facilitate efficient, fair and cost-effective litigation. The Court's duty is to act impartially and ensure procedural fairness to all parties, not merely one party who may be disadvantaged through lack of legal representation. The other party to the litigation is entitled to protection from oppressive and vexatious conduct regardless of whether that conduct arises out of ignorance, mistake or malice."

Chronology

[16] The relevant chronology leading to the order made on 18 December 2019 is as follows:

(a) on 30 April 2018 the applicant filed a claim and statement of claim;

(b) on 28 May 2018 the respondent filed a notice of intention to defend and defence;

(c) on 5 June 2018 the applicant filed a document titled "Response to the defence of defendant";

(d) on 24 July 2018 the respondent filed an application to strike out the statement of claim and for summary judgment, and on the same day the applicant filed an application to set the proceeding down for trial;

(e) before those applications were heard and determined, on 4 October 2018 the applicant filed an amended claim and amended statement of claim; the pleadings were amended in response to issues raised at directions hearings and in the previous application;

(f) on 19 November 2018 the respondent filed a further application to strike out the amended claim and amended statement of claim and for summary judgment;

(g) the applications were heard on 8 and 11 February 2019, with further written submissions provided by both parties after that date;

(h) on 18 April 2019 the amended statement of claim was struck out with leave to replead;

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6 [2011] QCA 92 at [13].

7 [2009] QCA 63 at [69]; footnote omitted.

(i) on 18 June 2019 the applicant filed a further amended statement of claim;[8] and

(j) the application was heard on 31 July 2019; the applicant declined to appear but filed submissions and sought that various documents be taken into account.

Consideration

[17] The respondent's application was brought under r 171 *UCPR*. It contended that the relevant grounds were that the pleading: disclosed no reasonable cause of action: r 171(1)(a); had a tendency to prejudice or delay the fair trial of the proceeding: r 171(1)(b); contained unnecessary or scandalous allegations: r 171(1)(c); and was otherwise an abuse of the process of the court: r 171(1)(e).

[18] The learned primary judge analysed the statement of claim and relief sought in the claim in some detail and concluded that the claim and statement of claim should be struck out:[9]

> "The plaintiff's current amended statement of claim is dogged by the same problems as previous versions. Nothing in the amended statement of claim discloses a reasonable cause of action over which the court has jurisdiction."

[19] Before the pleading sets out the substantive paragraphs it contains a section titled "Introduction". Then follows a series of statements that are not a pleading within the *UCPR* but more like a submission. For example, it says that the pleading has the "purpose to expose damages I suffered as a consequence of illegal practices at the College".[10] And, paragraph 6 states "The relief sought in this document follows a case in Federal Court of Australia", which is then identified as *Goldman Sachs JBWere Services Pty Ltd v Nikolich*.[11]

[20] The first substantive allegation in the pleading is that the school where the applicant was employed had a policy which "oversees the Process", a reference to the "probationary period planning & review process".[12] It is then alleged that the Principal breached the employment contract by "not implementing the Process".[13] This is said to constitute "ILLEGALITY"[14] though how that is so remains unclear. A nine paragraph set of particulars is then provided. Paragraph 14(5) does allege that "implementation of the Process was an obligation that emanated directly from the term of my contract that stipulated a probationary period", however, the particulars plead breaches of the *Fair Work Act* 2009 (Cth) by reason of the failure to implement the policy. Leaving aside the jurisdictional difficulty that poses,[15] there is no causal link pleaded between the breaches and damage. Such a link may be doubted given that the applicant's case is that he continued to be employed after the end of the probationary period.

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8 The applicant purported to file two later versions but these can be disregarded for present purposes.
9 Reasons below at [10].
10 Paragraph 4, AB 34.
11 [2007] FCAFC 120; (2007) 163 FCR 62.
12 Paragraphs 12-13, AB 35.
13 Paragraph 14, AB 35.
14 Particular 14(2).
15 Pursuit of relief under the *Fair Work Act* falls within the exclusive jurisdiction of the Fair Work Commission.

[21] There is an even greater problem confronting a claim that breach of the policy amounted to a breach of the applicant's contract of employment. The unchallenged evidence established that the respondent had no such policy that related to probationary employment of new employees, and the document referred to in the amended statement of claim was an internal management document only and therefore not, in fact, part of the applicant's contract of employment.[16] Therefore the claim based on breach of contract cannot succeed, nor any linked claims based on the policy. Reliance on *Goldman Sachs JBWere Services Pty Ltd* is misplaced because, unlike the applicant's position, there the policy formed part of the employment contract.

[22] In my respectful view, the learned primary judge was right to observe:[17]

> "The plaintiff has framed his contractual cause of action on that decision. However his reliance upon it is misconceived. The policy relied upon by the plaintiff in this case did not (on the evidence filed) form part of his contract of employment. The terms of his employment contract did not include any corollary of the term in *Goldman Sachs*. There is no causal link pleaded between breach of the "policy" and any loss or damage allegedly suffered by the plaintiff. Any claim for personal injury (psychiatric or psychological) is subject to the relevant workers' compensation legislation, which has not been complied with here. And finally, the plaintiff denies that his claim is for personal injury at all."

[23] The next substantive allegation is that:[18]

(a) the school permitted students to cheat on the mathematics examinations between 2009 and 2017;

(b) that was a breach of the *Education (Queensland Curriculum and Assessment Authority) Act* 2014, the *Education (Accreditation of Non-State Schools) Act* 2001, and the *Education (Accreditation of Non-State Schools) Regulation* 2017,[19] and therefore illegal;

(c) the requirement that the applicant be part of that system amounted to coercion and was illegal;

(d) the applicant raised that issue with the Principal;

(e) an Acting Principal was appointed when the school's Executive were sacked, and the applicant's teaching load and teaching subjects were changed without his agreement;

(f) the change in teaching subjects was part of a campaign to remove the applicant from the school in order to cover up the breaches on account of letting the students cheat on examinations; and

(g) the change in teaching load was a breach of contract.

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16 Affidavit of Mr Davis, AB 720-721.

17 Reasons below at [21].

18 Paragraphs 15-26, AB 36-40.

19 Reference is also made to the *Education (Accreditation of Non-State Schools) Regulation* **2001**. It is not clear if this was deliberate or an error.

[24] There are difficulties with this part of the pleading. Firstly, the assertion that there was a campaign to remove the applicant from his position is not accompanied by any identification of the cause of action it creates. Nor is it linked to the applicant's eventual resignation.

[25] Secondly, the allegation that the change in teaching load was a breach of contract only identifies the agreement between the school (the respondent) and the Principal, but not any agreement to which the applicant was party. Paragraph 26 does allege, as part of the particulars, that the Acting Principal should have activated the "Employee – Unsatisfactory Performance Process" and the applicable "Guideline/Procedure", but did not do so.[20] However, nothing is pleaded to follow from those failures. Paragraph 26 simply says "I accuse the [Acting Principal] of breach of contract for changing my teaching load." There is no pleading of any relevant term of his agreement that was breached.

[26] Thirdly, in so far as it alleges that there was illegality, the pleading suffers from the fact that there is no allegation of illegality attaching to the applicant's employment, or his performance of it. The pleading simply alleges that requiring him to be part of a system condoning cheating on exams was illegal, without any attempt to show how that result follows. The documents exhibited to affidavits filed by the respondent on the application for summary judgment do not support the allegations made, in that they say nothing about the imposition of a statutory duty in relation to repeating examination questions.

[27] The next part of the pleading alleges that the Diocese "initiated a denigration campaign" in order to "force [the applicant into] making the decision to leave the school". It is also alleged that the Director of the Diocese was the person responsible for orchestrating that campaign.[21]

[28] There are then 34 paragraphs by way of particulars. The particulars relevantly allege that:

(a) the Director lied to the applicant by suggesting that the Acting Principal was activating the Employee – Unsatisfactory Performance Process and never responded to the applicant's point about the students' cheating;[22]

(b) it was a term of his contract that he teach only Mathematics 9-12; 75 per cent of his new teaching load were subjects other than mathematics;[23]

(c) simultaneously with the change of his teaching load, the applicant's position was advertised; it was said that the intention to dismiss the applicant "was obvious, if the possibility for having two teachers in the same classes, teaching the same subjects, is eliminated";[24]

(d) by way of intimidation the Director initiated an unjustified investigation into the applicant's qualifications, for the purpose of creating stress;[25]

(e) in breach of the Catholic Employing Authorities Single Enterprise Collective Agreement – Diocesan Schools of Queensland 2015-2019, the applicant was

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20 Paragraphs 26(3), (7) and (8), AB 39-40.
21 Paragraph 27, AB 40-44.
22 Paragraphs 27(1) and (2).
23 Paragraph 27(3).
24 Paragraph 27(7).
25 Paragraph 27(8).

given an unreasonable direction to provide documentation confirming his qualifications, and suspended on full pay in the meantime;[26]

(f) the direction and suspension were unreasonable and unjustified because the applicant had provided all relevant documentation in a timely way, and his qualifications to teach mathematics had been assessed by the Victorian Institute of Teaching and the Queensland College of Teachers;[27]

(g) as a result the applicant was "humiliated, denigrated and forced to stay in isolation";[28]

(h) the applicant provided the Director with medical evidence predicting and evidencing a deterioration of his health but that was ignored;[29] because of that, the continued suspension was unjustified, a breach of duty of care, and a breach of the *Work Health and Safety Act* 2011 (Qld);[30]

(i) by 4 May 2018 the Director had the report from the Manager of the Professional Standards Unit as to the outcome of the investigation, but did not communicate with the applicant for three weeks, thus denying the applicant the chance to respond; and on 31 May the Director stopped the applicant's pay; that was a breach of contract, and a "last resource [sic] to force me to resign";[31] and

(j) left without income and concerned for his health, the applicant resigned on the advice of his doctors.[32]

[29] Once again there are difficulties with this part of the pleading. Firstly, there is no discernible pleading of the circumstances that give rise to the alleged duty of care, nor the content of that duty. The breach is alleged to be the continuation of the applicant's suspension but no causative link is alleged between that breach and the incurring of damage.

[30] The existence of a duty of care with a content beyond the terms of the applicant's contract of employment may be doubted. The applicant was subject to the Catholic Employing Authorities Single Enterprise Collective Agreement – Diocesan Schools of Queensland 2015-2019.[33] That agreement was evidently designed to comprehensively cover the matters that might arise in the employment of teachers. It contains detailed provisions governing things such as changes to the work roster and workload,[34] workplace harassment,[35] and the ability to direct that teachers carry out duties within the limits of their skill, competence and training.[36] Further, the agreement contains very detailed provisions governing the resolution of grievances and disputes between a teacher and the employer: clause 2.4. The progressive steps

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26 Paragraphs 27(9) and (10).
27 Paragraphs 27(11)-(17), (21)-(22).
28 Paragraph 27(19).
29 Paragraphs 27(20), (23)-(24).
30 Paragraphs 27(25)-(28).
31 Paragraphs 27(29)-(33).
32 Paragraph 27(34).
33 AB 83.
34 Clauses 2.2 and 2.3.
35 Clause 10.5.
36 Clause 10.9.

in that process all lead (in the event of resolution not being reached) to the Fair Work Commission dealing with the matter: clause 2.4.7.

[31] Secondly, there is no pleading of the relevant term of the applicant's contract under which it is alleged that he was required to teach only mathematics, and his teaching load could not be changed.

[32] Thirdly, the pleading does not identify the basis upon which it is said that the continued suspension was a breach of statutory duty under the *Work Health and Safety Act*. In any event, as the learned primary judge observed, that proposition is misconceived because nothing in that Act confers a right of action in civil proceedings in relation to a contravention of that Act: s 267.

[33] Fourthly, all of the individually suggested breaches are under the rubric of the Director's orchestrating a campaign to force the applicant to resign. Various steps in the particulars are characterised, usually in single words without elaboration, as "ILL-WILL", "NEGLIGENCE", or "ILLEGALITY". However, there is no attempt to plead the basis of those characterisations, such as to properly found an allegation of ill-will, or negligence, let alone illegality.

[34] Fifthly, there is no acceptable pleading of the material facts which show the causal link between the various allegations and the damages said to have been suffered.

[35] Sixthly, this part of the claim is, in effect, that the applicant was forced to resign from his employment. Such a claim falls under the provisions in the *Fair Work Act*, and jurisdiction over such a claim is given to the Fair Work Commission, not the District Court. Such a claim brought in the wrong jurisdiction is liable to be struck out.[37]

[36] Finally, the relief claimed makes no attempt to link the loss to the particular cause of action said to have caused it. The central paragraphs demonstrate the way in which the prayer for relief obscures the legal basis for the damages. They commence by referring to a Federal Court decision in *Goldman Sachs JBWere Services Pty Ltd v Nikolich*,[38] and asking that various paragraphs of that decision be read.[39] Paragraphs 31 and 32 continue:

> "31. The consequences for myself are far more devastating than the ones presented in that case. I was humiliated, harassed and denigrated. My image in the community and my career was irreparably damaged. To find a job in teaching is not like finding a job in IT or finance. Without references from the last school and without a proper conduct as a teacher, there is no chance to produce interest for a principal. If my name is typed on Google, the trial in the District Court of Queensland comes up. The Facebook has posts about this trial, with thousands of comments. Some papers in Queensland also printed articles on my story.

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37 *Knight v State of Queensland & Ors* [2019] QSC 86.
38 [2007] FCAFC 120; (2007) 163 FCR 62.
39 Paragraph 30, AB 44.

> 32. I claim the following: the sum of $100,000, after tax, for loss of income and the sum of $250,000, after tax, for the loss of future income. In the spirit of paragraph [339] of the decision made by FCA, at the discretion of Your Honour, I claim an additional $50,000 to the loss of future income, which is on top of the total sum expressed in the Claim. That will conclude with a total of $350,000 claimed in this statement (+ $50,000 at the discretion of the Honourable Judge)."

[37] The claim itself did nothing to identify the cause of action with the sort of clarity required under the *UCPR*. Under the heading "Relief Sought" this appears:

> "An order for damages, specifying monetary compensation of $350,000, in the light of the following causes of action that concluded with an irreparable damage of my career, cessation of my employment, the impossibility to be offered another teaching job (permanent) for at least 3-4 years, the suppression of my dignity, humiliation, deterioration of my public image and forced physical isolation for an unlimited period of time, isolation that could lead to depression:
>
> (a) breach of clauses stipulated in my employment contract
>
> (b) duress
>
> (c) illegality
>
> (d) malice and ill will
>
> (e) negligence
>
> (f) undue influence
>
> (g) estoppel"

[38] The problems as to identifying the contended breach of contract, illegality and negligence have been referred to above. So, too, have the difficulties in justifying assertions of duress, malice, ill will or undue influence. No attempt was made to make a case of estoppel.

[39] The defects in the amended statement of claim, to which I have referred above, are ones which the learned primary judge identified in the first decision, and remained in the pleading notwithstanding her Honour's reasons. As her Honour said, the substance of the applicant's allegations had not changed between the two sets of pleadings,[40] and the amended statement of claim the subject of the application was "dogged by the same problems as previous versions".[41] That being the case, given that the pleading had been struck out on the first application (albeit with leave to replead) it is not surprising that her Honour reached the same conclusion.

[40] It was, in my view, a conclusion that was open to her Honour. Further, the matters referred to above demonstrate, in my respectful opinion, that the decision of the learned primary judge to grant summary judgment cannot be said to be beyond the

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40 Reasons below at [4].

41 Reasons below at [10].

discretion reposed in the court upon such an application. The applicant's case faces such hurdles that its failure seems assured.

[41] Moreover, the orders that were made were the consequence of her Honour's exercise of a discretion, both as to striking out and as to whether to grant summary judgment. No error of the type in *House v The King*[42] has been demonstrated.

[42] The applicant is self-represented, as he has been throughout, but that does not mean that this Court should permit the prosecution of a claim which cannot proceed fairly to the other party because it proceeds unconstrained by the *UCPR*.[43]

[43] Further, the refusal to permit the litigation to proceed does not work an injustice upon the applicant. The applicant asserts he has suffered a psychiatric or psychological injury but disavowed any such claim for damages. The applicant asserts he was constructively dismissed, but any remedy in that respect would seem to lie under the *Fair Work Act*, and in the jurisdiction of the Fair Work Commission. The complete inability to identify the relevant material facts bespeaks not just noncompliance with the *UCPR* rules for pleading, but an absence of the underlying factual stratum necessary for a coherent cause of action.[44]

[44] I would refuse the application to extend time. Even if I had been willing to extend the time to seek leave to appeal, I would have refused that leave.

[45] I propose the following orders:

1. The application for extension of time within which to seek leave to appeal is refused.

2. The applicant pay the respondent's costs.

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42 [1936] HCA 40; (1936) 55 CLR 499.

43 *Robertson v Hollings & Ors* [2009] QCA 303 at [11] per Keane JA.

44 *Haggarty v Wood (No 2)* [2015] QSC 244 at [81]–[82]; *Althaus & Anor v Australian Meat Holdings Pty Ltd & Anor* [2009] QCA 221 at [7], [20], per Keane JA; *Chan & Ors v Macarthur Minerals Ltd & Ors* [2019] QSC 143 at [74]-[75].