

# SUPREME COURT OF QUEENSLAND

CITATION: *International Cat Manufacturing P/L (in liq) & Anor v Rodrick & Ors* [2009] QSC 254

PARTIES: **INTERNATIONAL CAT MANUFACTURING PTY LIMITED (IN LIQ)** ACN 099 908 942  
(first plaintiff)

**DAVID HAMBLETON AND ROBERT MURPHY AS LIQUIDATORS OF INTERNATIONAL CAT MANUFACTURING PTY LIMITED (IN LIQ)**  
ACN 099 908 942  
(second plaintiffs)

v

**RAYMOND JOHN RODRICK**  
(first defendant)

**NU-LOG PTY LIMITED** ACN 001 420 515  
(second defendant)

**SUSAN RUTH CARTER AND JASON WALTER BETTLES**  
(third defendants)

FILE NO/S: BS 6045 of 2007

DIVISION: Trial

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 25 August 2009

DELIVERED AT: Brisbane

HEARING DATE: 25 August 2009

JUDGE: McMurdo J

ORDER: **1. The plaintiffs shall, by 4.00 pm on Tuesday, 8 September 2009, serve on the defendants: –**

**(a) Written statements of all the witnesses whom they propose to call at the trial, such statements: –**

**i. To be signed by each witness; and**

**ii. To contain the evidence-in-chief of each such witness on the issues on which the plaintiffs bear the onus of proof; and**

**(b) The reports of any expert witnesses whom they propose to call at the trial; and**

	(c) A list of all documents that the plaintiffs intend to tender at trial; and	1
	(d) A list of all documents that the plaintiffs have supplied to each such expert.	
	2. The plaintiffs shall not, at the trial, without special leave: –	
	(a) Adduce any evidence from any witness a statement from whom is not served by 4.00 pm on Tuesday, 8 September 2009; or	10
	(b) Adduce any evidence from a witness that is not fairly contained in the written statement of that witness, served in compliance with paragraph 1(a) of this order; or	
	(c) Adduce any expert evidence from an expert that is not fairly contained in the report of that expert, served in compliance with paragraph 1(b) of this order; or	20
	(d) Tender any document that is not identified in compliance with paragraphs 1(c)	
	3. The matter is adjourned for further review on 21 September 2009 at 9.30 am.	
	4. The plaintiffs shall pay the defendants’ costs of and incidental to the proceedings on 9 July 2009 and of today, the costs of today to be on the indemnity basis.	30
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – OTHER MATTERS BEFORE TRIAL – where the Court had ordered the plaintiffs to serve written summaries of the evidence-in-chief of the witnesses on whom they intend to rely in respect of those issues on which the plaintiffs bear the onus of proof – where the summaries identified the witnesses simply as “the liquidator, former employees, suppliers, customers and the other directors of the company” – where the summaries state that the plaintiffs intend to rely upon “the final solvency report to be prepared by the liquidator” – whether this complies with the orders made	40
COUNSEL:	J K Ratanatray for the plaintiffs S C Russell ( <i>sol</i> ) for the first and second defendants C Coulsen for the third defendants	
SOLICITORS:	Piper Alderman for the plaintiffs Russell and Company for the first and second defendants QBM Lawyers for the third defendants	50

SUPREME COURT OF QUEENSLAND		1
CIVIL JURISDICTION		
McMURDO J		
No 6045 of 2007		10
INTERNATIONAL CAT MANUFACTURING PTY LIMITED (IN LIQ) ACN 099 908 942	First Plaintiff	
and		
DAVID HAMBLETON and ROBERT MURPHY AS LIQUIDATORS OF INTERNATIONAL CAT MANUFACTURING PTY LIMITED (IN LIQ) ACN 099 908 942	Second Plaintiffs	20
and		
RAYMOND JOHN RODRICK	First Defendant	
and		
NU-LOG PTY LIMITED ACN 001 420 515	Second Defendant	
and		30
SUSAN RUTH CARTER AND JASON WALTER BETTLES	Third Defendants	
BRISBANE		40
..DATE 25/08/2009		
ORDER		50
1-3	ORDER	60

HIS HONOUR: On the 23rd of April this year I made orders by consent one of which was that the plaintiffs serve written summaries of the evidence-in-chief of the witnesses on whom the plaintiffs rely in respect of those issues on which the plaintiffs bear the onus of proof, those summaries to be provided by 4 June 2009. With the consent of all parties it seems that that date was extended although there was no order to that effect.

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On the 9th of July the summaries had not been provided and I made a further order in the same terms providing for those summaries on or before the 12th of August. On that occasion counsel for the plaintiffs said that there would be a difficulty in completing the summaries of evidence before the 12th of August and the plaintiffs sought that date. The defendants, or at least the first and second defendants, resisted that extension but I was persuaded to grant it.

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Nothing was provided by the 12th of August. After the matter was relisted for today, what purports to be a summary in compliance with my order was provided yesterday.

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The content of a summary of evidence ought to be well understood by practitioners concerned with matters in this List. The provision of summaries of evidence has been a practice adopted in this List now for some years and is usually something which gives rise to no difficulty or debate. On any view, what was provided yesterday as a purported summary is no such thing. For example, the proposed witnesses

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are identified simply as the liquidator, former employees,  
suppliers, customers and the other directors of the company.

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The liquidators say that on the critical issue of the solvency  
or insolvency of the company over a period from November 2003  
to August 2005, the plaintiffs intend to rely upon "the final  
solvency report to be prepared by the liquidator of the  
company, a draft version of which is annexed to the affidavit  
of one of the liquidators sworn 24 April 2009." That  
reference to "the final solvency report to be prepared by the  
liquidator" is made in several places within this purported  
summary. So the liquidators have offered as a summary of the  
evidence to be called by them a reference to a document which  
they themselves are yet to sit down and write. And this is in  
the context of orders which go back to last April.

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Moreover, rather than seeking to explain their default and  
approaching the Court for some extension or relief from the  
operation of the orders, the liquidators have chosen to  
instruct their lawyers and in particular their counsel to come  
along and make the quite hopeless submission that they have  
complied with the directions, and, moreover, that the case is  
ready for trial, at least on the plaintiff's side of it, and  
that the Court should allocate trial dates.

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I have to say that the approach by the liquidators in those  
respects to this litigation is disappointing. There may be  
many reasons why this case has not been prosecuted as I think  
it should have been. But it is incumbent upon liquidators to

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be frank with the Court in that respect, whatever may be the reasons.

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Suffice it to say that the case is far from ready for trial and there is no reason why this case should be advanced beyond the queue of those which are ready for trial and are waiting for trial dates.

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The first and second defendants seek orders intended to have the effect which the orders for summaries of evidence should have had. But rather than seeking simply another order for summaries of evidence, the first and second defendants seek orders for the provision of written statements of the witnesses proposed to be called by the plaintiffs, reports of any experts proposed to be called, and a list of documents proposed to be tendered or which have been supplied to such experts.

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The further orders sought are that the plaintiffs should not at a trial without special leave adduce any evidence from a witness from whom a statement has not been obtained and served or adduce evidence from a witness that isn't fairly contained in the written statement of that witness, with a similar direction in relation to expert evidence.

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The purpose of those directions would not be to have the trial proceed as a trial on affidavit but rather to ensure that the defendants are sufficiently notified of the content of the

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plaintiff's case so that they can prepare their response and they are not taken by surprise.

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The conclusion I have reached is that orders as are sought by the first and second defendants, which are supported by the third defendants, should be made. The purpose of those orders should have been served by the orders which have been made for summaries, but I accept that were I to make yet another order for summaries of evidence, there would be little prospect that it would serve that purpose.

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The proposed order seeks the provision of those statements and reports and lists by 8 September 2009 which, in the circumstances, seems reasonable. The matter will then come back for further review in September and the questions which are likely to arise then are whether, as has been suggested by the third defendants, there should be a trial of the issues other than those raised by paragraphs 50 and 51 of the statement of claim in advance of the issues raised within those paragraphs. Those paragraphs plead the particular case against the third defendants. I would not be minded to make that order unless the third defendants agreed to be bound by the outcome in a preliminary trial, assuming that they would not actively participate in it. As to that, counsel for the third defendants said that he would wish to know more of the plaintiff's case before he responded to that qualification: hence, again the need for these statements of witnesses.

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The other order which is sought is that the plaintiffs pay the defendants' costs of and incidental to the proceedings on 9 July and of today on the indemnity basis.

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The comments I have made already should demonstrate why the defendants should have their costs of today on the indemnity basis. I am not persuaded that the same might be said about proceedings on 9 July but the defendant should have those costs.

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The orders will be in terms of paragraphs 1 and 2 of the draft provided by Mr Russell appearing for the first and second defendants; paragraph 3 of that draft will be completed to insert a review date of 21 September 2009 at 9.30. Paragraph 4 will be amended to read as follows: The plaintiffs shall pay the defendants' costs of and incidental to the proceedings on 9 July and of today, the costs of today to be on the indemnity basis.

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