SUPREME COURT OF QUEENSLAND

CITATION:	*Re: Castleplex Pty Ltd (in liq)* [2010] QCA 59
PARTIES:	**JOHN LABAJ** (applicant/appellant) **v** **DAVID JAMES HAMBLETON** (first respondent) **ROBERT EUGENE MURPHY** (second respondent)
FILE NO/S:	Appeal No 6483 of 2009 Appeal No 6698 of 2009 BS 4198 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 March 2010
DELIVERED AT:	Brisbane
HEARING DATE:	5 November 2009
JUDGES:	McMurdo P and Fryberg and McMeekin JJ Separate reasons for judgment of each member of the Court, McMurdo P and McMeekin J agreeing as to the orders made, Fryberg J dissenting in part
ORDERS:	**1. In Appeal No 6483 of 2009: Appeal dismissed with costs.** **2. In Appeal No 6698 of 2009: Application refused with costs.**
CATCHWORDS:	Corporations – Winding up – Liquidators – Appeal from liquidator's decisions – De novo appeal *Corporations Act* 2001 (Cth), s 553D(3), s 1321 *Corporations Regulations* 2001 (Cth), r 2.7, r 5.6.47, r 5.6.49(b), r 5.6.50(1)(a), r 5.6.54(2) *Supreme Court Act* 1995 (Qld), s 253 *Uniform Civil Procedure Rules* 1999 (Qld), r 28 *Beck v Darling Downs Institute of Advanced Education* (1990) 140 IR 364, cited

Court v Australian Securities Commission & Anor (1998) 16 ACLC 937, cited
Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd (2008) 234 CLR 237; [2008] HCA 10, cited
HIH Casualty & General Insurance Ltd v Dascam P/L & Ors [2002] QCA 187, cited
Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors (2003) 45 ACSR 224; [2003] NSWSC 307, cited
Re Federation Health Ltd (Administrator Appointed) [2006] FCA 314, cited
Re Galaxy Media Pty Ltd (In Liq) (2001) 167 FLR 149; [2001] NSWSC 917, cited
Re Golden Casket Art Union Office [1995] 2 Qd R 346; [1994] QCA 480, cited
Simto Pty Ltd v Court as Liquidator of Carob Industries Pty Ltd (in liq) (1997) 138 FLR 232, cited
Tanning Research Laboratories Inc v O'Brien (1990) 169 CLR 332; [1990] HCA 8, cited
Tasman Capital Pty Ltd v Sinclair [2008] NSWCA 248, cited
Westpac Banking Corporation v Totterdell (1998) 20 WAR 150, cited

COUNSEL: The applicant/appellant appeared on his own behalf
A A Evans for the respondents

SOLICITORS: The applicant/appellant appeared on his own behalf
Irish Bentley Solicitors for the respondents

[1] **McMURDO P**: In appeal number 6483 of 2009, I agree with McMeekin J that the appeal should be dismissed with costs. McMeekin J has set out the relevant facts and issues so that my reasons can be very briefly stated.

[2] The appellant, John Labaj, appeals from the primary judge's order dismissing his application to appeal from the respondent liquidator's partial rejection of Mr Labaj's formal proof of debt or claim. His sole ground of appeal was "that the Appellant was denied natural justice and procedural fairness".

[3] This contention seems to be based on the exchange between the primary judge and Mr Labaj set out in McMeekin J's reasons at para 51. The primary judge's comments in context were merely a measured and appropriate reminder to Mr Labaj that, to succeed, he must prove his claim. Neither the judge's comments, nor any other aspects of the hearing before the primary judge to which Mr Labaj has taken us, amounted to a denial of natural justice or procedural fairness.

[4] Mr Labaj raised other issues in his written and oral arguments which were not the subject of any ground of appeal. None of them demonstrate that the primary judge erred in dismissing Mr Labaj's application. The matter came before the primary judge under s 1321 *Corporations Act* 2001 (Cth). Although that provision uses the term "appeal", the proceeding before the primary judge amounted to a fresh

hearing.[1] The primary judge was required to review afresh all relevant facts to determine, in accordance with legal principle, whether the liquidator should have admitted or rejected in full or in part Mr Labaj's formal proof of debt. That said, the proceedings remained, however, a challenge to the liquidator's decision so that the onus was on Mr Labaj to establish his claim: *Westpac Banking Corporation v Totterdell*;[2] *Re Federation Health Ltd (Administrator Appointed)*[3] and *Re Galaxy Media Pty Limited (Recs and Mgrs apptd) (in liq) v Andrew (as Liq of Galaxy Media) and Ors*.[4] His Honour adopted this approach in conducting the proceedings.

[5] The primary judge rightly recognised that Mr Labaj's claim before the liquidator was for two amounts. The first was the amount accrued as owing to him before he terminated the consultancy agreement with the company in liquidation. The second was for damages for the company's breach of the agreement which accrued subsequent to termination. The first amount was allowed by the liquidator but the second was not. Mr Labaj sought to prove the second amount by nothing more than the claim he had made against the company in his District Court action. This claim was stayed once the company went into liquidation. Prior to the District Court proceedings being stayed, the company filed a lengthy defence and counter-claim alleging that Mr Labaj repudiated the consultancy agreement by resigning; and had failed to carry out his obligations under the agreement so that the company had suffered damages in excess of $177,000. The stay means that the dispute remains unresolved. The primary judge rightly noted that the only evidence before the liquidator and before his Honour as to Mr Labaj's dispute with the company about the second amount was that Mr Labaj had commenced a District Court action which was defended by the company and subject to a counter-claim.

[6] In those circumstances, I do not consider that Mr Labaj's claim for the second amount was established on the material either before the liquidator, or the primary judge or this Court. In the absence of supporting evidence, the judge was right to agree with the liquidator's decision admitting Mr Labaj's proof of debt for the amount of $62,379.32 but rejecting the balance of his claim of $73,770.89.

[7] I agree with the orders proposed by McMeekin J.

[8] In the associated application, number 6698 of 2009, the application for an extension of time to appeal should be refused with costs. This application concerns an order made by a judge of the Trial Division adjourning the applicant's application under the *Corporations Act* 2001 (Cth) because the applicant served supporting affidavit material late, contrary to both the *Corporations Rules* r 2.7 and the *Uniform Civil Procedure Rules* 1999 (Qld) r 28. The judge adjourned the matter to the next available hearing date and ordered that the applicant pay the respondent's costs thrown away by the adjournment and fixed those costs at $497.20. By the time the applicant filed this application to extend time to appeal, his substantive application had been heard and determined by another Trial Division judge. In those circumstances, it would be futile to grant his application for an extension of time to appeal. He is unable to appeal the discretionary decision of the primary judge as to costs only because he did not obtain leave from the judge as required under s 253

---

1 See *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332, 340-341.

2 (1998) 20 WAR 150, 154.

3 [2006] FCA 314, [34].

4 [2001] NSWSC 917, [33].

Supreme Court Act 1995 (Qld). An appeal only from a costs order in those circumstances is incompetent: see *HIH Casualty & General Insurance Ltd v Dascam Pty Ltd*;[5] *Re Golden Casket Art Union Office*.[6] The applicant has not provided any proper explanation for his delay in filing an appeal from that order but in any case any such appeal would inevitably fail.

[9] **FRYBERG J:** On 18 March 2008, the eve of the hearing of a winding up application against it, Castleplex Pty Ltd appointed Messrs D J Hambleton and R E Murphy as administrators. On 30 April 2008 a meeting of creditors of Castleplex resolved that the company, a building contractor, be wound up and that the administrators be appointed as liquidators. In the latter capacity they are the respondents to the present appeal. The appellant, Mr Labaj, who has not had legal representation in either division of this Court, was an unsecured creditor and an applicant in the winding up proceedings.[7] The appeal is from the dismissal in the Trial Division of an application brought by Mr Labaj to have his claimed debt of $136,150.21 accepted in full. The liquidators had allowed the claim to the extent of $65,292.70 and disallowed the remaining $70,857.51.

[10] Part of the claim, $26,095.38, arose out of an order for costs made against the company in this Court on its unsuccessful application to set aside Mr Labaj's statutory demand. Mr Labaj was legally represented on that application. His solicitors prepared a bill in assessable form, the total of which was $23,789.68. Either the company did not challenge the bill or it was allowed in full on assessment; in any event the liquidators allowed the claim in that amount. Neither at first instance nor in this division did Mr Labaj challenge that aspect of the decision. It may therefore be put to one side.

[11] The balance of the claim, $110,054.83, arose out of what was styled a "Consulting Agreement" between Castleplex and JWL.[8] Under that agreement Castleplex retained JWL to perform consulting services related to the business of the company. It is unnecessary to describe the services in detail, which is fortunate, because they were described only in vague terms in the agreement. The fee payable by Castleplex was "$110,000 per each twelve months of services rendered during the Term (as defined in cl 9, below) of this Agreement." To the extent that it defined "Term", cl 9 provided:

> "**9. Term and Termination**
>
> This Agreement shall commence on the Effective Date and is for an initial term of twelve months (the 'Term'). Paragraphs 5, 6, 7, 9, 10, and 11 shall survive the expiration or termination of this Agreement under all circumstances."

The "Effective Date" was 1 May 2007. There is no suggestion that it was made other than at arm's length. For reasons which were not explained, it provided that the retainer fee should be paid in 46 instalments of $2,391.30 per instalment,

---

5 [2002] QCA 187.

6 [1995] 2 Qd R 346; [1994] QCA 480.

7 Strictly speaking, it may be that the correct creditor was the firm J & WL Consulting Services, of which the proprietors were Mr Labaj and his wife. However no point has been taken about the correctness of the parties to the proceedings. Where necessary, I shall refer to the creditor as JWL.

8 See n 7. The amount of $110,054.83 represents a net balance and must not be confused with the $110,000 payable as the fee under the agreement.

payable at the end of each calendar week for which the fee was due. It also provided for reimbursement of approved expenses.

[12] The liquidators allowed $41,503.02 in respect of that part of the claim. It is not clear from the evidence how they calculated that amount. Mr Labaj deposed that on and after 1 May 2007, on behalf of JWL, he had performed services for, and rendered invoices for the retainer fee to, Castleplex; and that he had terminated the contract on 25 October 2007 on the basis of a substantial breach or repudiation by it by non-payment of over $40,000 owing under the contract. That evidence was not challenged. The amount allowed by the liquidators was said to be what they believed to be Mr Labaj's entitlement up to that date. The amount obviously represents a balance owing after adding the fees payable for 1 May-25 October 2007 (25 weeks 2 days @ $2,391.30 = $60,739.02) and approved expenses, and deducting the payments made by the company to that date.

[13] Mr Labaj's evidence of what was owing up to 25 October 2007 was equally uncertain and more confusing.

[14] However all of this uncertainty in the evidence was of no consequence in this Court. It was clear both at first instance[9] and in this division that the dispute between the parties involved only Mr Labaj's claim for an amount equal to consultancy fees which would have been payable for the period from 26 October 2007 until 30 April 2008 had the agreement not been terminated; and that although Mr Labaj was prone to refer to this amount as liquidated damages, his claim, properly characterised, was for damages for breach of contract.

[15] Unfortunately, the parties allowed themselves to become distracted from the real issue by a red herring. The liquidators had given this explanation as their only substantive ground for disallowing the balance of the claim:

> "your failure to adequately respond to my Notice that further evidence is required in respect of Formal Proof of Debt as follows:
>
> - Clause 9(b) of the Consulting Agreement allows 'all amounts which accrued before termination'. Given that you terminated the Consulting Agreement on 25 October 2007 I have calculated your claim to include 'all amounts which accrued before termination' on 25 October 2007. You have failed to substantiate why Clause 9(b) is not valid, and have in fact confirmed that Clause 9(b) is valid, yet you are claiming in excess of 'all amounts which accrued before termination' and have failed to substantiate why."

[16] Clause 9(b) was in these terms:

> "Upon the expiration or termination of this Agreement,
>
> ...
>
> b. all amounts not disputed in good faith that are owed by each party to the other party under this Agreement which accrued before such termination or expiration will be immediately due and payable..."

---

9 AR 30.33.

As Martin J rightly observed, the liquidators' request for further evidence or submissions about that clause was based on a misunderstanding of the claim. The clause had nothing to do with damages in respect of the period after termination of the contract.

[17] In these circumstances, there ought to have been little difficulty in determining the amount in dispute. It must surely have been the number of weekly instalments remaining after the date of termination (46 - 25.4 = 20.6) multiplied by the weekly fee under the contract. That calculation comes to $49,260.78. Unfortunately neither side drew that to the attention of Martin J at first instance. Mr Labaj told his Honour that after taking into account the amount allowed by the liquidators and the amount paid by the company, the amount outstanding was $50,216.25, but his mathematics seem to have been flawed. His attention was focused largely on rebutting any suggestion that cl 9(b) could be used to deny his claim. The solicitor appearing for the liquidators persisted in asserting to his Honour that there was insufficient evidence to support the claim.

[18] It was common ground between the parties that the contract was terminated on 25 October 2007. The liquidators did not challenge Mr Labaj's evidence that he terminated the contract and that he did so for breach (insofar as those were questions of fact). Their admission of the amount owing on 25 October 2007 corroborates that evidence by demonstrating the existence of a substantial breach on that date. The only way by which Mr Labaj could unilaterally have terminated the contract on that date was for breach. He had no contractual right to terminate it. There is no evidence of termination by the company either before or after it was wound up, nor of abandonment of the contract by agreement.[10] On the hearing of the appeal, counsel for the liquidators conceded that the material suggested they "treated the contract as being terminated validly in response to the repudiation". This Court must adopt the same approach.

[19] On the appeal it was common ground that the proceeding before Martin J, although called an appeal in the Act, was in fact a hearing de novo. Mr Labaj cited the decision of Brennan and Dawson JJ in *Tanning Research Laboratories Inc v O'Brien*:

> "If the liquidator, in performing his function of considering the admissibility of proofs of debt, decides to reject a proof of debt, the ordinary remedy of the person claiming to be admitted as a creditor is to apply to the court to reverse or modify the decision: *Companies Act* 1961 (N.S.W.), s. 279; r. 160 of the Supreme Court Rules 1968 (N.S.W.) promulgated under the *Companies Act*; see now *Companies (New South Wales)* Regulations, reg. 126(2). The proceedings thus instituted, though often referred to as an 'appeal' from the liquidator's decision to reject, are originating proceedings which the court hears de novo."[11]

[20] Mr Evans for the liquidators cited a passage from the judgment of Santow J in *Re Galaxy Media Pty Ltd (In Liq)*:

---

10 In its defence in District Court proceedings against it by JWL, the company alleged that Mr Labaj's purported termination of the contract amounted to repudiation, but there has been no attempt in the present proceedings to prove that allegation.

11 (1990) 169 CLR 332 at pp 340-341 (citations omitted).

> "33 Thus I agree with the submissions of the Plaintiffs that the Court's task in approaching the question de novo, is to bring to bear a proper rigour in reviewing all the relevant facts in their context, to determine whether indeed the debt should *have been* admitted or rejected, doing so by applying legal principle to those facts afresh. However, the onus still remains on the party challenging the liquidator's determination. The Court will not upset the liquidator's determination unless properly satisfied that that onus has been discharged, though there may well come a point where the onus shifts in an evidentiary sense.
>
> 34 In carrying out such a de novo review, I therefore so approach the matter, in determining whether the onus upon the parties challenging the liquidator's decision has been discharged. If I am unable to conclude either way (as to whether the proof should be admitted) then the liquidator's decision must stand."[12]

[21] I am reluctant to quibble with the expression of a proposition of law in this area formulated by Santow J, as his Honour's views are entitled to the greatest deference. Nonetheless I cannot help feeling that the proposition would have been better expressed had the words italicised above been replaced simply by "be". A court conducting the hearing de novo is not primarily concerned with the question whether the liquidators should have made a different decision on the materials and submissions before them. Its concern is to decide the question afresh. In the present case that meant that the relevant enquiry was not (except perhaps in relation to costs) the correctness of the liquidators' reliance on cl 9(b), nor whether they had sufficient material before them to allow the claim. It was not: Was the liquidators' decision demonstrably wrong. It was: On the evidence before the court, should the claim be allowed.

[22] There were, of course, no pleadings at first instance, as the matter was commenced by originating application under s 1321 of the *Corporations Act 2001*. However in my judgment it is clear that a claim for damages for breach of contract was one of the claims before the court. On the first day of the hearing, in the course of a discussion with his Honour about the basis of the claim, the following exchange occurred:

> "HIS HONOUR: … You say that your proof of debt consisted of about $40,000 with respect to a dishonoured cheque and the balance you say was an amount owing to you under the agreement, is that right?
>
> APPLICANT: Breach of contract, yes. Breach of agreement.
>
> HIS HONOUR: Breach of agreement."

Then, a little later:

> "HIS HONOUR: And what you're after is the first year's pay? The 12 months' pay under that agreement in your statement of claim?
>
> APPLICANT: I'm - yes - I'm after the 12 months' - value of the 12 months' contract less - less the amount already paid."

---

12 [2001] NSWSC 917 (emphasis added).

And on the second day of the hearing:

> "HIS HONOUR: So that's the amount from October to the end of April 2008?
>
> APPLICANT: Yes.
>
> HIS HONOUR: Why do you say that's owed to you?
>
> APPLICANT: Beg your pardon?
>
> HIS HONOUR: Why do you say that is owed to you.
>
> APPLICANT: Well, the - the company has repudiated terms of agreement. They - the - the statement of claim it says that - where, at paragraph 26, 'The defendant's breaches and wrongful repudiation of the consulting agreement and at termination the plaintiff has suffered loss or damage totalling 50,000.' What I'm saying is that should - I was - I had to continue in that retainer I would have received a - 110,000 in total or – or from 25th of October another 50 - 50,216."

And shortly afterwards:

> HIS HONOUR: Well, then why are you claiming $110,000?
>
> APPLICANT: Well, I'm claiming $110,000 because the company has breached the terms of agreement. Now, I'm not saying that the clause B entitles me to it. What I'm saying is that clause B doesn't prevent me from making any other further claim.
>
> HIS HONOUR: That's unliquidated. You're not - you see why would the liquidator - you're claiming damages for breach, is that what you're doing?
>
> APPLICANT: Yes."

And finally:

> "HIS HONOUR: … Your claim, as I understand it, is for damages for breach of contract.
>
> APPLICANT: That's correct.
>
> HIS HONOUR: And you say that you're entitled to the full amount of your claim because of moneys that were owing to you under the contract up to the date of termination.
>
> APPLICANT: Yes.
>
> HIS HONOUR: And after the date of termination you say that moneys are owing by way of damages for breach of contract.
>
> APPLICANT: Yes, that's essentially what the claim is about."

[23] Martin J accepted the liquidators' argument that on the evidence before the court, Mr Labaj's claim had not been made out:

> "Nevertheless, Mr Labaj has not, either with respect to any request from the liquidator nor in any of the lengthy affidavits and submissions which have been provided in this application, descended to any particularity with respect to the claims he makes against the company in liquidation and with respect to its conduct prior to the 25th of October 2007.

> He has not in the material established anything beyond the fact that he has made a claim in the District Court, which claim was of course brought to a halt by the liquidation of the company.
>
> It appears to me then that the liquidator has properly rejected the claim on the basis of it not being supported by any material."

On the appeal to this division, the liquidators submitted that these findings were correct.

[24] It is true that Mr Labaj's evidence did not cover in detail the history of his dealings with Castleplex. However there was no reason why it should have done so. JWL had a claim was for damages for breach of contract. It was entitled to damages for its loss in respect of the unexpired period of the contract. It was in a position analogous to that of an employee who resigns from a fixed term contract of employment as a result of repudiatory conduct of the employer, or a lessor who validly terminates a lease for fundamental breach by the lessee.[13] The prima facie measure of damages was the amount which it was denied the opportunity to earn. The evidence here established the breach and established the prima facie measure of the damages. Martin J. simply did not deal with that claim.

[25] Although it was not spelled out in his Honour's ex tempore judgment, I infer that his Honour was concerned at Mr Labaj's failure to give evidence of what he did during the 20 weeks and three days of the term of the contract after 25 October 2007 for which fees were payable; or more accurately, of what JWL earned or ought reasonably to have earned by redeploying Mr Labaj during that period. Whether JWL earned or ought reasonably to have earned anything during the relevant period were matters related to the legal concept of mitigation of damage. In *McGregor on Damages* that concept is expressed in "three closely interrelated rules". Two of the three are presently relevant:

> "(1) The first and most important rule is that the claimant must take all reasonable steps to mitigate the loss to him consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Put shortly, the claimant cannot recover for avoidable loss.
>
> …
>
> (3) The third rule is that, where the claimant does take steps to mitigate the loss to him consequent upon the defendant's wrong and these steps are successful, the defendant is entitled to the benefit accruing from the claimant's action and is liable only for the loss as lessened; this is so even though the claimant would not have been debarred under the first rule from recovering the whole loss, which would have accrued in the absence of his successful mitigating steps, by reason of these steps not being ones which were required of him under the first rule. In addition, where the loss has been mitigated other than by steps taken by the claimant subsequent to the wrong, the clamant can again recover only for the loss as lessened, provided

---

13 *Beck v Darling Downs Institute of Advanced Education* (1990) 140 IR 364 at p 372 ff; *Gumland Property Holdings Pty Ltd v Duffy Bros Fruit Market (Campbelltown) Pty Ltd* (2008) 234 CLR 237 at pp 256 and 259 (paras 52 and 58).

> that the benefit gained is not to be regarded as collateral. Put shortly, the claimant cannot recover for avoided loss."[14]

[26] The question of onus of proof is one aspect of that rule. *McGregor* is unequivocal:

> "The onus of proof on the issue of mitigation is on the defendant. If he fails to show that the claimant ought reasonably to have taken certain mitigating steps, then the normal measure will apply. This has long been settled … ."[15]

[27] This question was considered by the New South Wales Court of Appeal in *Tasman Capital Pty Ltd v Sinclair*.[16] In that case an employee was wrongfully dismissed without notice. She had been entitled to eight weeks' notice. Her claim represented her salary for that period. The evidence established that she had commenced a business with her husband on the first day of, and had conducted that business throughout, that period but neither side led evidence as to the income or other benefits derived by her. The court held that, the onus being upon the defendant, the claim succeeded. After reviewing a number of cases in some detail, Giles JA wrote:

> "72 There is thus justifiable support for placing the onus of proof of avoided loss also on the employer. The wrongfully dismissed employee's loss is measured by the salary and wages and other contractual benefits of which he has been deprived less the salary or wages and other financial benefits which he received or acting reasonably should have received from the exercise of earning capacity freed up by the dismissal. But it is not correct that the employee has the onus of proving his loss so measured. In relation to avoidable loss, the employer has an onus. In my opinion, it should be accepted that the employer has an onus also in relation to avoided loss, and it was for the appellant to prove the financial benefit received by the first respondent referable to the eight weeks use of her earning capacity."

McColl JA and Young CJ in Eq agreed. The latter referred to several additional authorities, consideration of which, he wrote, reinforced the view expressed by Giles JA.

[28] In the present case there is no evidence that JWL earned anything from redeploying Mr Labaj during the relevant period. Whether it ought to have done so was an issue upon which the liquidators carried the onus of proof; their role in the proceedings was adversarial.[17] If they wished to rely upon this point, it was their responsibility to raise the issue and to lead evidence on it. In the absence of evidence, the normal measure of damages should prevail.

[29] Some reference was made to the pleadings in the District Court action referred to above.[18] In its defence in that action, the company had claimed a set off. That set

---

14 McGregor H, *McGregor on Damages*, 18th ed, Sweet & Maxwell, London, 2009, at paras 7-004 and 7-006.

15 *Ibid*, at para 7-019 (citations omitted).

16 [2008] NSWCA 248.

17 *Tanning Research Laboratories Inc v O'Brien*, at pp 340-1.

18 Note 10.

off was based on the same facts as were relied upon to support a counterclaim. The liquidators have made no attempt to pursue the counterclaim and there was no evidence at first instance in the present proceedings to support it. The onus of proving a set off is on the party alleging it. Those allegations therefore cannot assist the liquidators in the present proceedings.

[30] I would allow the appeal.

[31] Mr Labaj also applied for an extension of time within which to appeal a decision of P Lyons J on 11 May 2009 to adjourn the hearing of the application until 18 May 2009. His Honour ordered Mr Labaj to pay the costs thrown away by the adjournment, fixed in the sum of $497.20. Mr Labaj frankly admitted that his main reason for seeking to appeal that order was to enable the costs order to be changed. Although there are some slightly disquieting aspects about the circumstances, the decision whether or not to grant an adjournment was a discretionary one relating to a matter of procedure. Mr Labaj submitted that the discretion had not been enlivened. However he had served affidavit material late, failing to comply with r 2.7 of the *Corporations Rules* and allowing his opponent only one day to deal with it. Not surprisingly, his submissions sounded like submissions on the merits of the decision. In these circumstances, an appeal would have few prospects of success. The application should be refused.

Orders

[32] I would make the following orders:

1. Appeal allowed with costs.
2. Set aside the orders of Martin J made on 22 May 2009.
3. In lieu thereof order that:
   (a) the appeal from the decision of the respondent liquidators dated 2 April 2009 on the claim of J & WL Consulting Services be allowed with costs;
   (b) that decision be modified by substituting $21,596.73 for $70,857.51 as the amount disallowed and by substituting $114,553.48 for $65,292.70 as the amount allowed.
4. Application to extend time dismissed with costs.

[33] **McMEEKIN J**: This appeal concerns a proof of debt lodged by the appellant, John Labaj, with the liquidator of Castleplex Pty Ltd. The proof of debt was rejected in part. Mr Labaj, who appeared self represented, argues that the whole of it should have been accepted by the liquidator. Mr Labaj appealed to the Supreme Court to vary the liquidator's decision as he was entitled to do (s 1321 *Corporations Act* 2001 (Cth)). His appeal was rejected. He now appeals to this Court. The grounds of the appeal are identified in the notice of appeal as being that the appellant "was denied natural justice and procedural fairness."

Background

[34] Mr Labaj is a consultant. Through his business entity[19] he entered into a contract with Castleplex Pty Ltd ("the company") on 1 May 2007 ("the consultancy

[19] J & W L Consulting Services – I have treated Mr Labaj and this entity as interchangeable, although it seems Mrs Labaj is also associated with the business name.

agreement"). Pursuant to Clause 2 of that agreement he was to be paid $110,000 "per each twelve months of services rendered" by way of 46 instalments of $2,391.30 each. He terminated the consultancy agreement on 26 October 2007. His stated reason for doing so was that he had reached the view "that due to conditions and circumstances prevailing in your company… it is not possible for my consultancy… to deliver and/or deliver consulting services… as … agreed."[20] He eventually sued in the District Court for fees owing. The action was defended and a counterclaim made by the company for substantial damages in excess of the monies claimed by Mr Labaj.

[35] The company went into administration and then into liquidation. Thus the proceedings in the District Court were stayed before any determination of the competing claims. The challenged proof of debt was lodged in the course of administration.

[36] The appellant's proof of debt reads, so far as is relevant here: "Claim No 3655/2007 in District Court – Brisbane registry – $110,054.83."[21]

[37] The claims and allegations made by the appellant in his Statement of Claim in those District Court proceedings (particularly paragraphs 26 and 27) are that $110,000 was due for the whole term of the consultancy agreement and from that amount was to be deducted the amount of $59,783.75 "paid or payable" up to 26 October 2007, the date the agreement was terminated by the appellant, leaving a balance of $50,216.25. That sum is claimed as "liquidated damages" at paragraph 3 of the prayer for relief. A separate sum of $42,698.73 is claimed on the basis that it is the amount owing for services rendered up to 26 October 2007, suggesting that about $17,000 had been paid by the company. In the course of trying to unravel the figures, the primary judge was told that about $19,000 had been paid. The Statement of Claim pleads that $39,708.15 was paid.[22]

[38] The liquidator allowed two aspects of the proof of debt or claim lodged by the appellant. The first related to an amount of assessed costs about which there is now no argument. The second related to the claims made pursuant to the consultancy agreement. The liquidator allowed those amounts to which the appellant would have been entitled on the assumption that the consultancy agreement came to an end on the 26th of October 2007 and that it came to an end by Mr Labaj's termination of it. The liquidator rejected the claim for damages for loss suffered after the termination of the consultancy agreement on 26 October 2007 when Mr Labaj ceased to render services.

[39] There is a reference in the appellant's material to a dishonoured cheque in the amount of $40,068.24. It is evident that the cheque was drawn to pay the appellant fees owing under the Consultancy Agreement and prior to its termination on 25 October 2007. Thus the liquidators' allowance of an amount greater than the amount of the dishonoured cheque and for fees incurred up to that time, satisfies the amount due on the dishonoured cheque.

---

20 AR 329. Further reasons were advanced in Mr Labaj's affidavit sworn 8 April 2008 (AR 294 para 28) including an expression of concern about lengthy delays in payment of accounts. See also his affidavit filed 20 May 2009 at para 12 (AR 318).

21 AR 139 (dated 1/4/08).

22 Paragraph 9 Statement of Claim (AR 80). It is evident that some payments related to the reimbursement of expenses met by Mr Labaj on behalf of the company.

[40] Mr Labaj tendered no evidence to the liquidator or to the primary judge as to why he should be entitled to any amount of consultancy fees after the termination of the agreement. It is evident that he had terminated it, and that he rendered no service thereafter. He made no attempt to prove that he had suffered loss.

[41] Mr Labaj's claim, as evidenced by his reference to the figure of $110,000 (the total due for the whole of the term of the agreement), by the wording of his claim as one for liquidated damages, and by his various dismissive responses to the liquidator's requests for "detail, including supporting documentation, that allows any further claim,"[23] all indicate that he took the view that the terms of the contract itself dictated that he was entitled to the entire amount due under the agreement for the initial twelve month term.

[42] The primary judge determined that "the liquidator has properly rejected the claim on the basis of it not being supported by any material."

Basis of Appeal

[43] Mr Labaj's outlines of argument suggest that he wants to argue a range of matters that extend beyond considerations of natural justice and procedural fairness. It is not easy to follow his contentions. If one takes the various arguments from his outline the contentions seem to be:

(a) That if the learned primary Judge proceeded pursuant to s 1321 *Corporations Act* 2001 ("the Act") he proceeded in error and rather should have appreciated that the originating process was started under the provisions of reg. 5.4.64(2) *Corporations Regulations* 2001 ("the Regulations");[24]

(b) The learned primary Judge erred when he failed to proceed in the matter "de novo";[25]

(c) The primary Judge failed or neglected to hear all of the evidence available;[26]

(d) The primary Judge erred in "imposing all burdens of proof on the appellant" and not requiring "proof or evidence from the respondents;"[27] and

(e) That there was no evidence before the primary Judge showing that the respondent's decision was right or the correct one but "considerable evidence" that it was a wrong decision.[28]

Section 1321 *Corporations Act*

[44] It is plain that the primary Judge was perfectly accurate in identifying the source of his power to hear the matter as originating in s 1321 of the Act.[29] That section provides so far as is relevant as follows:

---

23 AR 205

24 Paragraph 2a and 2b of the appellant's reply – contrary to paragraphs 3.6.1 and 4.1 of the original outline.

25 Paragraphs 4.1 (at p 9) 4.2 and 6.3 Appellant's Outline.

26 Paragraphs 4.1 (at p10) and 6.3 Appellant's Outline.

27 Paragraph 4.2 Appellant's Outline.

28 Paragraph 4.1 (at p 9-10) Appellant's Outline.

29 The solicitor appearing for the liquidator could have been a deal more helpful than he was. The primary judge enquired as to the relevant provisions and his attention was not immediately taken to s 1321, although a little later it was apparent the solicitors were very much alive to its relevance. Solicitors appearing in those circumstances, and particularly for a liquidator, have a responsibility to assist the court and not obscure the issues further.

> "A person aggrieved by any act, omission or decision of:
>
> …
>
> (d) a liquidator…. of a company;
>
> may appeal to the Court in respect of the act, omission or decision and the Court may confirm, reverse or modify the act or decision, or remedy the omission, as the case may be, and make such orders and give such directions as it thinks fit."

[45] The appellant contends that the primary Judge should have proceeded pursuant to reg. 5.4.64(2) of the Regulations. There is no such provision. Perhaps the appellant intended to refer to reg 5.6.54(2) which provides:

> "A person may appeal against the rejection of a formal proof of debt or claim within:
>
> (a) the time specified in the notice of the grounds of rejection;
> or
> (b) if the Court allows – any further period."

[46] While this provision expressly identifies that the right of appeal under s 1321 applies to a rejection of a proof of debt, its function is to provide for the time limits applicable to the lodging of an appeal. Self evidently there is no error in the primary Judge proceeding on the assumption that the appellant intended to invoke the provisions of s 1321 of the Act.

Hearing "de novo"

[47] The appellant is clearly right in his contention that the proceedings before the primary Judge were, despite being called an "appeal," an originating proceeding which the court hears de novo: *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 340-341 per Brennan and Dawson JJ. In such a hearing the Court hears the matter afresh. It will apply the relevant principles to the facts as found after reviewing all of the evidence the parties bring forward.

[48] The nature of the hearing was not raised before the primary judge hence he has made no comment upon it. There is nothing in the record to indicate that his Honour did not approach the hearing of the "appeal" as a hearing de novo and much to indicate that he did. No suggestion was made that the evidence should be restricted to the materials that may have been before the liquidator. The primary judge adjourned the hearing of the application to enable Mr Labaj to supplement his material with a copy of the consultancy agreement which, on Mr Labaj's argument, lay at the heart of the dispute between the parties. There is nothing to indicate that the primary judge did not consider the correct question – namely whether Mr Labaj could demonstrate that the primary judge ought to "reverse or modify" the decision of the liquidator. There was no reference in the primary judge's reasons to being confined to a need to first detect error in the liquidator's approach before any discretion or jurisdiction to interfere was enlivened.

[49] This ground has not been made out.

Consideration of All of the Evidence

[50] The source of the appellant's complaint is one comment made by his Honour in the course of hearing submissions that he "can't go through all these documents and spend days and days trying to work out what you really mean."

[51] It is useful to set out briefly the context in which the remark was made. The solicitor appearing for the liquidator indicated that he could not understand why the appellant was pursuing a claim for $26,000 for costs when, on his own case, the costs to which Mr Labaj was entitled had been assessed at $23,789.68, which assessment Mr Labaj himself had obtained and apparently accepted. When the primary judge pointed out that that appeared to him to be right, i.e. that he should be pursuing the amount of the assessed costs rather than the full amount that he had claimed of $26,000, the appellant replied: "Well, is it costs that – taxed – taxed costs $23,000 and I think that was $2,300 cost of that." To which the primary Judge replied, "Well see Mr Labaj I can't guess these figures and I can't go through all these documents and spend days and days trying to work out what you really mean."[30]

[52] His Honour's comment followed a number of questions directed to the appellant to endeavour to understand why it was he was pursuing the original amount that he had claimed. There was no evidence before the primary judge that justified the additional amount claimed. His Honour's comment merely reflected the fact that it is for the parties to advance their case, to be familiar with their facts and to direct the Court to any relevant evidence that supports their contentions. The appellant was simply not in a position to do this, presumably because there was no evidence to which he could direct the Court.

[53] Far from indicating that the primary Judge was not bringing into account all of the evidence, the matter complained of suggests that the primary Judge was well aware of the limitations of the material put before him.

[54] There is no suggestion that anything said by the primary Judge in the course of his reasons for judgement demonstrated any misapprehension of the facts. Indeed I apprehend that his reasons indicate a very clear appreciation of the evidence before him.

Onus of Proof

[55] The appellant complains that the onus of proof was put onto him and that there was no onus on the liquidator.

[56] The question that was originally before the liquidator and which the primary Judge had to determine was whether and to what extent the appellant ought to be allowed to rank as a proving creditor. The appellant challenged the liquidator's decision. It has long been considered that in these circumstances the person challenging the liquidator's decision bears the onus on an appeal brought pursuant to provisions akin to s 1321 of the Act. See, for example, *Westpac Banking Corporation v Totterdell* (1998) 20 WAR 150 at 154; *Re Federation Health Ltd (Administrator Appointed)* [2006] FCA 314 at [34]; *Re Galaxy Media Pty Ltd (Recs and Mgrs apptd) (in liq) v Andrew (as Liq of Galaxy Media) & Ors* [2001] NSWSC 917 per Santow J.

---

30 Transcript 22/05/09 at p 16/50.

[57] In that latter case Santow J said at [33], correctly in my view:

> "…the Court's task in approaching the question de novo, is to bring to bear a proper rigour in reviewing all the relevant facts in their context, to determine whether indeed the debt should have been admitted or rejected, doing so by applying legal principle to those facts afresh. However, the onus still remains on the party challenging the liquidator's determination. The Court will not upset the liquidator's determination unless properly satisfied that the onus has been discharged, though there may well come a point where the onus shifts in an evidentiary sense."

[58] There is nothing to suggest that the primary Judge did not approach his task appropriately. The onus lay on the appellant to satisfy the primary Judge that the liquidator's determination was in error. The primary judge found that he failed to discharge that onus.

[59] It follows that the appellant's complaint that the liquidator "failed to provide any evidence or proof to support their decision to reject a part of the appellant's claim" misses the point. It was the appellant who bore the persuasive onus.

Was the Liquidator's Decision Demonstrably Wrong?

[60] I turn then to consider the fundamental complaint that Mr Labaj makes – that the evidence supported his position and the primary judge should have found for him. He submitted that there was no evidence before the Court showing that the liquidator's decision was the "right or correct one." He contended that there was "considerable evidence" that the decision was wrong.

[61] As I have earlier mentioned,[31] it is quite apparent that Mr Labaj took the view that his was a claim for liquidated damages. His submission on appeal was that he was so entitled pursuant to cl 9(c)(ii) of the agreement, i.e. that he was entitled, without more proof than the terms of the agreement itself, to damages representing the difference between what he had been paid and the entire sum due for the first year of the agreement.[32] Can this assertion be accepted? And if he was wrong in this then does the evidence demonstrate that the claim for damages should otherwise have been admitted?

[62] Clause 9 of the consultancy agreement provided, so far as is relevant:

> "Upon the expiration or termination of this Agreement,
>
> …
>
> b. all amounts not disputed in good faith that are owed by each party to the party under this Agreement which accrued before such termination or expiration will be immediately due and payable and
>
> c. Consultancy shall deliver to Company all deliverables completed and accepted up to the date of termination and Company shall have all right, title and interest thereto.
>
> If the Company
>
> i. terminates the Agreement prior to the expiration of the Term, or

---

31 See paragraphs [37] and [41] above.

32 Paragraph 5.6 Appellant's Outline.

> ii. the Consultancy dies or becomes disabled (as determined by Employee's physician) prior to the expiration of the Term of the Agreement,
>
> then the Company may terminate this Agreement upon payment to the Employee or his estate in a lump sum all sums remaining due for the balance of the Term of the Agreement."

[63] While hardly a model of clarity and precise drafting, it seems clear enough that the parties had very different rights under the agreement. There is no mention of any consequence if Mr Labaj terminated the agreement before the expiry of the "Term" as defined, but if the company did so then the company incurred a responsibility to pay the fees due in respect of the balance of the "Term".

[64] Mr Labaj's argument is that "as a consequence of breach of clause 2 of the Agreement [a reference to the provision requiring payment of his fees] by Company, the Company has terminated the Agreement and the Clause 9 (c)(ii)[33] comes into effect and the Company is liable for payment 'in a lump sum all sums remaining due for the balance of the Term of the Agreement,'" "Term" being defined in clause 9 as the initial term of twelve months.[34]

[65] This assertion is fundamental to the case. Because Mr Labaj claimed that the company terminated the agreement prior to the expiration of the term then it followed that he had to prove no more. Given his starting premise it was logical for Mr Labaj to decline to either assert he had suffered any loss or prove what that loss might be. The contract provided for what was to happen. This was not a claim for damages for breach of contract. This was a claim for a debt in a sum certain. That was his argument before the liquidator and the primary judge. One consequence of that approach is that the rules relating to mitigation of loss are not relevant as they would be where the issue was one of damages for breach.[35] Hence the parties did not turn their minds to either loss or mitigation of loss in the materials placed before the primary judge and on which the case was determined.

[66] Mr Labaj is plainly wrong in his view that a breach of a clause of the Agreement necessarily equates to an act of termination of the agreement by the company. It is common ground here that it was Mr Labaj, and not the company, who terminated the agreement. It is plain that by the terms of the agreement itself Mr Labaj has no entitlement to be paid by way of a lump sum "all sums remaining due for the balance of the Term" simply because he terminated the Agreement. This was the argument that Mr Labaj pursued with the liquidator and before the primary judge.

[67] Therefore, the liquidator's position was that given that it was Mr Labaj, and not the company, who had terminated the agreement, the only entitlement that the appellant had to payment of fees under the agreement were those which had accrued "before such termination." The only provision which entitled the appellant to more than that only applied where the company terminated the agreement and that had not occurred.

---

33 The reference to cl 9(c)(ii) was used, no doubt, to refer to the final paragraph following the sub clauses requiring payment of all lump sums due for the balance of the term. Given that Mr Labaj was contending that the Company terminated the agreement prior to expiration of the term a reference to cl 9(c)(i) was probably intended.

34 Paragraph 5.6 Appellant's Outline.

35 See *Contract Law in Australia* by Carter & Harland 4th ed. at p 876 para [2201].

[68] While that disposes of any rights provided for expressly in the agreement, there may remain a right to damages for breach of it. This was not the way the matter was approached before the primary judge. To succeed to such damages Mr Labaj must prove both breach and the extent of the loss. It is evident that the primary judge was very much alive to the possibility that the appellant might be entitled to some amount of unliquidated damages for breach of a term of the contract, or damages for loss of the contract if he could establish repudiatory conduct.

[69] Putting to one side the characterisation of the claim as one for liquidated damages, the appellant's argument could be put in this way: that the company was in breach of the agreement by failing to pay instalments due; that there is no contest about the breach; that he therefore has a right to claim damages for breach; and it follows that his claim ought to be allowed in full. Even if one accepts that there is sufficient evidence substantiating breach by the company of its obligations under the contract, the *non sequitur* in all this is the leap from a right to claim damages to an assertion that the amount contended for must per force be accepted by the liquidator, the primary judge and this court.

[70] As to the question of damages there is simply no evidence to enable any assessment of what they might be. As best I can see from the material, nowhere does Mr Labaj assert that he in fact suffered any loss as a result of the consultancy agreement coming to an end. If he had claimed loss then, true it is that the starting point would be the amount that might have been earned under the consultancy agreement, but where to from there? The act of termination by Mr Labaj freed up his time to pursue other work. Nothing was proved as to what then occurred. It would not have required much in the way of evidence from Mr Labaj to show loss consequent upon a claimed breach, but he advanced no proof at all. This followed from his basic assertion that he was entitled to liquidated damages because the company terminated the agreement – an assertion that was fundamentally wrong.

[71] As to the question of breach, while the company seems plainly to accept that fees were not paid in accordance with the instalments provided for in the agreement, it is far from clear that a curial examination would result in a finding that there had been repudiatory conduct or that the appellant was entitled to damages. It may be that Mr Labaj is right in his contention that the company breached the agreement, and it may be that the company's conduct amounted to a repudiation of the contract entitling Mr Labaj to damages for loss of the contract and that as result he suffered damage. But without evidence there is no warrant to assume all that in his favour, particularly where the way in which the appellant chose to frame his case meant that the parties were directing their minds to a completely different point.

[72] That no such assumption necessarily follows is evident from a review of the pleadings exchanged in the District Court proceedings prior to those proceedings becoming stayed upon the company entering liquidation. As the primary judge observed, the pleadings indicated substantial disputes in relation to the facts alleged on each side. By that claim the appellant sought liquidated damages for breach of the consultancy agreement or wrongful repudiation of it by the company liquidation. The company in its defence contested many of the plaintiff's allegations and counterclaimed for substantial damages. The total of the claims alleged by the defendant exceeded $130,000. Thus each side argued that the other had breached the agreement.

[73] As best I can determine, the appellant relies on three bases for arguing that he has demonstrated breach and disproved the allegations against him. First there is reference to a recitation by Daubney J of the appellant's assertions in an application concerning a statutory demand brought by the appellant against the company in respect of a dishonoured cheque. Putting to one side the assumption that a finding in one proceeding is necessarily binding in another, Daubney J said nothing as to the merits of the matter. His Honour decided the application to strike out the statutory demand on the basis that the affidavit filed within the statutory 21 day period did not contain the necessary information to enable the applicant to contest the statutory demand.

[74] Secondly, Mr Labaj points to the fact of payment of a dishonoured cheque in the amount of the appellant's then claims for consultancy fees owing. Suffice to say that in an affidavit that was filed too late in the matter before Daubney J, the director of the company contended that there were other reasons for the payment.

[75] Thirdly, Mr Labaj says that the liquidators accepted that part of the appellant's proof of debt that reflected fees owing up to the time the appellant terminated the agreement. The liquidator swore that it was a commercial decision to do so.[36] Given the intimation to the primary judge that the dividend contemplated might be between 10 to 20 cents in the dollar then the amount in issue here might well be between $5,000 and $10,000 – hardly sufficient to warrant the expense of a trial involving the numerous issues raised in the defence and counterclaim filed by the directors.

[76] None of this reaches the level of demonstrating a proper basis for acceptance of the appellant's claim that there had been repudiatory conduct or demonstrating what amount of damages flowed from the loss of the contract.

[77] Hence the validity of the point made by the primary judge – the appellant's continued refusal to engage the liquidator by responding meaningfully to the requests made of him, and his maintenance of that attitude before the primary judge – has the result that no more is known than "that [the appellant] has made a claim in the District Court" and that he alleges repudiatory conduct by the company.

[78] In the absence of any proof in support of the claim the liquidator was plainly entitled to reject it. The appellant advanced no further proof before the primary judge. There was no basis on which the court below could be satisfied that it should reverse or modify the decision made by the liquidator.

Formal Proof of Debt

[79] There is one final matter not canvassed in the Outlines of Argument filed by the parties. In the course of the hearing an issue was raised as to the requirement under the Regulations that a formal proof of debt be lodged. Regulation 5.6.47 of the Regulations is relevant. It provides:

> "(4) A liquidator must not reject a debt or claim without:
>
> (a) notifying the creditor of the grounds of the liquidator's rejection; and
>
> (b) requiring that a formal proof of debt or claim be submitted for that debt or claim."

---

36 At paragraph 25 Affidavit Hambleton (AR 136).

[80] Here notification was given of the grounds for rejecting the claim but it does not appear that any formal proof of debt or claim was ever requested after the liquidators were appointed. The matter is complicated because Mr Labaj had, prior to their appointment, already adopted the mechanism that the Regulations provide for proving a debt formally – namely to lodge his proof in accordance with Form 535 (reg. 5.6.49(b)) containing the particulars of the debt or claim sought to be proved (reg. 5.6.50(1)(a)).[37] He did that in the course of the administration of the company and prior to it being placed in liquidation. It is plain that the liquidator treated that Notice as a formal proof of debt in the liquidation.[38] In my view he was entitled to do so. Sub-section 553D(3) of the Act provides that a "claim is proved formally if it satisfies the requirements of the regulations relating to the formal proof of debts and claims." Here those regulations were satisfied.

[81] The point of reg. 5.6.47 is to ensure that the liquidator (and if necessary a court) be appraised precisely of the claim made so as to enable an accurate assessment of it. It is not immediately apparent as to why, in order to achieve that aim, a temporal requirement needs to be introduced into the regulations such that a proof of claim could only be considered a "formal" one if lodged subsequent to the appointment of liquidators. I would be reluctant to read into the Regulations any such requirement. The path followed here of administrators acting for a period, obtaining proofs of claims, and then becoming the liquidators of the company is hardly a novel one. To require re-lodgement, perhaps of all claims made, despite full compliance with the requirements of the Act, does not seem to me to achieve any significant purpose. This approach is consistent with the view taken by Einstein J sitting in the Equity Division in the Supreme Court of NSW, and by members sitting in the Administrative Appeals Tribunal, that the liquidator's duty to deal with the proof of debt is not dependent on him having called for formal proofs of debt.[39]

[82] Mr Labaj has not suggested that any consequence flows from the failure to formally call on him to lodge the same form that he had already lodged. Indeed at one point Mr Labaj plainly assumed for the purpose of his argument that his proof of debt was a formal one. I refer to his contention at one stage that his proof of claim was not dealt with in a timely way and that had the effect of requiring the liquidator to deem his claim to be admitted.[40]

[83] The liquidator wrote to Mr Labaj on five occasions[41] in respect of his proof of debt, the first of those letters enclosing a Notice under reg. 5.6.53 seeking further evidence.[42] Thus Mr Labaj had ample notice of the grounds for rejecting his claim and was asked to provide further evidence if he could. He did not do so. That is because of his mistaken characterisation of his rights under the contract. It cannot be said that Mr Labaj has been denied an opportunity to fully prove his case.

---

37 AR 139.

38 See letter of 10/2/09 at AR 204.

39 *Ingot Capital Investments Pty Ltd & Ors v Macquarie Equity Capital Markets Ltd & Ors* (2003) 45 ACSR 224; [2003] NSWSC 307 per Einstein J at [39]; *Simto Pty Ltd v Court as Liquidator of Carob Industries Pty Ltd (in liq)* (1987) 138 FLR 232; *Court v ASC* (1998) 16 ACLC 937.

40 Letter of 23/02/09 (AR 208- 210) and email of 31/03/09 (AR 304-305) with echoes of the argument at paragraph 3.7.2 of Appellant's Outline.

41 See para 27 of Affidavit David James Hambleton (AR 136).

42 AR 205 – dated 11/2/09.

Conclusion

[84] I can detect no error in the approach of the primary judge or in his analysis of the facts before him.

[85] I would dismiss the appeal and order that the appellant pay the respondents' costs. I agree that application for an extension of time to appeal in the associated application, number 6698 of 2009, should be refused with costs for the reasons given by the President.