

SUPREME COURT OF QUEENSLAND

CITATION:	<i>Phoenix Constructions Queensland Pty Ltd v Coastline Constructions Pty Ltd and Michelle McCracken and Jarrod McCracken</i> [2011] QSC 167
PARTIES:	PHOENIX CONSTRUCTIONS (QUEENSLAND) PTY LTD (ACN 056 159 614) (plaintiff) and COASTLINE CONSTRUCTIONS (AUST.) PTY LTD (ACN 094 793 549) (first defendant) and MICHELLE ANN McCRACKEN (second defendant) and JARROD McCRACKEN (third defendant)
FILE NO:	BS5615 of 2006
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	15 June 2011
DELIVERED AT:	Townsville
HEARING DATE:	16 – 17 May 2011
JUDGE:	Cullinane J
ORDER:	[1] There will be judgment for the plaintiff in the sum of \$1,495,208.71 with interest calculated pursuant to the contract between the plaintiff and the first defendant in the sum of \$530,003.46.

CATCHWORDS:	CONTRACTS – JOINT VENTURE AGREEMENT – EFFECT OF – where claim against Director for breach of s 182 of the Corporations Act – whether plaintiff is entitled to damages under s 1324(10) of Corporations Act – prerequisites for such a claim
LEGISLATION:	<i>Corporations Act (Cth) 2001</i> <i>Lord Cairns Act</i>
CASES:	<i>Whitehouse v Carlton Hotel Pty Ltd</i> (1987) 162 CLR 285 <i>Allen v Atalay</i> (1993) 11 ASCR 753 <i>Airpeak Pty Ltd v Jetstream Aircraft Ltd</i> (1997) 23 ASCR 715 <i>Barbagallo v anor v J & F Catelan Pty Ltd and others</i> (1996) 1 Qd R 245 <i>Wentworth v Woollahra Municipal Council & Ors</i> (1982) 42 ALR 69 <i>Commonwealth of Australia v Amann Aviation Pty Ltd</i> (1991) 204 ALR 1
COUNSEL:	Mr D Savage S.C and Mr A.J Moon for the plaintiff Mr M Stewart S.C for the third defendant
SOLICITORS:	Connolly Suthers Lawyers for the plaintiff Walsh Halligan Douglas for the first, second and third defendants

- [1] In this matter the plaintiff instituted proceedings against the first defendant on 5 July 2006.
- [2] Subsequently, on 28 May 2007 the second and third defendants were added as parties.
- [3] The second defendant and the third defendant are husband and wife. At all material times, the third defendant was the sole director of the first defendant. The cause of action alleged against him is based upon an alleged breach of his duty as a director of the first defendant under s 182 of the Corporations Act.
- [4] At all material times the second defendant was the registered proprietor of land situated at 72-74 The Strand, Townsville described as lots 306 and 307 on CPT1181. The second defendant acquired the land in 2002.
- [5] The first defendant is now in liquidation and the second defendant is bankrupt. The matter proceeded to trial against the third defendant.
- [6] The second defendant acquired the land with the intention of developing it.
- [7] In August 2004 she entered into a joint venture agreement with the first defendant.
- [8] On 7 September 2004 the first defendant entered into a construction management agreement with the plaintiff.
- [9] One of the issues between the parties concerns the effect of the joint venture agreement.
- [10] It is necessary to refer to this agreement in some detail.
- [11] The two recitals provided:
- (A) The Owner is the registered proprietor of the Joint Venture Land. The Developer intends to develop the Joint Venture Land by constructing a unit development for residential and commercial use;*
- (B) The Owner will allow the Developer to develop the Joint Venture Land and will provide the Joint Venture Land as security for funding the development of the Joint Venture Land. The Owner will receive a return from the sale of lots developed upon the Joint Venture Land.*
- [12] The Joint Venture Development Agreement defined the joint venture as:
- “the association of the Joint Venturers to carry out the objectives specified in clause 3 of this Agreement”*
- [13] Joint venture costs were defined as:
- “All costs incurred by the developer in connection with the development of the joint venture land (and without limiting the generality of the foregoing) including all costs incurred or accrued by the developer”*

[14] Joint venture land was defined by clause 1.1(i) as:

"Means that land described in schedule 1 under the heading joint venture land."

[15] The schedule referred to the lands that I have already mentioned in paragraph 4 of these reasons.

[16] Clause 1.1(m) defines the proceeds of the joint venture in the following way:

"means any receipt derived from the development of the Project including (without limitation) interest on deposits, forfeited deposits, headworks credits, proceeds of the sale of Lots, refunds, credits and assumptions of debt, but excluding the Retained Units"

[17] Clause 2 provided for the joint venture relationship.

[18] Clause 2.3 provided:

"None of the Joint Venturers shall have power to:

- (a) deal with any assets of the Joint Venture;*
- (b) pledge the credit of either of them;*
- (c) purport to act as agent for the other; or*
- (d) bind the parties to any contract or obligation*

except as permitted under this Agreement.

[19] Clause 3 concerns the objectives of the joint venture. These are described as follows:

- (a) obtain such Local Authority approvals as are necessary to develop a feasible unit or community titles development on the Joint Venture Land as may be determined by the Developer in its absolute discretion;*
- (b) develop and construct the Project on the Joint Venture Land for profit; and*
- (c) cause the developed Lots to be sold in accordance with the marketing strategy to be determined by the Developer to obtain a return to the Joint Venturers.*

[20] By clause 4.1 the parties acknowledge that the development approval obtained by the developer is in all respects acceptable to each of the parties.

[21] Clause 8 provided for funding and imposed an obligation on the developer to organise funding for the project and to be the borrower under any loans obtained to fund the costs of the joint venture. The owners' liability was to be limited to the recourse only of the joint venture land.

[22] Clause 13 provided for a caveat to be lodged over the joint venture land by the developer with the owner's consent so as "to secure its interests in the joint venture land and the project."

[23] By clause 15 the owner agrees to grant a power of attorney to a director or employee of the developer in registrable form and clause 15.3 sets out the powers of

the attorney on behalf of the owner “for the purposes of carrying out the objectives of the joint venture, developing the project and the performance of the obligations of the owner under the agreement.” It then went on to stipulate a number of matters which the attorney had power to perform.

[24] Clause 16 provided for the proceeds of the joint venture.

[25] Clause 16.3 is in the following terms:

The Proceeds of the Joint Venture shall be dealt with as follows:

- (a) *Firstly, in reduction of Joint Venture borrowings obtained pursuant to clause 8 hereof;*
- (b) *Secondly to pay GST required to be remitted by the Owner on the sale of each Lot developed and sold as part of the Project at settlement of the sale of each such Lots;*
- (c) *Thirdly to satisfy all Joint Venture Costs;*
- (d) *Fourthly to pay any monies payable to the Developer under clause 10; and*
- (e) *The balance to be distributed to the Developer*

[26] Clause 21.3 is under the heading "Default" and is in the following terms.

At any time after a Joint Venturer commits default, the other Joint Venturer may do any one or more of the following things:-

- (a) *enforce the terms of this Agreement*
- (b) *exercise any rights which are given to the other Joint Venturer under this Agreement, by law, equity or otherwise; and*
- (c) *do anything to remedy the event of default at the cost of the Joint Venturer in default*

[27] In clause 1.1(o) the term "Retained units" is defined as being the lots retained by the owner under clause 6.1. No land is shown in this schedule.

[28] Under clause 16 "Proceeds of the project" the subject of retained units is dealt with in the following way:

16.1 The Owner shall following development of the Land pursuant to this Agreement, retain ownership of the Lots shown marked on the development plan reproduced in Schedule 2 (the "Retained Units")

16.2 In the event that the Developer changes those development plans (which it is entitled to do in its absolute discretion) then the Developer shall notify the Owner of, and provide to the Owner copies of such amended plans. If as a result of any such amendment the Retained Units so marked are not identifiable but are of a lower value to those described in Schedule 2, then the Owner shall have the option exercisable within 30 days of receiving such notice, to take Lots of the Owner's choice in place of the Lots shown in Schedule 3, to an equivalent value to those Lots with a cash adjustment if required. In the event of disagreement between the Owner and the Developer as to any issue as to the value of units proposed to be retained under this clause 16.1, then either party may refer that valuation issue for determination by a registered valuer nominated by the president at

the time of the Queensland Law Society, Inc. The fees of the valuer shall be borne equally by the parties. The valuer shall act as an expert and his or her decision shall in the absence of manifest error be final.

- [29] Senior counsel for the plaintiff contended that the lands of the second defendant fall within the description of joint venture costs and that this included all of the lands which explains the absence of any lands in schedule 2.
- [30] The second defendant on this approach would recover the value of the land as a joint venture cost under clause 16.3.
- [31] The defendant contended that if the plaintiff's construction is correct the second defendant obtained no benefit under the agreement. This would be a completely improvident bargain. It was further contended that on its proper construction, the first defendant obtained no interest in the land and could thus suffer no loss as a result of the subsequent agreement to which reference will shortly be made.
- [32] Senior counsel for the plaintiff argued that the question whether the first defendant obtained a beneficial interest in the land is irrelevant. The plaintiff's argument is that the rights conferred on the first defendant by the joint venture agreement are substantial. It is said that the second defendant following the joint venture agreement ceased to have any right in relation to the joint venture land except the rights conferred by the agreement which included the right to be paid for the land as a joint venture cost.
- [33] On its face the agreement confers very significant rights over and in relation to the land on the first defendant. In addition to the provisions I have already referred to some reference to clause 7.1 should be made:
- “The owner warrants that it is the registered owner of the Joint Venture Land and disclosed that the Joint Venture Land is encumbered. The Owner agrees not to transfer, mortgage, lease or encumber or otherwise deal with the Joint Venture Land except in accordance with the terms of this Agreement or with the written consent of the Developer.”*
- [34] The second defendant loses all right to deal with the land save and except in accordance with the agreement.
- [35] I agree with senior counsel for the plaintiff that the question whether there is a beneficial interest in the land is not the crucial issue here. The first defendant gains rights over and in respect of the lands. The land can only be used for the purposes of the joint venture. It is I think, arguable that the interest of the first defendant is a beneficial interest in the land but whether this is so or not the first defendant had valuable rights under the joint venture agreement in relation to the lands.
- [36] The defendant at one time was inclined to contend in the alternative that the joint venture agreement had not been concluded. I do not accept that there is any basis upon which such a conclusion can be reached.
- [37] Following the institution of proceedings by the plaintiff which followed the delivery of a statutory demand the parties participated in mediation in Brisbane in December 2006 and subsequently resumed mediation in Townsville on 15 and 16 January 2007. The matter was not resolved.

[38] According to Robert Evennett, a director of the plaintiff company the third defendant said to him in the course of the mediation:

"I will not be paying anything and I can close the company down if I need to."

[39] Mr McCracken denies that he said anything like this but I am satisfied the evidence of Mr Evennett is correct.

[40] On 19 February 2007 the first defendant and the second defendant entered into a document described as "Deed of amendment to joint venture development agreement."

[41] The deed relates in the recitals thereto;

"A The parties entered into the Joint Venture Development Agreement annexed hereto and "Annexure A" ("the Agreement")

B The schedules to that agreement were not completed at the time the Agreement was entered into and this Deed confirms the agreement of the parties regarding those aspects of the Agreement.

C The Parties desire to amend the terms of the agreement of the manner set out in this Deed."

[42] Clause 1 of the agreement provides as follows:

1. Variation of the Agreement

1.1 The Owner and the Developer declare that the Agreement is modified, varied, amended or added to as follows:

- (a) Schedule 1 of the Agreement is replaced with Schedule 1 of this Deed and the parties declare that the title description contained in Schedule 1 to this Deed is the title description of the land the parties always intended to be the Joint Venture Land;*
- (b) Schedule 2 of this Deed is inserted as Schedule 2 to the Agreement.*

[43] Schedule 1 sets out a number of parcels of land representing the development which had taken place at that time. These represented the development which had proceeded to completion. Schedule 2 listed some six units to which a value of \$7,385,000 was ascribed.

[44] It is the plaintiff's case that by the agreement of 19 February 2007 the third defendant procured the first defendant's abandonment of the contractual interest which the first defendant had under the joint venture lands to the extent of the lands described in schedule 2. The result was that these lands were excluded from the joint venture lands and the first defendant deprived of the benefit of the joint venture agreement in relation to those lands. The plaintiff to whom the first defendant was indebted for breaches of contract was denied recourse to the first defendant's assets in so far as they consisted of rights in relation to the units described in schedule 2 to the February 2007 agreement. There is no satisfactory

evidence suggesting that the first defendant had other assets which could have satisfied such indebtedness.

[45] The plaintiff made application to the Supreme Court for a Mareva injunction in response to the threat by the third defendant referred to above. On 23 February 2007 undertakings were given to the court regarding some of the units and subsequently further undertakings were given to the court on 16 March 2007 and 27 April 2009. The earlier undertakings were given by the first and second defendants. In relation to the April 2009 undertakings these were given by the third defendant on behalf of the first defendant.

[46] Section 182(1) of the *Corporations Act 2001* provides as follows:

(1) A director, secretary, other officer or employee of a corporation must not improperly use their position to:

(a) gain an advantage for themselves or someone else; or

(b) cause detriment to the corporation

[47] In *Whitehouse v Carlton Hotel Pty Ltd* (1987) 162 CLR 285 Toohey J said, dealing with the question of improper use:

"The expression is, as the appellant accepted, one to be determined objectively; essentially the issue is whether the conduct impugned is inconsistent with the proper discharge of the duties of the office in question. To resolve that issue it will be necessary to look at all relevant circumstances, including for instance the extent of a director's awareness, of the financial stability of the corporation. But that does not mean that the test of improper use is subjective; it simply indicates the range of considerations that may have to be taken into account."

[48] The effect of the agreement of 19 February 2007 as set out above, taken with the threat made by Mr McCracken readily justifies the conclusion that his conduct in entering into that agreement on behalf of the first defendant falls within the description of "improper" and that he has used his position to gain an advantage for the second defendant and to cause detriment in the manner described above to the first defendant.

[49] The plaintiff's entitlement to damages depends upon whether it can bring itself within the terms of section 1324 of the *Corporations Act*. It is desirable if I set out this provision in full:

Injunctions

(1) Where a person has engaged, is engaging or is proposing to engage in conduct that constituted, constitutes or would constitute:

(a) A contravention of this Act; or

(b) Attempting to contravene this Act; or

(c) Aiding, abetting, counselling or procuring a person to contravene this Act; or

(d) Inducing or attempting to induce, whether by threats, promises or otherwise, a person of this Act; or

- (e) Being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of this Act; or
- (f) Conspiring with others to contravene this Act;

the Court may, on the application of ASIC, or of a person whose interests have been, are or would be affected by the conduct, grant an injunction, on such terms as the court thinks appropriate, restraining the first-mentioned person from engaging in the conduct and, if in the opinion of the court it is desirable to do so, requiring that person to do any act or thing.

(1A) For the purposes of subsection (1):

- (a) a contravention of this Act affects the interests of a creditor or member of a company if the insolvency of the company is an element of the contravention; and
- (b) a company's contravention of:
 - (i) paragraph 257A(1)(a) (share buy-back not to prejudice ability to pay creditors); or
 - (ia) paragraph 256B(1)(b) (share capital reduction not to prejudice ability to pay creditors); or
 - (ii) paragraph 260(1)(a) (financial assistance for share acquisition not to prejudice company or shareholders or ability to pay creditors);
 affects the interests of a creditor or member of the company; and
- (c) a company's contravention of paragraph 256B(1)(a) (fair and reasonable test for share capital reduction) affects the interests of a member of the company

This subsection does not limit subsection (1) in any way.

(1B) If the ground relied on in an application for an injunction is conduct or proposed conduct of a company or other person that it is alleged constitutes, or would constitute:

- (a) a contravention of paragraph 256B(1)(a) or (b), section 257A or paragraph 260A(1)(a); or
- (b) a contravention of a provision of this Act involving the insolvency of the company because of:
 - (i) the company making a reduction of its share capital to which Division 1 of Part 2J.1 applies; or
 - (ii) the company buying back its shares; or
 - (iii) the company giving financial assistance to which Part 2J.3 applies;

the Court must assume that the conduct constitutes, or would constitute, a contravention of that paragraph, section or provision unless the company or person proves otherwise.

(2) Where a person has refused or failed, is refusing or failing, or is proposing to refuse or fail, to do an act or thing that the person is required by this Act to do, the court may, on the application of:

- (a) ASIC; or

- (b) Any person whose interests have been, are or would be affected by the refusal or failure to do that act or thing;
- grant an injunction, on such terms as the court thinks appropriate, requiring the first-mentioned person to do that act or thing.
- (3) Where an application for an injunction under subsection (1) or (2) has been made, the Court may, if the Court determines it to be appropriate, grant an injunction by consent of all the parties to the proceedings, whether or not the Court is satisfied that the subsection applies.
- (4) Where in the opinion of the court it is desirable to do so, the Court may grant an interim injunction pending determination of an application under subsection (1).
- (5) The Court may discharge or vary an injunction granted under subsection (1), (2) or (4).
- (6) The power of the Court to grant an injunction restraining a person from engaging in conduct may be exercised:
- (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind; and
 - (b) whether or not the person has previously engaged in conduct of that kind; and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.
- (7) The power of the Court to grant an injunction requiring a person to do an act or thing may be exercised:
- (a) whether or not it appears to the Court that the person intends to refuse or fail again, or to continue to refuse or fail, to do that act or thing; and
 - (b) whether or not the person has previously refused or failed to do that act or thing; and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person refuses or fails to do that act or thing.
- (8) Where ASIC applied to the Court for the grant of an injunction under this section, the Court must not require the applicant or any other person, as a condition of granting an interim injunction, to give an undertaking as to damages.
- (9) In proceedings under this section against a person the Court may make an order under section 1323 in respect of the person.
- (10) Where the Court has power under this section to grant an injunction restraining a person from engaging in particular conduct, or requiring a person to do a particular act or thing, the Court may, either in addition to or in substitution for the grant of the injunction, order that person to pay damages to any other person.

- [50] In particular, the question arises whether the power of the Court to award damages in section 1324(10) arises in this case.
- [51] The time at which the plaintiff must be taken as having its interests adversely affected in the way pleaded in the Statement of Claim (see paragraph 62 to 66) is upon the execution of the deed of the 19 January 2007.
- [52] The plaintiff lost any right of recourse to these assets of the first defendant at that time.
- [53] The plaintiff as a creditor is a person whose interests are affected by the third defendant's breach of s 182 and thus comes within s 1324(1) of the Act, see *Allen v Atalay* (1993) 11 ASCR 753 and *Airpeak Pty Ltd v Jetstream Aircraft Ltd* (1997) 23 ASCR 715.
- [54] The section is expressed in terms analogous to *Lord Cairns Act*. The history of *Lord Cairns Act* in Queensland is set out by McPherson J (as he then was), in *Barbagallo v anor v J & F Catelan Pty Ltd and others* (1996) 1 Qd R 245 at pages 250-1.
- [55] The Court was referred to a number of cases in which the construction of section 1324(10) was considered as well as a number of cases concerned with *Lord Cairns Act* dealing with the right to claim damages in addition to or in lieu of equitable relief.
- [56] The cases are far from unanimous on the following questions which arise here:
- (a) Must an injunction be sought in the proceedings? In this case an injunction was sought when the third defendant was added as a party. Subsequently this claim was deleted and a different injunction sought.
 - (b) If yes to (a), is it sufficient to seek the injunction at the commencement of proceedings or, where as here, when the third defendant was added, or must it be part of the claim at trial?

Here as I have mentioned, the plaintiff included a claim for an injunction when the third defendant was added and at all times had a claim for an injunction on foot. I am satisfied that the inclusion of such a claim when the third defendant was added is sufficient for the purposes of maintaining the claim for damages.

I take the relevant principles to be those set out in Meagher, Gummow and Lehane's 'Equity Doctrines and Remedies', 4th ed at paragraph 2309:

Fourthly, there is some confusion as to the time at which a plaintiff seeking damages under Lord Cairns' Act has to demonstrate that the Court has the requisite jurisdiction. It would seem that the plaintiff is entitled to claim damages if at the time he instituted his suit for relief he could have obtained an injunction or specific performance but his right to that relief has been lost to him in between the institution of the suit and the hearing. *Gory v Thames Ironworks & Shipbuilding Co Ltd* (1863) 8 LT 237 (where the sale of which specific performance was sought was completed between institution of the suit and its hearing) is the earliest example. *Fritz v Hobson* (1880) 14 Ch D 542

(where a nuisance sought to be enjoined was abated pending the hearing) is another example. In each case equitable damages were awarded. There are many other instances. It is also clear that if the plaintiff commenced a suit at a time when he had the right neither to an injunction nor to specific performance he could still claim that the court had jurisdiction if such a right had accrued to him before the hearing of the suit. *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1981] 3 All ER 667 is the most recent example.

- (c) If yes to (a), will the claim for damages be denied if the injunction claimed would fail on discretionary grounds or is it sufficient if the court has power to grant such an injunction? Here the defendant emphasised the fact that the exclusion of the lands by the second joint venture agreement was complete upon its execution and that well before the third defendant became a party the lands had been so excluded.

The plaintiff contends on the other hand that it is sufficient if the court had jurisdiction to grant the injunction and it is irrelevant for the purposes of a claim under s 1342(10) that the injunction might have been refused on discretionary grounds. In *Spry on Equitable Remedies* (8th ed) at page 626 the author deals with the subject:

“It is clear on the balance of authorities that it is not necessary to show, in order that a Lord Cairns’ Act provision should be applicable, that a court of equity would, in the absence of a special power to grant damages, have exercised its discretion in such a way as to grant an injunction or specific performance, as the case may be. Admittedly there are some statements to the contrary; and thus it has been affirmed that provisions of this nature do ‘not, however, extend the jurisdiction of the court; and damages will not, therefore, be given in cases where, previously to the Act, the court would not have ordered an injunction, or decreed specific performance’. But the view which is most consistent with the authorities, and which accords more nearly with the words of the material enactments, is that the statutory power of awarding damages subsists whenever at the material time the contract in question is susceptible of specific performance or the right in question is susceptible of protection or enforcement by injunction, whether or not relief might be refused on a discretionary ground”

See also *Wentworth v Woollahra Municipal Council & Ors* (1982) 42 ALR 69. The court said at pages 73 and 74:

"It is obvious that a discretionary defence to a claim for equitable relief does not, if made out, operate as a defence to a claim for common law damages for infringement of the legal right on which the case for equitable relief is based. Although damages under s 68 are not common law damages and they are expressed by statute to be given in lieu of or in addition to the basic claim for equitable relief it conforms to the main object of the statute if damages in such a case are awarded under the section, even though the claim for equitable relief is defeated by a discretionary defence such as laches, acquiescence or hardship. We are content to assume, without finally deciding, that this is so."

[57] Here the court plainly had jurisdiction to grant an injunction. See s 1324(6).

[58] In my view then the plaintiff has established its right to recover damages for the breach by the third defendant of his duty under s 181.

- [59] The claims for damages by the plaintiff are largely set out in the report of Tracy Brunstrom and Hammond prepared by Jonathan Shahady (exhibit 33). These were not the subject of any real dispute. This was also the case with the various affidavits of William Cosgrove, Nathan Evennett and Robert Evennett which are also relevant to the calculation of the damages claimed.
- [60] I have had the opportunity to read exhibit 33 and senior counsel for the plaintiff took the court through it in the course of his address. There is no basis for not accepting the methodology adopted and the conclusions reached. I am satisfied that the plaintiff has established the various claim it makes against the third defendant.
- [61] Senior counsel for the third defendant raised in his outline a contention that the court should not accept the case for damages as advanced by the plaintiff because it has not been demonstrated that the plaintiff would have received the benefit of any entitlement as calculated by Mr Shahady given the supervening liquidation of the first defendant and the absence of any evidence as to what if anything creditors would have received in the winding up of the company.
- [62] As senior counsel for the plaintiff pointed out, this was not raised at any time prior to the outline and there is no evidence on the subject.
- [63] I was referred to the judgment of the High Court in *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 204 ALR 1.
- [64] Where as here a party to a contract who alleges breach by the other party of its terms adduces evidence of the expenditures made or costs incurred or losses suffered the onus then moves to the defaulting party to displace these claims. See Mason CJ and Dawson J at page 14.
- [65] Here there was no evidence that would displace the plaintiff's entitlement to the amounts claimed.
- [66] I accept the argument that in circumstances where the first defendant has failed to refer claims to the project consultant the plaintiff is entitled in those circumstances to recover the amount claimed without itself seeking the project consultant's approval.
- [67] The plaintiff's claims are set out in the Statement of Claim paragraphs 20 to 40 and the Schedules.
- [68] The plaintiff's claim is made under the following heads:
- (a) \$1,230,614.79 being damages for the losses suffered by the plaintiff as a result of the first defendant's delays (clause 16 of the contract)
 - (b) \$69,052.75 being additional management fees for works not disclosed by the first defendant (paragraph 2 of the Statement of Claim)
 - (c) \$120,000 being loss of additional management fees payable if the first defendant had entered into trade contracts on the dates required by the contract

- (d) \$49,055.66 being liabilities incurred by the plaintiff recoverable from the first defendant pursuant to clauses 6 and 10 of the agreement together with GST of \$4459.63.
- (e) \$26,485.51 being a late payment claim.

- [69] Clause 14 of the agreement provides for the payment of interest upon failure to pay claims within the time stipulated. The interest rate provided for in that clause is two percentage points higher than the five year swaps quarterly in arrear rates stated in the Financial Review.
- [70] This rate as published in the Financial Review was as at 17 May, 5.54%. The relevant rate is 7.54%.
- [71] This rate is claimed in respect of each of those amounts in which interest is claimed. It is less than the rate calculated in accordance with the Supreme Court Practice Direction No 6 of 2007.
- [72] I propose to allow interest on those claims for which interest is claimed and for the periods of such claims.
- [73] I allow interest at the rate of 7.540%.
- [74] The total interest then to the date of judgment is \$530,003.46.
- [75] It follows that there will be judgment for the plaintiff in the sum of \$1,495,208.71 with interest calculated pursuant to the contract between the plaintiff and the first defendant in the sum of \$530,003.46.