

DISTRICT COURT OF QUEENSLAND

CITATION: *Australian Photographic Engineering P/L v Dick & Anor*
[2015] QDC 344

PARTIES: **AUSTRALIAN PHOTOGRAPHIC ENGINEERING
PTY LTD**
ACN 010 943 021
(plaintiff)
v
COLIN GEORGE DICK
(first defendant)
and
TERRENCE PAUL MURPHY
(second defendant)

FILE NO/S: 1562/11

DIVISION:

PROCEEDING: Civil Trial

ORIGINATING
COURT: District Court of Queensland

DELIVERED ON: 11 December 2015

DELIVERED AT: Brisbane

HEARING DATE: 4, 5, 6, 14, 15 and 20 August, 18 November and 12
December 2014

JUDGE: Andrews SC DCJ

ORDER: **JUDGMENT FOR THE PLAINTIFF AGAINST THE
DEFENDANTS IN THE SUM OF \$5,431.01 INCLUSIVE
OF INTEREST**

CATCHWORDS: GUARANTEE – whether unenforceable for want of
consideration from the creditor – whether guarantee
applicable to past debts – whether guarantee ambiguous –
whether to admit extrinsic evidence – whether debts proved

LIMITATION OF ACTIONS – where action on contract
commenced out of time – where defendants acknowledged
that another entity made payments to the plaintiff – whether
right of action against defendants accrued afresh – whether
plaintiff should have leave to add right of action out of time

Limitation of Actions Act 1974 (Qld) s 35 (3)

UCPR r 376 (1) and (4)

Ankar Pty Ltd v National Westminster Finance (Australia) Ltd (1987) 162 CLR 549

Coghlan & Anor v SH Lock (Australia) Ltd (1987) 8 NSWLR 88

Westpac v Hughes [2011] QCA 042

COUNSEL: Stephens for the plaintiff

Gunn for the first defendant

Erskine for the second defendant

SOLICITORS: PPCS Lawyers for the plaintiff

Allan R de Brenni & Co for the first defendant

Carl Blumen for the second defendant

- [1] A creditor plaintiff claims money from two defendants who were directors and guarantors of the debts of a company which is now insolvent. The defendants' liability to pay money is alleged to arise firstly pursuant to a 'Guarantee Agreement' and secondly pursuant to arguably more onerous terms of an 'Application for Credit Account', signed contemporaneously with the 'Guarantee Agreement'.

Liability issues

- [2] **About the 'Guarantee Agreement':** The 'Guarantee Agreement' was signed in 2006. Was it signed in July or on 20 September? (20 September 2009) Where the agreed consideration from the creditor for the guarantee was supply on credit but the creditor generally required payment for supply, did the creditor provide consideration? (Yes) Is the guarantee unenforceable for want of consideration provided by the creditor? (No) Is the intent of the guarantee that the guarantors are liable for unpaid debts incurred at any time, or only after the guarantee was operative? (After) Is there ambiguity in the guarantee? (Yes) Do the circumstances known to the parties when they signed the guarantee affect its interpretation? (Yes, they assist to confirm its interpretation) Is the Guarantee Agreement intended to operate from 4 July or 20 September 2006? (20 September) Has the creditor identified to the guarantors the unpaid liabilities of the debtor for which the creditor seeks the guarantors' payment? (Yes) Did the creditor waive its rights to pursue one guarantor, Mr Murphy? (No)
- [3] **About the right of action for money payable under the terms of the 'Application for Credit Account':** Where the creditor out of time when it pleaded this claim did its right of action accrue afresh when the guarantors' defences acknowledged that the debtor made repayments due to the creditor? (No) Is the right of action for money payable under the terms of the 'Application for Credit Account' simply a further particular of the right of action against the defendants for money payable under the terms of the 'Guarantee Agreement'? (No) Does the creditor have

leave to amend to maintain a claim for a right of action arising under the ‘Application for Credit Account’? (No) Are the defendants liable to pay money under the ‘Application for Credit Account’? (It is unnecessary to decide whether a liability arose under the ‘Application for Credit Account’ because the limitation period for this right of action expired before the claim in respect of it was added.)

Quantum issues

- [4] The effect of the liability findings is that the defendants are liable only pursuant to the Guarantee Agreement and only for the debtor’s unpaid debts arising from supplies made on or after 20 September 2006. It follows that the quantum issues are reduced to: What supplies were made after 20 September 2006 that have not been paid for? Do payments made by the debtor after 20 September 2006 reduce the debt before that date or reduce the debt for supplies after 20 September? Two copies of the relevant invoices produced by the creditor are in evidence. One set is marked ‘PAID’. Can the creditor prove the invoices are unpaid?
- [5] APE does not seek interest it originally claimed pursuant to an alleged oral agreement. It seeks statutory interest at a lesser rate.

Facts relevant primarily to liability issues

- [6] Statewide Photos Pty Ltd (**Statewide**) is the debtor for whose debts Mr Dick and Mr Murphy are alleged to be liable as guarantors. Mr Dick was a director of Statewide from 6 November **1987**. Mr Murphy was a director of Statewide from 30 May **1990**.
- [7] Australian Photographic Engineering Pty Ltd (**APE**), the plaintiff, is the creditor. APE was at all material times a company carrying on business servicing photographic equipment. Later in APE’s business life it also imported and distributed photographic paper, chemicals and equipment. Mr Ackfield is the managing director of APE. He and Mrs Ackfield founded APE and have been directors of APE since it commenced trading in about **1992**.
- [8] In the **1990s**, Mr Dick, Mr Murphy and Mr Ackfield became shareholders in Statewide. Mr Ackfield’s interest as shareholder of Statewide was about 13%.
- [9] At least as long ago as **23 May 1995** Statewide was one of APE’s customers.
- [10] From **8 December 1999**, Mr Ackfield also became a director of Statewide.
- [11] From **2002** Ms Josephson began work with APE as an administrative assistant, eventually becoming its assistant bookkeeper. She was trained by Mrs Ackfield, the person in charge of bookkeeping. She also received training from a QuickBooks trainer. Ms Josephson remained at APE until **30 June 2010**.
- [12] In the years from **2003 to 2006** there were significant changes in the photographic industry. There were many innovations in photographic finishing. Photographic booths emerged allowing instant printing of photographs. This was before the revolution of digital photography. Mr Dick had been the managing director of Statewide and concerned with its day to day operation from 2003 to 2006. These changes made Mr Dick apprehensive for Statewide. His day to day control of Statewide diminished from October 2005. Mr Ackfield had more influence from that time. Mr Ackfield and Mr Dick had different ambitions for Statewide. Mr

- Dick believed that Mr Ackfield wanted Statewide to make new investments which Mr Dick regarded as imprudent in that period of rapid change.
- [13] APE did not generally require its customers to fill in an agreement relating to credit terms and did not generally require a director's guarantee. APE had solicitors prepare such documents for a customer in **2005**.
 - [14] By **late 2005**, Statewide was a wholesale photographic processing company whose revenue was falling. Another wholesale photographic processing company was QFL. In late 2005 Messrs Ackfield, Murphy and Dick discussed the falling revenue of Statewide and the competition from QFL. By early 2006, Mr Ackfield as director of Statewide signed a contract between Statewide and QFL for Statewide to do photographic processing for QFL clients in Queensland.
 - [15] In about **October 2005** or **February 2006** Statewide's supplier of photographic paper and processing chemistry stopped trading. Statewide increasingly used APE as a substitute supplier of photographic paper and processing chemistry. Until that date, APE had not previously provided photographic paper and processing chemistry to Statewide. APE had been servicing Statewide's photographic processing equipment. That meant, Mr Ackfield, as director of APE had been attending at Statewide's premises to fix Statewide's machines and equipment. But by March 2006 Statewide's significance as a customer to APE expanded considerably.
 - [16] From about **March 2006** Statewide obtained all photographic paper and processing chemistry from APE and Mr Ackfield was more involved in Statewide's management in Brisbane.
 - [17] Mr Ackfield gave evidence that by **June 2006** he believed that Statewide's debt to APE was increasing and was about \$130,000.¹ So Mr Ackfield asked Mr Dick² if he would agree to all three directors signing a guarantee and Mr Dick was agreeable on condition that all three directors signed. Notably, the request was not that Mr Dick sign a credit application. Mr Ackfield purported to recall that Mr Dick said words to the effect: 'I agreed (sic) to sign a guarantee'.³ Notably, Mr Dick's agreement was not to apply for credit on his or on Statewide's behalf.
 - [18] The three directors of Statewide in June 2006 were Mr Ackfield, Mr Dick and Mr Murphy. According to Statewide's own books of account reconstructed by Ms Cook, the debt owing on 3 July 2006 was \$139,218.60. I accept that Statewide's debt due to APE was no less than Statewide's reconstructed books have shown.
 - [19] I accept that in June 2006 Mr Ackfield for APE was concerned to have the three directors sign a guarantee. Since Mr and Mrs Ackfield's company, APE, instituted this proceeding against Messrs Murphy and Dick for payment of Statewide's outstanding debts, APE has not pursued Mr Ackfield. The defendants have not claimed in this proceeding equitable contribution from Mr Ackfield as their alleged co-obligee and to which they would arguably be entitled if APE recovers from them.

¹ T1-41

² T1-33 and 34

³ Exhibit 2 paragraph 46.

- [20] The amount of the debt due from Statewide to APE to 3 July 2006 is in issue. Having regard to my finding about the debts to which the Guarantee Agreement relates and my finding that APE may not amend to include a claim based upon the Application for Credit Agreement, the issue loses all significance.
- [21] APE alleged that between 23 May 1995 and 3 July 2006 it sold goods and service to Statewide to the total amount of \$285,932.27. APE submitted that the defendants each are deemed to have admitted that amount sold, to that date. Reference to the respective defences shows that the defendants took issue with a number of items in APE's schedule A of particulars. The items to which the defendants took issue were not charges between 23 May 1995 and 3 July 2006. Each of the items raised by the defendants was a charge included in APE's particulars of the allegation for a claim after 3 July 2006. Thus the defences raised matters which were not logically responsive to APE's pleading. I accept that the defendants are deemed to have admitted that between 23 May 1995 and 3 July 2006 APE sold goods and service to Statewide to the total amount of \$285,932.27.
- [22] APE submitted that the defendants each are deemed to have admitted the amount owing by Statewide on 3 July 2006 as \$169,921.12. I accept that the first defendant is deemed to have done so.⁴ I reject that the second defendant is deemed to have done so. This rejection is on the basis that Mr Murphy's fifth amended defence did not admit the alleged amount and included his basis for his non admission.
- [23] APE submitted that the debt due from Statewide on 3 July 2006 was \$169,921.12. In support of its submission, APE relied upon the statement of evidence of Mr Ackfield to this affect⁵ and Mr Ackfield's answer to a leading question, suggesting to him the amount of goods and services sold,⁶ and his reference to a statement.⁷ I am not satisfied that Mr Ackfield has knowledge of the precise amount of the debt due from Statewide to APE on 3 July 2006 or on any another date relevant for this proceeding. I infer that Mr Ackfield had no independent memory of the precise debt and did no more than swear to a figure he found by reading a statement of account for 1 August 2006 of APE as creditor and Statewide as debtor but dated 1 January 2011,⁸ and apparently printed five years after the period to which it relates. As a result of my findings on liability in the case against Mr Murphy, it is unnecessary to decide whether APE has established that Statewide owed APE \$169,921.12 on 3 July 2006. It is sufficient to appreciate that the debt was increasing sufficiently to concern Mr Ackfield.
- [24] An 'Application for Credit Account' and a 'Guarantee Agreement' were adapted by APE from documents it had received from its solicitors in 2005 and which had been prepared for a different customer. The documents were adapted by APE by inserting the name of Statewide and the names of Messrs Ackfield, Dick and Murphy where the draftsman thought appropriate. No person at APE had legal training. Mr Ackfield's plan in about July 2006 was for the pro forma pair of documents, appropriately altered for Statewide's circumstances, to be printed, signed by himself and Mr Dick and Mr Murphy in the appropriate places. Mr Ackfield did not believe

⁴ See the sixth amended defence of the first defendant to the third amended statement of claim para 5

⁵ Exhibit 2 paragraphs 34 and 40

⁶ T1-32

⁷ T1-33

⁸ Exhibit 2 a statement of Mr Ackfield at Exhibit JJA page 18.

that the ‘Application for Credit Account’ was a necessary item.⁹ He was not pressing for Statewide to submit an application for credit as his interest was in obtaining a guarantee.¹⁰

- [25] In the evening of **4 July 2006** Mr Ackfield and Mr Dick were each at Statewide’s premises at Virginia Street, Virginia in Brisbane. According to Mr Ackfield’s statement of evidence,¹¹ and to similar effect in an affidavit sworn in December 2011¹² Mr Ackfield swore that:

I told Dick that the reason for having the directors of Statewide execute a guarantee was because of my concern about the size of Statewide’s outstanding debts to APE. I also told him that APE needed the security of knowing that the performance of Statewide’s obligations to APE, both past and future, were guaranteed by the directors of Statewide.

- [26] The reference to ‘past and future’ obligations was a very significant detail and, if accepted, would arguably have promoted APE’s prospects in this proceeding by adding weight to an argument that the parties intended the defendants to be responsible for past debts. During his evidence in chief, Mr Ackfield¹³ said that there was no mention about whether the guarantee would relate to past or future debts of Statewide. It helped to consolidate the impression I formed that Mr Ackfield, when giving oral evidence, was generally honest. But it helped to consolidate the other impression I formed that, when Mr Ackfield’s memory failed him, he tended to reconstruct events favourably for APE. Mr Ackfield’s memory of events was affected by the passage of time. Sometimes Mr Ackfield was shown to have reconstructed mistakenly and on critical issues. That oral answer and the prior written evidence are inconsistent on a critical issue. Mr Ackfield’s earlier allegations of a conversation about ‘past and future’ debts suggests that Mr Ackfield had reconstructed a conversation whose content he did not recall. I am satisfied that Mr Ackfield did not tell Mr Dick that the guarantee would relate to past debts.
- [27] It was Mr Ackfield’s evidence by statement that the Guarantee Agreement and the Application for Credit Account, which subsequently became exhibit 1, had been signed by him and by Mr Dick on 4 July 2006 (exhibit 6 was, but not exhibit 1); that Mr Murphy was absent that day (he was); that Mr Ackfield was notified later the following week that Mr Murphy had signed. The effect of that evidence was that the guarantee had been signed by all parties, including both defendants, by the week following 4 July 2006. Mr Ackfield gave related evidence that on the strength of the signed guarantees APE continued to supply goods and services to Statewide.¹⁴
- [28] That evidence by Mr Ackfield, if accepted, would arguably improve APE’s prospects in two ways: firstly by fixing the date that the 2 documents were signed as being a date in early July rather than late September, and thus indisputably establishing that the guarantee related to \$25,000 or so of Statewide’s debts incurred between early July and 20 September 2006; secondly, evidence that APE would have discontinued supply from early July 2006 but for the security of the signed documents would arguably have improved APE’s prospects of proving that consideration was provided by APE for the defendants’ guarantees.

⁹ T2-35 line 36.

¹⁰ T2-35 line 20.

¹¹ Exhibit 2, para 45.

¹² Exhibit 5 at [10].

¹³ T1-41, line 18.

¹⁴ Exhibit 2 para 58.

- [29] Mr Ackfield added further evidence to bolster his evidence that exhibit 1 was signed, as he alleged, in July 2006 and that it was the other copy, exhibit 6, which was produced later. Exhibit 6 was supposedly produced by APE because exhibit 1 appeared to have been lost after its alleged return to APE in July 2006. Mr Ackfield gave an account of having discovered the guarantee, in exhibit 1, in the filing cabinet at APE's premises and gave evidence of how it had fallen from its file into the bottom of the drawer.
- [30] It is unlikely that Mr Ackfield's version of his discovery of exhibit 1 in the filing drawer was correct. That became apparent to Mr Ackfield as he gave evidence when Mr Ackfield was shown his email¹⁵ of 31 January 2007 to Mr Murphy. It reads: 'I found the guarantee for APE that we all signed. My accountant had it'. Mr Ackfield sought to explain the inconsistency between his finding the document at the bottom a filing drawer and an accountant's possession of it. He suggested the document was in the hands of APE's *internal* accountant. Later in cross-examination, Mr Ackfield conceded it was likely that it was APE's external accountant who had the document.
- [31] Mr Ackfield's evidence that exhibit 1 had been signed in July 2006 can be understood as honest but mistaken. On 4 July 2006 Mr Ackfield gave Mr Dick a different pair of documents, also a Guarantee Agreement and an Application for Credit Account, requesting that Dick sign them and requesting that Dick ask Murphy to sign them. They were never returned to Mr Ackfield. Years passed. Memory fades. That pair of documents was retained by Mr Dick. The pair was tendered by Mr Dick and became exhibit 6. The documents comprising exhibit 6 showed Statewide's address as Virginia Street, Virginia. That was Statewide's correct address at 4 July 2006 when Mr Ackfield handed the documents exhibit 6 to Mr Dick. I am satisfied that exhibit 6 was the only pair of documents which Mr Ackfield provided to Mr Dick in July 2006.
- [32] The address of Statewide appearing in the Application for Credit Agreement is not consistent with Mr Ackfield's version, neither are the dates '20/09/06' handwritten by Ms Cook. I reject Mr Ackfield's evidence that exhibit 1 was signed by all three guarantors in July 2006. When was it signed?

The Application for Credit and the Guarantee Agreement exhibit 1

- [33] The pair of documents being the 'Application for Credit Account' and the 'Guarantee Agreement' which are Exhibit 1 are two documents. The 'Application for Credit Account' provided, so far as seems relevant:

APPLICATION FOR CREDIT ACCOUNT

1. ...

Trading Name: Statewide Photos P/L

Business Address: ~~Virginia St~~ Virginia Qld

197 Robinson Rd GEEBUNG

...

3. **COMPANIES**

Company Name:

...

Registered Address: ~~Virginia St Virginia Qld~~
197 Robinson Rd GEEBUNG

...

4. **FULL NAMES ... OF DIRECTORS ...**

Name: John Ackfield Name: Colin Dick

...

...

Name: Terrence Murphy

...

...

6. **CREDIT**

Estimated monthly credit required: \$

...

9. This Agreement is deemed to be made...upon the acceptance of this application by Australian Photographic Engineering Pty Ltd...

10. In the event that this application is approved, the Applicant agrees that any credit extended by the Company is extended to the parties named in the application and that those parties will be responsible for any debt incurred under this agreement. This obligation will continue notwithstanding any changes in or cessation of the constitution of any trust, partnership or company or any change in or cessation of the ownership of any trading or business name.

...

15. I/We agree that the Applicant is liable for all costs incurred in the recovery of any overdue account, such as costs being calculated on a Solicitor ... to client basis.

16. I/We acknowledge the Company reserves the right ... to determine that a previously approved account is no longer so approved. At such time, all monies owing shall become immediately due and payable and the Company ahs (sic) the right to refuse to deliver further supplies to the customer unless such supplies are paid for by the Applicant in cash prior to delivery.

...

19. I/We acknowledge that the ownership of any goods under this Application shall not pass to the Applicant until all moneys have been paid to the Company by the Applicant in full. The Company shall be entitled to retake possession of the goods at any time upon default by the Applicant to secure any payment due and the Company may enter upon the Applicant's premises, to which the applicant hereby consents, at any time without notice to retake possession of the goods.

(Applicant 1)

Signed: [signature] Date: 4 July 06

Full Name: Colin Dick Position: Managing Director

Witness Signed: [signature] Date: 4 July 06

Witness Full Name: Kay Cook Position: Office Administrator

(Applicant 2)

Signed: [signature] Date: 4 July 06

Full Name: John Ackfield Position: Director
 Witness Signed: [signature] Date: 20/09/2006
 Witness Full Name: Kay Cook Position: Office Administrator

(Applicant 3)

Signed: [signature] Date: _____

Full Name: Terrence Murphy Position: Director
 Witness Signed: [signature] Date: 20/09/2006
 Witness Full Name: Kay Cook Position: Office Administrator

...

[34] The 'Guarantee Agreement' provided, so far as seems relevant:

GUARANTEE AGREEMENT

IN CONSIDERATION of AUSTRALIAN PHOTOGRAPHIC ENGINEERING PTY LTD ("the Company") supplying goods and/or services on credit to the customer/s named in the schedule, I/We:

1. Colin George Dick C/- Statewide Photos P/L ...
2. John James Ackfield C/- Statewide Photos P/L ...
3. Terrence Paul Murphy C/- Statewide Photos P/L ...

(hereinafter referred to as "the Guarantor")

Hereby jointly and severally guarantee to the Company due payment by the customer for all such goods and/or services that the Company may from time to time supply to the customer so that such payment shall be made in accordance with your usual and customary terms of payment which had been made known to the Guarantor and the customer.

AND it is hereby further agreed and accepted by the Guarantor/s and the Company that:

1. This Agreement shall, subject to Clause 5 below, be a continuing guarantee to the Company for all debts contracted by the customer with the Company in respect of goods and/or services supplied to it and all other indebtedness by the customer to the Company whatsoever and howsoever arising including (but not limited to) any judgment/judgement debt payable by the customer to the Company and notwithstanding that from time to time the customer may have repaid all monies outstanding.

...

4. Each Guarantor signing this Guarantee agrees that he ... shall be jointly and severally liable to the Company hereunder notwithstanding that some one or more of the abovenamed Guarantors ... shall refuse or fail to sign this or any other Guarantee ...

...

7. The Guarantor/s agree to indemnify the Company against any and all losses and expenses whatsoever directly or indirectly arising from or by virtue of any default whatsoever on the part of the customer under its contract with the Company, including (but not limited to) any legal expenses incurred by the Company in seeking to recover any moneys owing by the customer to the Company and any monies owing by the Guarantor/s pursuant to the provision of this Guarantee.

...

Customer ... Statewide Photos P/L

Business Address Virginia St Virginia Qld

Dated at Virginia on Fourth of July 2006

Full name ... of ... directors

Name: Colin George Dick _____ Signature [signature]

...

Witness name: Kay Cook _____ Signature [signature]

...

Name: John James Ackfield _____ Signature [signature]

...

Witness name: Kay Cook _____ Signature [signature]

...

Name: Terrence Paul Murphy _____ Signature [signature]

...

Witness name: Kay Cook _____ Signature [signature]

...

- [35] In the extracts from Exhibit 1 set out above, where the words and symbols '[signature]' appear, they have been inserted by me to designate that in the exhibit, the appropriate handwritten signature appears, whether it be the signature of Mr Dick, Mr Ackfield, Mr Murphy or Ms Cook. The date '20/09/2006' is handwritten.
- [36] In the extract above, from the 'Guarantee Agreement', the highlighting was added by me to emphasise those parts I regard as of particular relevance to the issue of whether the parties intended the guarantee to apply to Statewide's debts incurred before the guarantee was effective or only those which were incurred after the guarantee was effective.
- [37] Statewide operated from leased premises at Virginia Street, Virginia at relevant times until about **1 August 2006**. Mr Dick had negotiated for the lease of premises at 197 Robinson Road, Geebung. The lease commenced on about 1 August 2006. Statewide commenced operating from the Geebung premises from that date.
- [38] In about **September 2006**, Mr Ackfield produced another pair of documents which I find are exhibit 1. The documents produced in September, showed a line striking out Statewide's address as Virginia Street, Virginia and inserting its address as 197 Geebung Rd Geebung. That is the address of the premises which it had occupied since 1 August 2006. Those documents in exhibit 1 were forwarded by Ms Cook to Mr Murphy in Sydney, signed by him, returned to Statewide's new office in Geebung, probably by overnight courier, on **19 September 2006**.
- [39] On **20 September 2006**, at Statewide's new premises at Geebung, Mr Ackfield signed the two documents where there was space for his signature, as did Mr Dick. Ms Cook signed as witness to their signatures and also in the place for a witness to Mr Murphy's signature. The documents were retained by Mr Ackfield for APE. They are an 'Application for Credit Account' and a 'Guarantee Agreement'. Each is

signed by three of Statewide's directors and shareholders, Messrs Ackfield, Dick and Murphy. The pair of documents are exhibit 1. The guarantee which APE sues upon is the guarantee in exhibit 1.¹⁶ Exhibit 1, by contrast with exhibit 6, contains the Geebung address of Statewide, which was the correct address from 1 August 2006.

- [40] Mr Ackfield eventually accepted, and I find, that in **September 2006** Mr Ackfield was pressing for Mr Murphy to sign exhibit 1 which Mr Murphy had not signed, that Mr Dick conveyed this to Mr Murphy, that exhibit 1, then unsigned by Mr Murphy, was sent by APE to Mr Murphy, that it was returned to APE with Mr Murphy's signature on about 19 September 2006, that on that day Kay Cook, an employee of Statewide, at Mr Ackfield's office in Statewide's premises in Geebung, signed as witness to the signatures of Mr Dick and Mr Ackfield on both the Guarantee Agreement and the Application For Credit Account which are exhibit 1. Mr Ackfield accepted that he signed in front of Kay Cook on **20 September 2006** though he remained unsure. I find that he had no memory of the occasion when he signed exhibit 1. It confirmed that his evidence in chief about exhibit 1 having been signed on 4 July by him and by Mr Dick was, at best, a failed attempt to accurately reconstruct what he did not recall.
- [41] In spite of the date 'Fourth of July 2006' appearing in several places in exhibit 1, I find that the signatures were not applied until September 2006.
- [42] The issue is the date that exhibit 1 was signed. The first signatures, those of Mr Murphy, were made on 19 September 2006. The last signatures were made on 20 September 2006.
- [43] I reject Mr Ackfield's written evidence¹⁷ that on the strength of the signed guarantees APE continued to supply goods and services to Statewide from July 2006. Supplies had continued despite the absence of signed guarantees.
- [44] Ms Josephson's evidence was to the effect that from **30 June 2006** Statewide paid for goods by cash or credit card upon collection, that Mr Ackfield directed that goods could be supplied to Statewide on condition that Statewide paid immediately. Such a direction would be consistent with Mr Ackfield's concern at Statewide's increasing indebtedness to APE and his failure to get timely signed guarantees from the defendants. Ms Josephson's evidence was:

T3-28 lines 16 - 29

Did you ever handle any of that?---Yes.

And how did you know which invoice - which APE invoice that Statewide was paying?---Prior to - prior to approximately the end of June 2007 payments would be allocated to the oldest - oldest invoices. After that date goods were bought and were paid for immediately or within the next very, very short time.

Is that by Statewide?---Yes.

What were the dates again, please?---Approximately the - June 2007.

¹⁶ T7-16 l 27

¹⁷ Exhibit 2 [58]

Do you mean June - June 2006? It's just that Statewide - I don't - I won't give evidence here, but I thought Statewide stopped buying from you in May '07?---Sorry. Yes, 2006.

T3-43 line 31 to TT 3-44 line 16

"All right. Do you remember ever having a conversation with Kay Cook, or one of the other people over at Statewide, where they'd ring up and say, "Hey, Sue, I'm going to pay this. I've got the credit card. Can you put it against the invoice?"?---I'm sure it's happened. I can - I can recall Colin regularly coming in at - toward the end with his credit card and we would - we could take the credit card out immediately.

Thanks. So in other words - - - ?---So - - -

- - - possibly on the phone, but certainly in person people - - - ?---Certainly in person, yes.

- - - people would bring in the credit card?---Yep.

And would they say, "Look, this is for such and such" - - - ?---Yep.

- - - "an invoice."?---Yes.

Thank you?---Or it's for the invoice that they were collecting that day.

Yes. And when you say "towards the end", roughly when would that be?---2000 and whatever it was when Statewide stopped.

Well, six was the - 2006 at June 30, I think, was the time that I inferred that they were put on to cash?---Mmm-hmm.

Do you remember you made that correction before and - no criticism here - you said '07, June '07, but went back to - so is June '06 about the time that this started?

HIS HONOUR: By "this" you mean paying a particular invoice?

MR GUNN: Yes. On pick up, of course?---Yes.

HIS HONOUR: Thank you."

[45] Ms Josephson's evidence was less equivocal in re-examination by Mr Stephens-TT 3-74 line 20 – 32

"HIS HONOUR: Well, just before you answer that, on the 30th of June 2006, did you know then what the terms of trade were between APE and Statewide?---Loosely, yes.

Thank you.

MR STEVENS: Could you tell us what you understood them to be?---Statewide had a 30 day account, and when the - when the balance was such that Statewide wasn't paying on time, John put in place that Statewide were still able to have stock, but stock had to be paid for immediately.

And at that time, what was the outstanding balance on the account?---According to this statement, \$157,727.76.

And did that amount remain outstanding, or was any of it paid from that date forward?---There have been payments, which the statement shows. There have

been payments after that date, but the payment history, which we've also put there, will show that each of those payments refer to an invoice after the 30th of the 6th.

So that after that date, the payments were generally allocated to a particular invoice - - -?---Correct.

- - - more or less on the same day?---Yeah, within a day or so.

Reflecting that the terms were more or less cash on invoice?---Yes.

And the balance, the 160, 170 thousand dollars? Did that remain on the account?---Yes."

- [46] I accept that from **30 June 2006** Statewide, at least generally, paid for goods by cash or credit card upon collection and accept that Mr Ackfield directed that goods could be supplied to Statewide and that Statewide must pay immediately. I find that from 30 June 2006, generally a payment would be allocated to particular invoice, the invoice describing the goods supplied to which the cash or credit card payment related. I infer that those who put data into the QuickBooks system at APE's business premises from 1 July 2006 would record a payment received from Statewide for a cash or credit card sale against the invoice to which it related. I find that practice differed from a general practice at APE of allocating payments to a customer's oldest outstanding debt.
- [47] A consequence of that practice with respect to supplies to Statewide from 1 July 2006 is that payment for such goods at the time of supply meant that no debt was incurred in respect of that supply. An accounting system which attributed Statewide's payments in and after July 2006 to Statewide's oldest debts, would have distorted the reality for such sales. Such cash and credit card sales would generally not create fresh debt. There is an element of uncertainty arising from Ms Josephson's evidence that payments were generally allocated to a particular invoice 'within a day or so'. Her reference to allocation 'within a day or so' could mean there were sales on credit which were paid for within a day or so. The legal consequence for the guarantors is the same: the debt which existed for a day or so and for which the defendants were guarantors was paid and any contingent liability the defendants may have had in respect of that debt was extinguished when it was paid. If APE, by later accounting consistent with APE's general practice before 1 July 2006, attributed in its accounts, payments received from Statewide in and after July 2006 to Statewide's oldest debt instead of to the invoices Statewide had chosen to pay in compliance with Mr Ackfield's direction, it would not materially affect Statewide. It would materially distort the true position with respect to guarantors of Statewide's debt, if the guarantors' liability was limited to payment of only fresh debt, incurred after the date of their guarantee.

Circumstances known to the parties when they signed the guarantee

APE submitted that in interpreting the Guarantee Agreement that I should have regard to the surrounding circumstances known to the parties and the purpose and object of the transaction.¹⁸ That approach was disputed by the defendants who argued, without reference to authority, that authorities relied upon by APE for that approach to interpretation were distinguishable because they were cases concerned

¹⁸ Submissions on behalf of the plaintiff dated 8 October 2014 para 33.

with contracts which were not guarantees.¹⁹ I reject the defendants' submission. That does not prejudice the defendants however. The list of matters relied upon by APE as relevant circumstances was unhelpful.²⁰ Two items on the list are relevant. Firstly, all knew Statewide was in debt to APE by 3 July in the sum of about \$169,000 and that Mr Ackfield was concerned about the amount owed. That shared knowledge does not assist one to determine whether the parties intended the guarantee to operate retrospectively. Secondly, APE submitted that Mr Ackfield told Mr Murphy that he needed the performance of past and future obligations guaranteed. That would be relevant if it could be established that Mr Dick knew it too. But I accept Mr Ackfield's reservations in oral evidence. I am not satisfied that Mr Ackfield said to Mr Murphy anything about past obligations.

Is the intent of the guarantee that the guarantors are liable for unpaid debts incurred at any time, or only after the guarantee was operative?

[48] APE emphasised in submissions these words from the Guarantee Agreement:

This Agreement shall, subject to Clause 5 below, be a continuing guarantee to the Company for all debts contracted by the customer with the Company in respect of goods and services supplied to it and all other indebtedness by the customer to the Company whatsoever and howsoever arising...

[49] APE then submitted:

"1. A literal interpretation of the guarantee supports the construction contended for by the Plaintiff because

(a) the words "supplied" is a word referring to past tense. If it was the intention of the parties that the guarantee operate prospectively only, it could reasonably be expected that the words "*to be supplied to it*", or a synonyms thereof, would appear after the word "*services*" and before the word "*and*" and in place of the words, "*supplied to it*"; and

(b) the words "*whatsoever and howsoever arising*" are words of broad scope. They are not limited by any qualifying condition. If it was the intention of the parties that the guarantee operate prospectively only, it could reasonably be expected that the words "*hereafter incurred*", or a synonyms thereof, would appear after the words "*all other indebtedness*" and before the word "*by the customer*";

[50] I begin with APE's submission that 'supplied' refers to past tense. APE cannot sensibly submit that 'supplied' is intended to refer only to the past tense as APE also relies upon the guarantee for recovery of any debts incurred for supply after the guarantee was operative. APE's submission implies that 'supplied', in spite of being a past tense of the verb 'to supply', was not intended to be read literally because it was intended to mean past and future supplies. If one looks at the word 'supplied' in its context one reads that it is in the sentence beginning with 'This Agreement shall... be a ... continuing guarantee...' One sees that the subject whose future is contemplated by the words 'shall ... be' is, literally, the Agreement. Yet the agreement came into existence at an instant in time (on 20 September 2009). The agreement was intended to operate thereafter, that is to say in a future, relative to the instant of agreement. The agreement's operation was not intended to be postponed until a later date or time. It would have made more sense if the clause had provided 'This Agreement is ... a continuing guarantee'. The use of the words 'shall be' instead of the word 'is' introduced imprecision into the clause. It introduced futurity, but in a place in the sentence where futurity has no utility. That explanation

¹⁹ Second defendant's outline of submissions in reply para10 and Reply by the first defendant para 33
²⁰ Submissions on behalf of the plaintiff dated 8 October 2014 para 37.

is a long way of writing that the clause has some clunky drafting. The future was adverted to but in an irrational place in the sentence. The use of the past tense ‘supplied’ in that obtuse sentence gives no clear impression that the parties intended that ‘supplied’ meant the guarantee to apply to debts incurred for past supplies. The same may be said for the use of the word ‘contracted’.

- [51] APE relies on the words ‘whatsoever and howsoever arising’. Those words qualify the words ‘other indebtedness by the customer (Statewide) to the company (APE)’. ‘arising’ suggests debts which had not, by 20 September 2006, arisen. I do not accept that those words bolster APE’s interpretation argument.
- [52] The defendants emphasised the preceding words of the Guarantee Agreement:
- We...guarantee to the Company due payment by the customer for all such goods and/or services that the Company may from time to time supply
- [53] I accept that those words are consistent with a guarantee of payment for debts incurred for only future supplies. I am satisfied by the words of the Guarantee Agreement that the intention is that it operate in respect of Statewide’s unpaid debts incurred for supplies of goods and services after the Guarantee Agreement agreed on 20 September 2006 became operative.
- [54] I must go further to respond to the further arguments relevant to the interpretation of the guarantee. Each confirms the interpretation I have made.
- [55] APE submitted that the part of the Guarantee Agreement it emphasised is not ambiguous.²¹ One must consider the whole of the document rather than a single extract. The second defendant also submitted that the document is not ambiguous.
- [56] I am satisfied that the guarantee is sufficiently obtuse to be ambiguous. The sentences emphasised by each side reveal that adequately.
- [57] As it is ambiguous, certain results follow. One is that the court is permitted to look at the surrounding circumstances known to the parties and the purpose and object of the transaction. I regard the contemporaneous demand by APE for a signed Application for Credit Account as relevant. That document suggests that it was to regulate debt for prospective sales on credit. It specifically refers to ‘*any debt incurred under this agreement*’. The parties concern with prospective credit under that agreement is consistent with a concern for the contemporaneous guarantee to secure Statewide’s debt incurred for prospective sales. The surrounding circumstances known to the parties support the interpretation of the Guarantee Agreement that it relates to only debt incurred in future.
- [58] Another result of the finding of ambiguous provisions is that ambiguity should be construed in favour of the surety. That principle is accepted by APE.²² APE drafted the Guarantee Agreement. APE accept that the Guarantee Agreement, is to be read *contra proferentem* and, if ambiguous, is to be construed in favour of the surety.²³

²¹ Submissions on behalf of the plaintiff dated 8 October 2014 para 86.

²² Submissions on behalf of the plaintiff dated 8 October 2014 para 86 referring to *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 561.

²³ Submissions on behalf of the plaintiff dated 8 October 2014 para 86 referring to *Coghlan & Anor v SH Lock (Australia) Ltd* (1987) 8 NSWLR 88 at 92

- [59] That approach reinforces my view that the tension between the meaning of the words ‘We ... guarantee to the Company due payment by the customer for all such goods and/or services that the Company may from time to time supply’ and the subsequent words ‘This Agreement shall ... be a continuing guarantee to the Company for all debts contracted by the customer with the Company in respect of goods and services supplied to it and all other indebtedness by the customer to the Company whatsoever and howsoever arising...’ should be resolved in favour of the defendants.
- [60] These principles reinforce the interpretation that the Guarantee Agreement is intended to operate prospectively making the guarantors liable for Statewide’s debts incurred after the Guarantee Agreement became operative.

When did the guarantee become operative?

- [61] APE submitted that the Guarantee Agreement ‘on its true construction ... operated ... from 4 July 2006’.²⁴ APE submitted that the date in the document was like the date for commencement of a term of a lease. The Guarantee Agreement does not expressly provide that 4 July 2006 is when the guarantee begins. It is relatively clear from the Guarantee Agreement that the only significance of the fourth of July was as the date when it was anticipated the parties would sign. That emerges from the fact that it provides: ‘Dated at Virginia on Fourth of July’ and does not provide spaces expressly for signatories to fill in the date when they sign. That does not prevent the guarantee’s having retrospective effect. It is unlikely that the date was intended to imply that there is a term of obligation and that it commences on that date. Just as the place of signing printed on the document had no significance for defining the obligations of the sureties, neither did the date printed on it. The document appears to me to be, from its words, intended to operate from the date when the guarantors presented it, signed by them, to APE. It was presented to APE’s director, Mr Ackfield on 20 September 2006. It is not expressed to have a date for the commencement of its term of operation. If there is ambiguity arising from the words of the document as to the date the parties intended it to operate, it should be resolved in favour of the surety. It was intended to operate on and from 20 September 2006.

Did Mr Ackfield waive APE’s rights to pursue Mr Murphy under its guarantee?

- [62] Mr Murphy pleaded an accord and satisfaction defence.²⁵ His pleading alleged that before Mr Murphy assisted in the development of the ‘Instant Prints’ project, APE through Mr Ackfield stated to Mr Murphy that APE would not chase Mr Murphy, that in reliance upon that, Mr Murphy assisted in the development of the Instant Prints project; that Mr Murphy believed the words meant that APE would not try to enforce the Guarantee Agreement against Mr Murphy and expose Mr Murphy to legal costs of defending; that APE, by accepting Mr Murphy’s help, impliedly did so in satisfaction and discharge of the cause of action based upon the guarantee; that at a meeting on 11 February 2010 at Mascot Mr Ackfield confirmed to Mr Murphy that APE was going to shield Mr Murphy from the claim while APE pursued Colin Dick, and Mr Murphy and Mr Ackfield shook hands together in confirmation of the

²⁴ Submissions on behalf of the plaintiff dated 8 October 2014 paras 1(k) and 1(l) and 13, 36.

²⁵ Fifth amended defence of the second defendant, paragraphs 31-39.

oral statement; that on 16 February 2010 Mr Ackfield emailed Mr Murphy that his preference was to shield him as much as possible.

[63] The evidence did not go so far as the pleading.

[64] Mr Murphy gave evidence of a conversation on topic but recalled the conversation to have been three years before the date pleaded and at some time in June 2007:

John Ackfield stated then that as we were involved in Instaprints that I was safe from any pursual of that guarantee. However, he hadn't made up his mind with regard to Colin Dick. A subsequent conversation a few weeks later ... He complained to me about the solicitor that we had acting for us and his insistence that a letter be drafted releasing the directors from the guarantee signed to APE by the directors of Statewide. He indicated then that he would not be doing that.²⁶

[65] That indication by Mr Ackfield that 'he would not be doing that' was evidence from Mr Murphy that in a conversation a few weeks after June 2007 Mr Ackfield indicated that he would not be causing APE to release Statewide's directors from their guarantee. That is inconsistent with a waiver or an agreement not to pursue Mr Murphy. It is an unequivocal indication that the directors would not be released from the guarantee. But Mr Murphy added: 'I believe he said "sweet", indicating that I was safe from any prosecution.'²⁷ Mr Murphy did not give evidence that Mr Ackfield said 'You are safe from prosecution'. Mr Murphy gave evidence of what he believed Mr Ackfield to have said, namely the word 'sweet' and gave evidence of what Mr Murphy suggests that word should be interpreted to mean. I am not satisfied that Mr Murphy recalls precisely what Mr Ackfield said. I am not satisfied that if Mr Ackfield had said 'sweet' that it amounted to a promise never to institute a proceeding against Murphy upon his guarantee. The use of such a word in that context might be understood to mean that you are 'safe for the time being'. For example, it could mean that APE intended that if Statewide's liability remained unsatisfied, APE would pursue Mr Dick first. A creditor cannot protect a joint guarantor simply by refraining from proceeding against that guarantor. If Statewide recovered any sum from Mr Dick, Mr Dick would have been entitled to seek contribution from Mr Murphy as co-guarantor. Just as the defendants in this proceeding are entitled to seek contribution from Mr Ackfield if APE obtains judgement against them. That context, makes even less persuasive Mr Murphy's recollection of the conversation and his conjecture as to the effect of the word 'sweet'.

[66] Mr Ackfield denied giving any such assurance.

[67] I am not satisfied by Mr Murphy's recollections that APE agreed or represented that if Mr Murphy assisted with Instant Prints, APE would not enforce its guarantee against him.

[68] Further, I am not satisfied by the evidence that Mr Murphy inferred in 2007 that APE would never proceed against him upon its guarantee.

[69] Mr Murphy did assist Mr Ackfield in a plan to set up Instant Prints. It may have been called 'Instantprints' but nothing turns on the name. Even if there had been a representation by Mr Ackfield, there was no evidence that Mr Murphy involved himself or continued to involve himself with Instant Prints in reliance upon anything

²⁶ T5-82 LL 11-20.

²⁷ T5-82 LL 11-20.

said by Mr Ackfield about APE's guarantee. The Instant Prints business was not profitable and it was not carried on for long.

- [70] Mr Murphy gave evidence²⁸ of a more recent conversation. The relevant parts were:
I believe it was February 2010. Perhaps the 11th of February. We spoke about a number of things in that conversation...In the end, we shook hands and he indicated to me that the conversation he had had with me had helped make up his mind. He would honour his word that he wouldn't pursue me but that he was likely to "chase", I think was the word, Colin Dick.
- [71] On 16 February 2010 Mr Ackfield did email Mr Murphy as follows:
Terry I have had a conversation with the solicitor and have told him of my preference to shield you as much as possible from angst while pursue Dick. He has said that he think he can come up with a system that will work for both of us. I expect to meet him next week.
- [72] The email is not consistent with a promise that APE would never enforce its guarantee against Mr Murphy or that it would never proceed against Mr Murphy. I am not satisfied that Mr Ackfield said anything on 11 February 2010 which constituted an agreement by APE that APE would never enforce its guarantee against Mr Murphy.
- [73] I am not satisfied that APE has waived rights to pursue Mr Murphy as guarantor. I am not satisfied that there was an accord about not pursuing Mr Murphy as guarantor.

Is APE statute barred from relying upon the liability arising under the 'Application for Credit Account'?

- [74] APE's third amended statement of claim²⁹ ('3ASOC') added, for the first time in the proceeding, a further alleged right of action against each of the first and second defendants. The right of action is identified in 3ASOC at paragraphs 7 (a), (c), (d), 8, 14 and in the prayer for relief at (a) and (b). APE does not dispute that the limitation period for the newly added rights of action would expire 6 years after the rights of action arose and that it expired before APE added the further rights of action to its pleading. APE raised two arguments to overcome the bar.
- [75] APE argued that it is not barred from including the rights of action because
There has been an acknowledgement of the debt owing to the Plaintiff by the first defendant and the second defendant on the pleadings.³⁰
- [76] Section 35 (3) of the *Limitation of Actions Act* 1974 (Qld) provides, so far as is relevant:
35. Fresh accrual of action on acknowledgment or part payment
...
(3) Where a right of action has accrued to recover a debt or other liquidated pecuniary claim....and the person liable or accountable therefor acknowledges the claim or makes a payment in respect thereof, the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment."
- [77] The submission of APE is that there has been an acknowledgment of the 'debt'. The brevity of the submission makes it easy to lose sight of the essential requirements to

²⁸ T5-82 lines 37-43

²⁹ Court document 36 filed 6 September 2013.

³⁰ Submissions on behalf of the plaintiff 8.10.14 para 153.

satisfy section 35. In the circumstances of this matter, the section requires that there has been an acknowledgement by the defendants (on their pleadings) of a debt owing by the defendants (not a debt owing by Statewide) to APE arising from the failure of the defendants to pay money due by them under the 'Application for Credit Account'. Nowhere in the defendants' pleadings has Mr Dick or Mr Murphy so acknowledged the claim which APE makes against him pursuant to the Application for Credit Account or acknowledged that he has made a payment in respect of that claim.

- [78] In support of its argument, APE submitted that admissions in various pleadings by the first and second defendants were acknowledgements by the first defendant³¹ and by the second defendant³² of debt. A useful summary of the admissions is set out over five pages of APE's submission.³³ References to each alleged admission reveals that it is an admission that Statewide has paid money to APE in reduction of the amount owed by Statewide to APE. There is no admission by either defendant that he paid money to APE, that he owed money to APE in respect of the 'Application for Credit Account' or that he has the obligations of a party to the 'Application for Credit Account'. If APE, by its submission, implied that Mr Murphy and Mr Dick acknowledged the claim against them under the 'Application for Credit Account' by making a payment in respect of it, I reject the submission.
- [79] I reject the argument that anything pleaded by the defendants has the effect, by reason of s 35 of the *Limitation of Actions Act* 1974, of a fresh accrual of APE's alleged right of action based upon the 'Application for Credit Account' signed by the defendants.
- [80] APE raised an alternative argument. It seeks leave, to amend in terms of 3ASOC on the basis that the new rights of action included are 'simply further particulars of the cause already claimed'. APE referred to *Westpac v Hughes* [2011] QCA 042.³⁴
- [81] APE made no argument to bolster its submission that its amendment is 'similarly further particulars of the cause already claimed'. It referred to no passage in *Westpac v Hughes*.
- [82] The power to give such leave arises under UCPR rr 376 (1) and (4) which provide:
 '**376 Amendment after Limitation Period**
 (1) This rule applies in relation to an application, in a proceeding, for leave to make an amendment mentioned in this rule if a relevant period of limitation, current at the date the proceeding was started, has ended.
 ...
 (4) The court may give leave to make an amendment to include a new cause of action only if—
 (a) the court considers it appropriate; and
 (b) the new cause of action arises out of the same facts or substantially the same facts as a cause of action for which relief has already been claimed in the proceeding by the party applying for leave to make the amendment.'
- [83] The initial rights of action included in the various iterations of the statement of claim prior to 3ASOC allegedly arose from the defendants' agreement to a 'Guarantee Agreement'. The new rights of actions allegedly arose pursuant to

³¹ Submissions on behalf of the plaintiff 8.10.14 para 159.

³² Submissions on behalf of the plaintiff 8.10.14 para 160.

³³ Submissions on behalf of the plaintiff 8.10.14 paras 160 and 161.

³⁴ Submissions on behalf of the plaintiff 8.10.14 para 163.

Clause 10 of the ‘Application for Credit Account’³⁵ from the defendant’s liability as original debtors. I reject the submission that it is simply further particulars of the cause already claimed. APE submits that the defendants’ liability arising under the terms of the Application for Credit Account is for all Statewide’s unpaid debt whether incurred before or after 20 September 2006. That is substantially different liability from that which arises under the terms of the Guarantee Agreement which imposes liability limited for prospective debts.

- [84] APE did not submit that the different right of action arose out of the same or substantially the same facts as the right of action on the ‘Guarantee Agreement’ and did not submit why it was appropriate to give leave to make the amendment.
- [85] Leave to amend so as to include in 3ASOC a claim against the defendants based upon the allegation that they are parties to the ‘Applications for Credit Account’ is refused.

Do the terms of the ‘Application for Credit Account’ make the guarantors liable as principal debtors?

- [86] It becomes unnecessary to determine this question. The rights of action against the defendants based upon their alleged liability arising from their allegedly being parties to the ‘Application for Credit Account’ is statute barred and APE did not obtain leave to rely upon its amendments alleging these rights of action.

Is the guarantee unenforceable for want of consideration provided by the creditor?

- [87] The ‘Guarantee Agreement’ referred to APE’s consideration thus:
 In consideration of Australian Photographic Engineering Pty Ltd... supplying goods and/or services on credit to the customer/s named in the schedule, I/We:
 ...
 1. Collin George Dick...
 3. Terrence Paul Murphy...
 (Here and after referred to as “the Guarantor”)
 Hereby jointly and separately guarantee to Company due payment...
- [88] The defendants submit there was no consideration moving from APE to support the guarantee because there was no supply on credit. APE accepts that the consideration to be provided by it was supplying goods and/or services on credit.³⁶ I find that to be the consideration which was to be provided by APE to support the Guarantee Agreement.
- [89] To support the argument that there was no consideration, the defendant’s submitted that APE’s
 Documents disclose all Tax Invoices were due for payment of the same date as the date of issue.³⁷

The submission referred to 3ASOC annexure A and to exhibit 2 annexure JJA 1. Each is an identical bundle of reprinted, inexact copies of APE’s statements sent monthly to Statewide. The statements concern transactions dated from 2 June 2006 (Invoice 8534) to 31 May 2007 (Invoice 10705). In the case of each invoice referred

³⁵ Set out herein.

³⁶ Submissions on behalf of the plaintiff 8.10.14 paras 65(a) and 87(c).

³⁷ The second defendant’s outline of submissions on trial 25.8.14 para 21 (a).

to in a statement, the statement's transaction column asserts that the amount is due on the date attributed to the invoice. One can determine that the date attributed by the statement to any invoice correctly shows the date appearing on the invoice by referring to the copy tax invoices in exhibit JJA1 to the statement of Mr Ackfield which is exhibit 3. The copy tax invoices bear the same dates as are attributed to the invoices in the statements. The monthly statements from APE create the impression that the due date for payment of any invoice was the date of the invoice. This impression seems to be accepted by APE.

[90] But APE submitted:

65. (e) it is alleged that payment was due on the date of purchase, but that was not correct. The Plaintiff's accounting system generated the due date as the date of the invoice, so the parties had regard to the Credit Agreement not the arbitrarily generated due date.³⁸

The reference to 'Credit Agreement' is a reference to the terms found in the Applications for Credit Account. The submission did not refer to any evidence in support of the assertion that the due date for an invoice shown in the statement was arbitrarily generated. I do not accept that the date was arbitrarily generated. The appearance of an invoice being due for payment on the date of the invoice was consistent with Mr Ackfield's direction that Statewide pay cash for supply and consistent with his concern that Statewide's debt had grown too large.

[91] I reject APE's submission that in determining the due date for payment of an invoice, the parties had regard to the credit agreement. The reason for rejection requires lengthy explanation.

[92] APE did not indicate which clause of the Application for Credit Account to which the parties had regard.

[93] The credit agreement which would have arisen based upon the Application for Credit Account was deemed by clause 9 to be made '*upon the acceptance of the application*' by APE. APE's submission is that 'the intention of the parties was the Credit Account Agreement and Guarantee should be dated and take effect on and from 4 July 2006'. So far as the credit account is concerned, I reject that submission as inconsistent with the express words of clause 9 of the Application for Credit Account. The credit agreement did not commence until that application was accepted by APE.

[94] When did APE accept the Application for Credit Account? APE did not sign the Application for Credit Account. There was no provision for it to do so. There is no evidence of APE expressly accepting the Application for Credit Account. APE submitted that it accepted by conduct³⁹ but APE supported that submission with a reference to conduct of Statewide's three directors, not conduct of APE. That conduct was Mr Murphy's signing the Application for Credit Account and the Guarantee Agreement on 19 September 2006 and Statewide's other 2 directors, Messrs Ackfield and Dick, signing the Application for Credit Account and the Guarantee Agreement on 20 September 2006. There was no provision for Mr Ackfield to sign anything on behalf of APE. There was no reference to any conduct by APE.

³⁸ Submissions on behalf of the plaintiff 8.10.14 para 65 (e).

³⁹ Submissions on behalf of the plaintiff 8.10.14 para 1(m).

- [95] On 20 September 2006 Mr Ackfield retained possession of the duly signed documents. APE did not lead evidence of, or submit that any cash sale was specifically allowed because the signed Application for Credit Account was in APE's possession from 20 September 2006. I am not satisfied that the credit agreement was accepted by APE before 20 September 2006.
- [96] Clause 16 of the Application for Credit Account included an acknowledgment that APE reserved the right to determine that a previously approved credit account is no longer so approved and that at such time all moneys owing shall become immediately due and payable and that APE then would have the right to refuse to deliver further supplies unless they were paid for by the applicant in cash prior to delivery. By that term APE reserved to itself an unconditional right to determine that Statewide's credit account was no longer approved. The terms in the Application for Credit Account did not make provision for the reinstatement of a credit account once APE exercised its right under clause 16 to determine that the account was not approved.
- [97] APE submitted that the parties had regard to the Application for Credit Account. APE nevertheless accepted that at material times there were supplies for which cash was required and provided. APE submitted:
- The best analogy is that Statewide was in the position of a credit cardholder that had reached his credit limit. Statewide had to reduce his borrowing in order to make more purchases on credit.
- [98] That submission described a situation consistent with APE's having exercised its unconditional liberty to determine the credit account.
- [99] From 30 June 2006 Statewide's trade was subject to Mr Ackfield's direction that goods could be supplied to Statewide but that Statewide must pay immediately.
- [100] I am not satisfied that at any material date on or from 4 July 2006 that the parties had regard to the Application for Credit Account Credit Agreement, as APE submitted. If there were occasions when goods were provided without APE first requiring payment it would allow for the plausible argument that the goods were supplied by APE consistently with and pursuant to the terms of the Application for Credit Account. But any one of the many times when APE required payment for supply is consistent with APE's ending the credit account as it was at liberty to do; ending it by exercising its right under clause 16. I am not satisfied that APE did not determine Statewide's credit account before any sale was made on credit. I am not satisfied that credit was extended to Statewide pursuant to the terms agreed by the parties to the Applications for Credit Account.
- [101] But to reject APE's submission is not to find that there was no sufficient consideration for the guarantee.
- [102] The consideration for the Guarantee Agreement was '*supplying goods and/or services on credit to the customer...*' The Guarantee Agreement did not specify expressly and no party submitted that the supply of goods on credit required to constitute consideration needed to be pursuant to a credit account established by APE's acceptance of the Application for Credit Account in exhibit 1 or exhibit 6.
- [103] I am satisfied that any supply after the Guarantee Agreement became operative on 20 September 2006 by APE to Statewide on credit was sufficient consideration from

APE to render the Guarantee Agreement enforceable. The practical effect is that the guarantors became liable in respect of any supplies on credit after 20 September 2006 which have not yet been paid for. As it turns out, there are few relevant supplies.

Quantum

- [104] APE's contentions about quantum dealt with various liability hypotheses. Primarily, APE's submissions on quantum were on the basis that liability findings would be made to the effect that the guarantors are liable for any debt unpaid by Statewide, whether incurred before or after the Application for Credit Account and Guarantee Agreement were signed. Accordingly, APE's submission sought to establish the total value of goods and services ever supplied to Statewide and the total of payments ever received in payment of Statewide's account. APE contended: by July 2006 Statewide owed APE approximately \$169,921.12;⁴⁰ 'The claimed amount was comprised of both pre-application and pre-guarantee debts and post-application and post-guarantee debts in the sum of \$220,288.49 together with interest on that sum... calculated from 17 May 2007 in accordance with s 58 of the *Civil Proceedings Act* 2011 interest calculator'; 'On the Trial a further interest amount on 30 June 2006 Invoice 8661 for \$1,563.96 was found and that changes the above figures to: (a) Balance Due: \$220,288.49'.⁴¹ 'From 3 July 2006, goods and services to the value of \$159,172.33 net of adjustments have been sold to Statewide';⁴² 'Between 7 July 2006 and 31 May 2007, Statewide have paid the sum of \$107,241.00'.⁴³ From 4 July to 20 September 2006 APE provided Statewide with \$101,465.91 in goods on credit;⁴⁴ the payments by Statewide between those dates were \$70,023.71; the indebtedness between those dates increased by \$31,442.20; at 19 September 2006 Statewide was indebted to APE in the sum of \$204,327.62.
- [105] APE added a limit upon its claim under the Guarantee Agreement. To Mr Murphy's submission to the effect that APE's demand was deficient for failing to enable the guarantors to be sure whether the amounts claimed were correct or not and for failing to identify which tax invoices are those on which APE relies for its claim against the guarantors⁴⁵ APE responded:
- "105. The invoices upon which the Plaintiff relies for its claim against the guarantors are those set out in Schedule B List of the Unpaid Invoices and are contained in Exhibit 20."
- [106] By that submission APE referred to a schedule B to its submission. It is a summary which identified 65 invoices by number and advised 'They are exactly the same as those contained in Exhibit 20. However the invoices must be adjusted as per Note 1 and 2'. 11 invoices were for interest for \$17,913.77. The other 54 identified invoices were expressed in schedule B to be for a total slightly exceeding \$220,288.49. The copies of all but two of those invoices are in exhibit 20. Reference to exhibit 20 shows that the invoices span dates from 22 March 2006 to 17 May 2007. APE reduced the claim to that figure by reason of some part payments it admits and an interest charge it admits was included erroneously.⁴⁶ APE abandoned

⁴⁰ Submissions on behalf of the plaintiff dated 8.10.14 para 6 (a) (ii).

⁴¹ Submissions of the plaintiff 8.10.14 para 46 (a).

⁴² Submission on behalf of the plaintiff 8.10.14 para 40 (b) (iii).

⁴³ Submissions on behalf of the plaintiff 8.10.14 para 40 (iv).

⁴⁴ Submissions on behalf of the plaintiff 8.10.14 para 41 (d).

⁴⁵ The second defendant's outline of submissions on trial 25.8.14 para 92.

⁴⁶ Submissions on behalf of the plaintiff dated 8.10.14 schedule B notes 1, 2 and 3.

its claim for interest under an alleged agreement for 1% per month. Instead, APE claims interest from the dates of default until judgment pursuant to s 58 of the *Civil Proceedings Act 2001* (Qld). Accordingly, I take APE's reference to the invoices in exhibit 20 as excluding the invoices for interest. APE seeks interest on \$220,288.49 from the 17 May 2007.

- [107] Thus, one sees that APE contended, on the hypothesis that it would succeed on all liability arguments, that the defendants were liable as guarantors to pay for supplies made from a date about six months before the Guarantee Agreement was signed. Because I find that APE may not raise its alleged right of action under the terms of the Application for Credit Account and also find that the Guarantee Agreement was not operative before 20 September 2006 and also find that it did not apply to debts incurred before it was signed those contentions by APE are based on the wrong hypothesis.

The parties contentions about the quantum related to supplies on and from 20 September 2006

- [108] But APE provided a number of other quantum contentions on a basis more consistent with the actual liability findings which have been made. APE contends that: from 20 September 2006 to 31 May 2007 APE provided Statewide with a further \$58,543.16 in goods on credit;⁴⁷ between 20 September 2006 and 31 May 2007 Statewide paid APE \$38,504.03 and Statewide's indebtedness to APE increased by \$20,489.13.⁴⁸ Assuming that the figures accord with APE's records in evidence, these contentions are based upon a false premise about the assessment of the quantum of the guarantors' indebtedness to APE. The guarantors are liable for all unpaid debts contracted by Statewide with APE in respect of goods and/or services supplied on or after 20 September 2006. That amount may be different from the increase in Statewide's total indebtedness shown in APE's accounts on or after 20 September 2009. The accounts may include adjustments, credits or debits, which do not relate to what is owed for debts contracted on or after 20 September 2006.
- [109] It follows from the liability findings that only those unpaid invoices contended for by APE which concern supplies on or after 20 September 2006 are relevant to the claim based upon the Guarantee Agreement. There are nine such invoices. Those nine relate to goods and services allegedly supplied for a total of \$22,204.07, by my calculation. Reference to schedule B to the submission on behalf of the plaintiff dated 8.10.14 reveals that the invoices are numbered: 9379, 9433, 9767, 10088, 10521, 10577, 10583, 10737 and 10614 ('the nine relevant invoices'). The total of \$22,204.07 exceeds the extent to which APE submitted that debt increased after 20 September 2006, which was \$20,489.13.
- [110] The quantum issue begins by determining what debts APE has proved to be unpaid in respect of the nine relevant invoices.
- [111] For Mr Murphy the contentions were that the invoices relied upon by APE are marked 'PAID' on the copies exhibited to exhibit 3, that the marking means they were paid, so nothing is due.⁴⁹ It was further submitted that anything inconsistent

⁴⁷ Submissions on behalf of the plaintiff 8.10.14 para 41 (e) to (h).

⁴⁸ Submissions on behalf of the plaintiff 8.10.14 para 41 (j) and (k).

⁴⁹ The second defendant's outline of submissions on trial 25.8.14 paras 102 and 110.

with Statewide's trial balance should be disregarded and that Statewide's trial balance for supplies from 20 September 2006 to 31 May 2007, excluding interest shows \$4,141.78 for goods and services.⁵⁰

- [112] APE replied to that submission that Statewide's Aged Trial Balance exhibit 16 omitted reference to four invoices.⁵¹ Those four omissions relevantly relate to three of the nine relevant invoices: 9379 for \$3,322.78, 10088 for \$726.00 and 10737 for \$11,452.03. The fourth omitted invoice was for supplies earlier than 20 September 2006 and may be relevant to Statewide's debt but is irrelevant to the guarantors' indebtedness.
- [113] For Mr Dick the contentions were similar in effect to those for Mr Murphy. There was a further submission that invoice 10737 for \$11,452.03, mostly for services, should not be accepted as Statewide's debt.⁵² Mr Dick by his pleading denied⁵³ that APE sold goods and services to Statewide in respect of invoice 10737. The denial was on the basis that the invoice was for 'a multiple of matters arranged between Ackfield and others which were without relevance or benefit to the Company but included a benefit to Ackfield and the Plaintiff and/or others'. Mr Dick denied that Statewide was indebted to APE in respect of that invoice on the further basis that 'the sum of \$11,452.03 includes other work/goods/services than the goods and services provided by the Plaintiff to the Company. The value of such other work/goods/services was more than \$5,000 but less than \$6,000'.⁵⁴ For Mr Dick there was also a submission, consistent with the evidence, that an invoice in APE's electronic records does not prove supply because data for an order is input before stock is supplied.
- [114] Mr Murphy's fifth amended defence at paragraph 21C similarly put in issue invoice 10737 and similarly did not put in issue that at least \$5,452.03 was supplied.
- [115] APE submitted in reply⁵⁵ that there was no evidence called by Mr Dick of the work or its value and the defence has not been made out. By the manner of Mr Dick's defence, and Mr Murphy's, each was at liberty to call evidence relevant to establishing the basis of his denial. The onus of proof of the sale of goods and services by APE to Statewide of an amount exceeding \$5,452.03 remains with APE.
- [116] Each defendant accepted that if an allegation by APE of unpaid supply was mirrored in the records of Statewide reproduced by Ms Cook, he would accept that Statewide was liable to pay the amount of the invoice.⁵⁶ That was to effectively concede that of the 9 relevant invoices, numbers 10521 for \$968, 10577 for \$176, 10583 for \$1,452 and 10614 for \$484 remained unpaid. They total \$3,080. It was not a concession that APE's evidence was sufficient. APE submitted in response to the concession that Statewide's records omitted reference to relevant invoices 9379, 1008 and 10737. That is correct. If APE has proved the subject of those invoices was supplied and not paid for, it will be entitled to recover for them.

⁵⁰ The second defendant's outline of submissions on trial 25.8.14 paras 118 and 119

⁵¹ Submissions on behalf of the plaintiff dated 8.10.14 para 149.

⁵² Submissions on behalf of the first defendant 2 September 2014 para 53.

⁵³ By paragraph 24 of the sixth amended defence of the first defendant.

⁵⁴ Paragraph 26 of the sixth amended defence of the first defendant.

⁵⁵ Submissions on behalf of the plaintiff dated 8.10.14 para 181.

⁵⁶ Submissions on behalf of the first defendant 2 September 2014 para 17; The second defendant's outline of submissions on trial 25.8.14 paras 115-119.

Invoice 10737

- [117] What is APE's evidence relevant to the issue of whether it sold the goods and services specified in invoice 10737?
- [118] Mr Ackfield's statement of evidence, Exhibit 2 paragraph 67, recites that 'Between 3 July 2006 and 31 May 2007, APE sold further capital Goods and Services to the Company on credit to the total amount of \$159,172.33... See Exhibit JJA1 to this my statement which contains a true copy of the Statement of Account evidencing this'. The statement referred to is dated 01/01/2011. It is not a copy of the monthly statements which Mrs Ackfield would produce and send to Statewide. A statement in the form of a monthly statement appears in exhibit 3. It is dated 1 June 2007.
- [119] Invoice 10737, in a form marked 'PAID', appears in Exhibit 3 among the documents in JJA1 exhibited thereto. Another copy of invoice 10737 appears without that 'PAID' marking in exhibit 20. Each copy runs for two pages. Each is different from every other invoice in one respect: Many of the supplies recorded in invoice 10737 are dated well before the date of the invoice. The services specified in the description are unlike services described as supplied in other invoices. The services include a trip to Sydney, a trip to Melbourne, four meetings for Pharmacy Prints', four items for web design and two for artwork design. There were no similar services in any other invoice. Mr Ackfield had generally been the provider of APE's services and they generally had been repair and maintenance of photographic equipment.
- [120] The evidence of the system of invoicing by APE was to the effect that when goods were supplied, a copy of the invoice was supplied with the goods. In that respect, invoice 10737 does not appear to have been prepared in the usual way, for supply with goods. The services recorded in it are dated in February, March and April. The invoice is dated 15 May. It is an atypical invoice.
- [121] APE's counsel, in oral submissions on this issue, did not refer to evidence of supply but referred to the defendant's admissions in their pleadings referred to above and submitted that at least \$5,452.03 is admitted as a liability by Statewide. I reject the submission that Statewide's liability was admitted. I accept that at least \$5,452.03 is admitted as having been supplied to Statewide.
- [122] I accept the evidence of Ms Cook that she does not recall seeing the invoice. That does not mean that the supply of goods and services described did not occur.
- [123] With respect to this invoice, APE having called no persuasive evidence of supply and the defendants having put APE to proof of supply of more than \$5,452.03, I am satisfied that there was supply of goods and services to Statewide in the amount of \$5,452.03 in respect of the subject matter of that invoice.
- [124] It follows that the amount referred to in the 9 relevant invoices and for which APE may contend for judgment is reduced by \$6,000 which APE failed to prove supply of in respect of invoice 10737. The quantum in contention is no more than \$16,204.07 (being \$22,204.07-\$6,000).

Have the goods the subject of the nine relevant invoices been supplied and has APE established that there was no payment by Statewide?

- [125] Mr Ackfield swore in his statement that he⁵⁷included a ‘true copy’ of APE’s Invoices, Adjustment Notes/Credit Notes, General Journal Entries, Statements, Payment History and Customer Quick Book Reports relating to Statewide.
- [126] Mr Ackfield went on to state that he had:
- inspected the books and records keep (sic) by APE on Quick Books and compared them to the documents ...being true copies of APE’s Invoices...Statements, Payment History and Costumer Quick Book Reports relating to Statewide and the copies are correct.⁵⁸
- [127] I am sceptical as to whether any of APE’s invoices exhibited to Mr Ackfield’s statement is a true copy of the original. I accept the evidence of Ms Josephson that when one inspects the records kept by APE on QuickBooks one looks at a computer record to determine the detail in an invoice; that one cannot see on the computer screen an image of the invoice. For reasons which are set out below, the invoices in exhibit 20 and their twins in exhibit 3 are unlikely to be true copies of the original paper invoices which APE retained or which APE provided to Statewide at any relevant time from 4 July 2006. Ms Cook, who used work at Statewide and whose role there included reviewing invoices from APE at relevant dates, was shown one of the invoices in exhibit 3 which APE contends is unpaid. It is, according to Mr Ackfield’s statement, a true copy. I accept Ms Cook’s evidence that she never saw an invoice like it. She referred to its format. It was the format in which every allegedly unpaid invoice appears.
- [128] I do not accept Mr Ackfield’s written evidence that the copies of the invoices are correct, in the sense that I do not accept that they are true copies.
- [129] Mr Ackfield went on to certify that in relation to those documents in exhibit 3⁵⁹ and to the statements they contain that ‘the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the activities regularly carried on over that period, by APE’. That may be true, even if reprints are different from each other in some respects. Mr Ackfield was not expressly challenged on the component of his evidence that the information in a document is derived from information supplied to the computer. I accept that it is.
- [130] Was the information contained in the documents exhibited by Mr Ackfield to exhibit 3 supplied in the ordinary course of the business of APE?
- [131] There was one attack on Mr Ackfield’s credibility related to the information generally supplied to the computers at APE. It was an attack based upon events at Statewide’s office. Mr Ackfield in his capacity as a director of Statewide directed Ms Cook to make some temporary entries to Statewide’s electronic books of account to create a false appearance at the end of a financial year. The entries were then promptly corrected within days after commencement of the new financial year. I was invited to draw adverse inferences generally against Mr Ackfield from that. Aside from drawing an inference that a motive may have been to postpone a tax liability from one financial year to the next I do not draw any other adverse inference from Mr Ackfield’s giving that direction to Ms Cook.

⁵⁷ Exhibit 3 at para 18

⁵⁸ Exhibit 3 para 19.

⁵⁹ Invoices, Adjustment Notes/Credit Notes, General Journal Entries, Statements, Payment History and Customer Quick Book Reports

- [132] There was further issue taken by the defendants about information supplied for the creation of one particular invoice, 10737. The issue was to the effect that the information contained within that invoice was not supplied to the computer in the ordinary course of business but in an exceptional way.
- [133] Both defendants submitted that APE's accounting records were unreliable for various reasons. The copy tax invoices in exhibit 3 are not the original tax invoices retained by APE. I accept Ms Josephson's evidence on this. I am not satisfied that they are exact copies of the originals.
- [134] But, with the exception of invoice 10737, the unchallenged evidence of Mr Ackfield with respect to the tax invoices in exhibit 3 is that the 'the information contained in the statement reproduces or is derived from information supplied to the computer in the ordinary course of the activities regularly carried on over that period, by APE'. The tax invoices in exhibit 3 which APE alleges are unpaid are each carrying a mark 'PAID'. The defendants do not challenge the accuracy of the 'PAID' mark. The evidence about it from Mr Ackfield is effectively that it was derived from information supplied to the computer in the ordinary course of the activities regularly carried on over the period by APE.
- [135] When the second defendant requested disclosure, APE's solicitors provided a bundle of tax invoices with a covering letter advising that they are 'Tax invoices related to the debt'. The tax invoices in exhibit 20 are not sworn to contain information reproduced or derived from information supplied to APE's computer in the ordinary course of business. They look like their twins in exhibit 3 except that those in exhibit 20 do not carry the 'PAID' mark. They contain the 9 relevant invoices. Thus, in exhibit 3 the nine relevant invoices are marked as 'PAID'.
- [136] I am satisfied that the failure to produce copies of the original tax invoices supplied to Statewide has not impeached the accuracy of the dollar amounts shown in the reprinted tax invoices in exhibit 3 or exhibit 20. That finding does not assist in determining whether or not the amounts shown in any invoice for goods and services remain unpaid or whether goods shown in the invoices were supplied.
- [137] APE used various revised iterations of QuickBooks for its accounting programs from 1993. It used those programs for all its sales to Statewide to assist with recording the sales, payments and goods and services ordered or rendered by APE to Statewide. QuickBooks would electronically retain certain relevant data in electronic files whenever a customer's order was recorded by APE's employee. QuickBooks would also print two paper copies of an invoice.
- [138] APE's process for generating electronic and paper copies of invoices was the subject of much cross-examination. At relevant times between June 2006 and May 2007 inclusive, the process, when Statewide ordered goods or services, was generally as follows.
- [139] Statewide would telephone APE. Generally, one of three persons was likely to answer the phone for APE at its premises. Mr Ackfield, Paul Doman, who generally worked downstairs in stores and dispatch, and Ms Josephson might answer a call. Each of them had their own desk and each could individually access the QuickBooks system with his or her own computer terminal in APE's premises. Lois Ackfield worked from home and not from APE's premises and would send monthly statements to customers. Ms Josephson usually worked Tuesday,

Wednesday and Thursday from about 9 a.m. to 4.30 p.m. If a caller from Statewide rang to place an order, the procedure usually followed was that the person at APE receiving the call would write the order on a slip of paper. If it was Ms Josephson who received the call, she would write it on a slip of scrap paper she had fixed in a bundle of scrap paper under a bulldog clip. As soon as she had written the order onto the scrap and finished the call she would use her computer terminal to enter data into the QuickBooks program current at that date. QuickBooks, using a template selected by the operator from various templates available within QuickBooks, would apply the entered data to a QuickBooks template.⁶⁰ The template used could be varied at the election of the operator of the program. An operator looking at the computer's monitor would not see the template into which the data would ultimately be printed in a paper copy of an invoice.⁶¹ The operator would collect the two printed copies of the invoice from the printer nearby and could see the template in the printed copies.

- [140] I infer that the data entered would be the customer's name, a description of the goods or services ordered, the quantity and the rate of charge or cost per item. Presumably, QuickBooks recorded the date, assigned an invoice number and recorded the proper dollar amount calculated by multiplying the quantity of items ordered by the rate per item. QuickBooks automatically did a subtotal, added the GST and then created a total.⁶² There was no issue about QuickBooks capacity to correctly recreate the quantities, rates, amounts and arithmetic which had appeared in APE's paper tax invoices which had since been destroyed. It was not suggested to Mr Ackfield, Mrs Ackfield or to Ms Josephson that QuickBooks or APE's computers corrupted data. I accept the evidence of Ms Josephson that APE's computer system did not ever have corrupted data, subject to the qualification that she could speak only of events to the date her employment ended in 2010.
- [141] Once data was entered on the computer, if the operator clicked 'print' the QuickBooks program automatically printed two identical sales invoices with 'tax invoice' printed on them, saved electronically the data entered, recording a sale and an indebtedness of the customer.⁶³ When the invoices were printed they would contain significant amounts of printed material which had not been entered by the operator from APE at the computer terminal. QuickBooks would supply much of the material from a template. Accordingly, two tax invoice would be printed with various printed boxes, columns and words which had not been typed by the person who entered data. One copy invoice was destined to be retained by APE and the other sent to the customer. Both would be taken downstairs to a stores area where an employee, generally Paul Doman if the orders were bulky, would locate the stock described in the invoices prior to dispatch. The invoices were generally created before goods were picked off APE's shelves and before the goods were dispatched to the customer. Exceptions were possible. No further electronic record was made when goods were dispatched to the customer. Instead, upon dispatch, a notation that there had been a dispatch would be made on the paper copy invoice which APE would retain.
- [142] APE developed a practice of destroying paper copies of tax invoices which APE had retained. Mr Ackfield gave evidence that APE's practice was to retain paper

⁶⁰ T3-29

⁶¹ T3-29 line 43

⁶² T3-30

⁶³ T3-13 and T3-24 lines 12-24

copies for five years and destroy them. All of the original tax invoices retained by APE and relevant to this proceeding had been destroyed by the time this proceeding was commenced. Some which were destroyed would have been less than five years old at the time. It follows that if Mr Ackfield's evidence of the practice is correct the absence of some invoices requires explanation to avoid drawing inferences against APE. Mr Ackfield's evidence of the practice elicited some justifiable scrutiny from the defendants in cross-examination and some justifiable criticism of Mr Ackfield's evidence in submissions. Ms Josephson explained APE's practice very differently.

[143] All customers' invoices were kept in suspended files in one cabinet of four filing drawers on the upper, mezzanine level of the office. The files would fill. In the case of the file containing copies of tax invoices dispatched to Statewide, the file would become over full every four to six months. When that happened, Ms Josephson would extract from the back of the Statewide file some of the oldest of the tax invoices and shred them. She explained that the only use for the office copy was to determine, in case of a dispute, who had picked and packed any goods to be supplied.⁶⁴ Her evidence was that she did not seek permission to shred invoices and that between in 2009 and 2010 she saw Lisa Attwood and Paul Doman do likewise with overfull files of invoices. I prefer the evidence of Ms Josephson about destruction to the evidence of Mr Ackfield for three reasons: Firstly, because Ms Josephson was recalling what she and two others did while Mr Ackfield was recalling, in effect, a policy; secondly because it was Ms Josephson who was responsible for customer accounts from 2002 to 30 June 2010 and she is more likely to have been concerned with paper record keeping than Mr Ackfield; thirdly, because with electronic records, there was little reason to retaining paper copies for longer than it would take for a customer to complain about an incorrect supply or non-delivery. It means that I am satisfied that the paper copies were destroyed by APE in the ordinary course of business and that the destruction does not lead to any adverse inference. But it is another occasion where I find that Mr Ackfield, purporting to remember, has incorrectly reconstructed history as he imagined it to have been.

[144] The appearance of the tax invoices supplied to Statewide from June 2006 is relevant and unclear. APE's loss or destruction of paper copies of invoices has some practical consequences. One is uncertainty as to some of the wording on the invoices supplied to Statewide from dates material for APE's arguments or from 20 September 2006 which is the material date having regard to my findings. In particular, one cannot see whether the invoices carried such words as 'PLEASE PAY ON INVOICE'. That is relevant to the defendants' argument that there was no credit account after 1 July 2006. Another practical consequence is that there is no opportunity to inspect and to see whether the original invoices carried a notation showing that the goods described in the invoices had been supplied. Only the paper copies would receive a notation to record whether goods were supplied: either by collection or dispatch to Statewide. That is relevant to the first defendant's argument that several invoices which appear to be for alleged supplies in May 2007 cannot be confirmed or denied by reference to the records of Statewide and sometimes invoices were generated before delivery and invoice 10737 is unorthodox and Ms Cook from Statewide recalls that she did not see it. A third consequence is that, if Statewide had paid using APE's EFTPOS terminal,⁶⁵ the

⁶⁴ T3-23 line 9-11 and 17-20

⁶⁵ T3-44 and 45.

copy receipt that APE would staple to APE's copy of the invoice would be shredded with the invoice. It would have been direct evidence about whether goods in an invoice were or were not supplied on credit.

- [145] The appearance of APE's monthly statements at the time they were supplied to Statewide is relevant and unclear. Those which form annexure 'A' to the third amended statement of claim and their identical twins in exhibit JJA1 to exhibit 2 are obviously reprints, obviously not exact copies of the originals and likely to have been printed on or after 1 January 2011. Each records the amount due as 'A\$0.00'. Ultimately, it emerged that the zero balances in the statements do not necessarily mean that nothing was due and owing. Where an amount recorded as due is also recorded as a 'Doubtful Debt' the statement will record the amount due in respect of that debt as zero, notwithstanding that an amount for that debt may be due and owing by the debtor. Statements were sent monthly to Statewide. The only statements which show the appearance of monthly statements are those in exhibit 3 exhibit JJA1.
- [146] APE's computers retained electronic data which had been entered into its tax invoices.
- [147] Mr Ackfield exhibited to his statement various invoices from 1995 to May 2007, monthly statements, adjustment notes, general journal transactions, and payment histories. He swore that the 'documents' were produced by the computer during a period from 20 January 1993 to the date of his statement.⁶⁶ Literally true in the sense that the documents were produced to the date of his statement, Mr Ackfield's statement contained no mention of the fact that some documents, perhaps all, were produced after the proceeding commenced. I intend no criticism of Mr Ackfield's frankness. But the fact is that Mr Ackfield's statement contains no useful evidence of the dates when the copy invoices exhibited to it were produced. Each 'payment history' in the exhibit was produced on 12 September 2013. The general journal transactions were produced in August 2013.
- [148] It became clear during the course of cross-examination, that for this proceeding, APE recreated from its electronic record some or all of the tax invoices which describe Statewide as the customer. APE created no less than two sets of copy invoices for the particular supplies for which it alleges the defendants are liable as guarantors. Two sets are in evidence⁶⁷ and they differ materially.
- [149] APE submitted that the outstanding invoices are those in exhibit 20.⁶⁸ Exhibit 20 contains invoices for the period from 22 March 2006 to 31 May 2007. That is to say, it contains invoices which predate the signing of the Guarantee Agreement and the Application for Credit Account on 20 September 2006.
- [150] Exhibit 20, produced by APE to the second defendant on about 14 September 2011 has invoices with a uniform template. That template bears a name 'APE DISTRIBUTION'. Those invoices relate to only the period from 22 March 2006 to 31 May 2007. That 'APE DISTRIBUTION' template, I am satisfied from the evidence of Ms Josephson, was not printed by APE in the period from 22 March 2006 to 31 May 2007. They are not true copies of the paper invoices produced in

⁶⁶ Exhibit 3, the second witness statement of Mr Ackfield para 20. b.

⁶⁷ Forming part of exhibit 3, the second witness statement of Mr Ackfield; forming part of exhibit 20.

⁶⁸ Submissions on behalf of the plaintiff dated 8 October 2014 para (n) on page 24.

2006 and 2007. Another consistent feature of the invoices in exhibit 20 is that not one of them bears the mark 'PAID'.

- [151] The invoices which Mr Ackfield exhibited to his statement, exhibit 3, dated 28 January 2014 span a wider range of dates. Those invoices dated within the period to which exhibit 20 relates, from 22 March 2006 to 31 May 2007, shows that not one invoice bearing an invoice number to match its twin in exhibit 20 is identical with the twin in exhibit 20. The twins have similarities but are not identical. All twins in exhibit 3 and 20 share the same 'APE DISTRIBUTION' template which was not used at the date the invoices carry. It means each was printed after the date of the original invoice. But invoices nearby in exhibit 3 and within the date range carry different templates. Any invoice in exhibit 3 which bears the incorrect 'APE DISTRIBUTION' template also bears the printed word 'PAID'.
- [152] Other templates appear on invoices in exhibit 3. In exhibit 3, in the period from 22 March 2006 to 31 May 2007 other templates appear about 60 times. Five invoices which purport to be issued in November or December 2006 or January 2007 warn in the template that: 'CHRISTMAS HOLIDAYS We will be closing down from the 21st of December 2007 and reopening on the 2nd January 2008'. The warning referred to holidays a year later than the invoice. One reasonable inference is that the invoice template selected when printing those five invoices was a template which was not in APE's QuickBooks system until about a year after the data for those invoices was entered into QuickBooks. A plausible further inference would be that when those five invoices in exhibit 3 were printed, the operator unsuccessfully attempted to apply a historic template and made an error as to the year. Whoever created the invoices in exhibit 20 and whoever created the invoices and other documents in exhibit 3 did not give evidence to explain the anomalies in the templates.
- [153] There was scant evidence to explain the presence or absence of the word 'PAID'. The operator responsible for printing exhibit 20 (whose invoices do not carry the word 'PAID') was not called to reassure that there had been no manual change to data to remove the word 'PAID'.
- [154] Counsel for APE optimistically submitted that the invoices in exhibit 20 were more reliable. He observed in his oral submission:⁶⁹
- exhibit 20. It was - it is an excellent - it is excellent evidence from a number of points of view; firstly, it was given in response to a 222 request at the very outset and whoever did the job knew what they were doing unlike some of the people that produced some of the subsequent evidence.
- [155] Unlike the twin invoices in exhibit 3, nobody has sworn that the copy invoices in exhibit 20 contain information reproduced or derived from information supplied to APE's computer in the ordinary course of business. If the invoices in exhibit 20 were copies of invoices upon which APE relied for proof of debt, ordinarily one would expect that Mr Ackfield's statement, exhibit 3, would have exhibited similar versions so that Mr Ackfield could swear to the circumstances of their production and the veracity of the information contained in them.

⁶⁹

T8-64 line 16.

- [156] If a problem arose with QuickBooks at APE Ms Josephson would not ask Mr Ackfield about it.⁷⁰ It was Ms Josephson's job to run QuickBooks at APE.⁷¹ I infer that Ms Josephson is more knowledgeable about QuickBooks than Mr Ackfield.
- [157] I accept the evidence of Ms Josephson that the template used for any particular invoice in evidence is not necessarily the form in which it appeared when it was supplied to Statewide and that one cannot tell by looking at the copies of tax invoices in evidence what template was originally used when printing an invoice to supply to Statewide.
- [158] Some explanations for the change in template are innocuous.
- [159] One obvious difference appears in the recreated invoices: the address of the purchaser. If data was supplied to QuickBooks that the purchaser's address had changed, an invoice printed after that address data was supplied would differ from the original invoice. QuickBooks would not cause the reprint of the superseded address which had appeared in the original paper invoice. QuickBooks would electronically store only the updated purchaser's address and the updated address would appear in the reprinted invoice.
- [160] Statewide moved to the 197 Robinson Road Geebung address on about **1 August 2006**. Relevantly, the address of Statewide shown in all hard copy versions of APE's tax invoices from 1995 is an address '197 Robinson Road Geebung QLD 4034'. That was not Statewide's address before August 2006.
- [161] Any 'APE DISTRIBUTION' invoices in evidence carry the words 'PLEASE PAY ON INVOICE AS NO STATEMENTS WILL BE ISSUED'. That request was used by APE in invoices from some unspecified date after **May 2007**.⁷² Invoices carrying the words 'APE DISTRIBUTION' were also used only from some unspecified date after May 2007.⁷³
- [162] Another material difference is the inclusion in a reprinted invoice of the appearance of the word 'PAID'. The word 'PAID' was not a 'comment field' which would automatically appear in a template, like the words 'TAX INVOICE' or 'INVOICE TO'. The word 'PAID' would appear if data was entered manually into QuickBooks in relation to an invoice.⁷⁴ The electronic version would be altered and thereafter any paper copy printed of the invoice would bear a 'PAID' mark.
- [163] Mr Ackfield could not explain in cross-examination why some copy invoices⁷⁵ were marked 'PAID' though they relate to debts for which for which APE sues in this proceeding. Mr Ackfield suggested the question to be answered by Ms Josephson. Ms Josephson was responsible for customer accounts from 2002 to 30 June 2010 and had personal knowledge of the information in APE's records as she 'either created those records, or (had) undertaken an inspection of the records kept by APE on QuickBooks'.⁷⁶ She was the witness most knowledgeable about the use of QuickBooks at APE. Mr Ackfield's evidence was:⁷⁷

⁷⁰ T3-36 lines 11 to 15.

⁷¹ T3-36 lines 14 and 31.

⁷² T3-26 line 34.

⁷³ T3-26 line 32.

⁷⁴ T3-35 lines 10 to 11

⁷⁵ and exhibited as JJA 1 to Mr Ackfield's statement exhibit 3

⁷⁶ Ex 9 [20].

It has stamped on it paid, does it not?---Correct. I – I don't know why that is so. I honestly don't.

All right. So that's really a matter for the accounts people - - -?---I would think so, yeah. I - - -

- - - as to how they applied - - -?---That's right. Yes.

- - - the monies that came in?---I'd be asking Sue about that.

- [164] Those answers are consistent with Mr Ackfield's acceptance of the possibility that the accounts people may have applied monies that came in from Statewide to the invoice that has 'PAID' stamped on it.
- [165] Ms Josephson's evidence was that the way in which QuickBooks would create an invoice which carried the 'PAID' mark would be if the tax invoice had been paid and someone had entered that data.
- [166] Ms Josephson explained that from **30 June 2006** Statewide was put onto a cash system for purchases,⁷⁸ that is to say, it was to receive no more supplies on credit. She explained that once that happened, generally, Mr Dick would ring to say what he wanted, data would be entered, two invoices prepared, stock picked and one invoice placed with the stock for Mr Dick, that Mr Dick would arrive with a credit card, he would use the card at APE's EFTPOS terminal to pay for goods, two EFTPOS receipts would print, one would be stapled to APE's copy invoice and one would be available for Mr Dick, that Mr Dick would leave with the goods, that data would then be entered to record that Statewide had paid that invoice. It follows that if APE had occasion to reprint an invoice after that data was entered against the invoice, it should have carried the 'PAID' mark.
- [167] It follows that from the time when Statewide began paying with cash or credit card as a precondition for supply there should have been numerous occasions when data entries into APE's QuickBooks accounting system would have shown that Statewide had paid a tax invoice. If APE had occasion to reprint such a tax invoice after it had been paid, it should have carried the 'PAID' mark. On occasions when goods were sold on credit and Statewide paid later, for example after receipt of a monthly statement, and APE allocated such payments to the oldest debts, there was no direct evidence as to whether a reprinted invoice would carry a 'PAID' mark.
- [168] When APE compiled Mr Ackfield's statement exhibit 3 and the bundle of copy tax invoices he exhibited as JJA 1, those which had been paid, consistently with the evidence of Ms Josephson, should have carried a 'PAID' mark and those which were not paid should have carried no 'PAID' mark. Curiously, every invoice which APE submits is unpaid carries the 'PAID' mark, but many invoices in that bundle for the same date range, and for which APE makes no claim, carry no 'PAID' mark.
- [169] Counsel for APE valiantly submitted a theory to explain why invoices which appear in exhibit 20 as unpaid appear in exhibit 3 carrying the 'PAID' mark. I call it a theory as there is no direct evidence that it is correct. He put it this way:⁷⁹

The word 'Paid' appears on certain invoices that were part of Exhibit 3. The reason that this word 'Paid' appears on these invoices is because those debts were placed into doubtful debts within Quickbooks, with the result that any further printing of any of those invoices showed them as being

⁷⁷ T1-45 lines 1 to 8

⁷⁸ T3-44 and 45.

⁷⁹ Submissions on behalf of the plaintiff dated 8 October 2014 para (o) on page 23

paid, when they had not in fact been paid. The effect of the General Journal taking the debt to Doubtful Debts had the effect of generating a “paid” sign on the invoices and showing them as a zero balance. (Exhibit 3 at paragraph 22; Exhibit 9 at paragraph 24 Transcript p 2-16 line 40-44)

[170] Counsel for APE made a further related submission:⁸⁰

The Plaintiff, on accounting advice decided to pass General Journal entries to send the outstanding invoices to Doubtful Debts in the books of the Plaintiff. The Journal Entries it passed were:

(i)	21/12/06 GENJRNL Doubtful Debt	\$ 211,925.00 Cr
(ii)	28-06-07 GENJRNL Doubtful Debt	\$ 26,277.01 Cr

This was not intended to operate as a forgiveness. However, as a result, when the invoices are accessed on the accounting system of the Plaintiff, the outstanding invoices are shown as paid. This is what has happened when the copy invoices have been printed.

[171] I may not accept that contested submission without evidence to support it.

[172] Ms Josephson gave evidence that if a ‘general journal entry is done’ she could not be sure that QuickBooks would print ‘PAID’ on the invoice. A doubtful debt entry were made in APE’s statements for Statewide in December 2006 and another in June 2007. Ms Josephson was employed at APE at those dates.

[173] APE’s counsel referred⁸¹ to three pieces of evidence to support his theory. Examination of the evidence to which he referred⁸² shows that neither Mr Ackfield nor Ms Josephson swore to the appearance of tax invoices or to the presence of ‘PAID’ marks. They each referred specifically to the appearance of statements. Each swore that a doubtful debt’s balance appears as zero in a ‘statement’. That is to say, by referring to a ‘statement’ they each were referring to a statement of account and not to an invoice.

[174] In re-examination, Mr Ackfield accepted a proposition put to him by APE’s counsel in a leading question:

*Similarly, where there were indications that the invoice had been paid. Was that because a subsequent [indistinct] had been put through, cancelling all the outstanding debt? Absolutely. Yes.*⁸³

[175] Mr Ackfield had made it clear in his evidence in chief that he did not know why ‘PAID’ appeared in the invoices. If he was seeking to change his evidence, he offered no explanation for the change and in the absence of an explanation I would not be satisfied that his subsequent evidence was reliable. It is not evident that Mr Ackfield understood the question about ‘*indications that the invoice had been paid*’ to be a question about the ‘PAID’ stamp appearing in relevant invoices. Mr Ackfield may have been referring to the zero balance which appears in a statement after a doubtful debt entry is made. That zero balance might be misinterpreted as an indication that invoices had been paid.

[176] Counsel’s question to Mr Ackfield was ambiguous about whether the ‘*indications that the invoice had been paid*’ were indications one would see within a statement of account or within a tax invoice. As Mr Ackfield had specifically referred in his witness statement to the appearance of statements rather than the appearance of tax

⁸⁰ Submissions on behalf of the plaintiff dated 8 October 2014 paras 122 and 123

⁸¹ Submissions on behalf of the plaintiff dated 8 October 2014 para 126 and page 24 at (o).

⁸² Exhibit 3 at paragraph 22; Exhibit 9 at paragraph 24.

⁸³ T2-72 line 37

invoices, and as he specifically advised in his evidence in chief that he could not explain the appearance of the 'PAID' mark in tax invoices, I am disinclined to treat the answer in re-examination as intended by him to refer to the appearance of tax invoices.

- [177] I infer that the '[indistinct]' appearing in the transcript refers to either 'general journal' or 'doubtful debt'. 'GENJRNL Doubtful Debt' appears in only two of the monthly statements from APE to Statewide appearing in exhibit 3.⁸⁴ Where such an entry appears in an APE monthly account 'statement' there appears a negative amount in the 'AMOUNT' column and the balance appears to reduce by the negative amount. It is self-explanatory. The debt is not paid. The amount of the doubtful debt is removed from the balance shown in the statement.
- [178] I reject the submission that the evidence referred to by counsel for APE supports the theory of counsel for APE that 'PAID' marks appeared on invoices because of a doubtful debt entry.
- [179] If Ms Josephson is to be believed, sales from 30 June 2006 were at least generally paid on delivery of goods to Mr Dick and 'PAID' on an invoice means it has been reprinted after a data entry that payment was received.
- [180] Counsel for APE submitted I should disregard as inadmissible, the evidence of Ms Josephson, that invoices from 30 June 2006 generally were paid by Statewide on collection of the goods. The basis of the submission is that this defence was not pleaded and APE objects to its being raised.⁸⁵ The first defendant expressly pleaded that there was no credit supply after 23 July 2004 and that invoices were made due on the date of the invoice.⁸⁶ The second defendant pleaded similarly.⁸⁷ Those pleaded matters are sufficient to put APE on notice of an issue that goods were paid for upon supply. The evidence from Ms Josephson was given without timely objection and is on the record. I do not uphold the objection made in APE's submission. It follows that I may have regard to Ms Josephson's evidence. She was the most knowledgeable of APE's witnesses about the workings of the QuickBooks system in 2006 and 2007 and was knowledgeable about the ordinary course of the sales and recording business of APE at APE's premises at the material times in 2006 and 2007.
- [181] One may be tempted to test the theory of counsel for APE as to why some invoices for which APE claims are marked 'PAID' on the copies in exhibit 3, by looking for circumstantial evidence consistent with it. One should appreciate that the theory appears to assume more than one fact not in evidence. Firstly, it assumes that after a doubtful debt entry, any invoice reprinted for an amount comprising part of the balance reversed by the doubtful debt entry will be printed with a 'PAID' mark; secondly that the invoices in exhibit 20 were printed before the relevant doubtful debt entries were made in December 2006 and June 2007 and those marked 'PAID' in exhibit 3 were printed after the doubtful debt entry, or alternatively, perhaps, that a data operator at APE has been altered the data relating to doubtful debts to permit

⁸⁴ See pages 405 and 411.

⁸⁵ Submissions on behalf of the plaintiff dated 8 October 2014 para 120.

⁸⁶ Sixth amended defence of the first defendant to the third amended statement of claim paras 2(b), 24(i) and 35.

⁸⁷ Fifth amended defence of the second defendant paras 2, 17B(v), 21B(c), 27 and 30.

invoices to be reprinted for evidence in this proceeding with and without the 'PAID' mark.

- [182] There is no reliable evidence as to when the invoices in exhibit 20 concerning the period from 22 March 2006 to 31 May 2007 were printed, save that they were printed before APE produced them to the defendants on 12 September 2011. There is no reliable evidence as to when the invoices in exhibit 3 concerning the period from 22 March 2006 to 31 May 2007 were printed, save that they were printed before Mr Ackfield exhibited them to his statement dated 28 January 2014.
- [183] I do not regard the absence of a 'PAID' mark in the invoices in exhibit 20 as evidence that the goods or services described within those invoices have not been paid for. The provenance of exhibit 20 is unexplained.
- [184] Each relevant invoice in exhibit 3, which includes each of the nine relevant invoices, bears a 'PAID' mark. Accepting as I do the evidence of Ms Josephson as the best evidence led by the plaintiff on the issue of how to interpret APE's invoices, *prima facie*, they have been paid. Accepting, as I should, the unchallenged evidence of Mr Ackfield that the information in the invoices marked 'PAID' was derived from information supplied to the computer in the ordinary course of the activities regularly carried on over the period by APE, the nine relevant invoices have been paid.
- [185] Ms Josephson had later connection with APE's records after the proceedings had commenced. In preparation for trial, Ms Josephson was asked, on behalf of APE, to use APE's QuickBooks to produce exhibit 10. That is consistent with Ms Josephson's being the witness most familiar with QuickBooks and Ape's records. She did this task on 10 July 2014. Exhibit 10 appears on its face to be a compendium of the dates of invoices and invoice numbers, a 'due date' in respect of each invoice, positive amounts in respect of each invoice, and the description 'VOID' in respect of one invoice. It was also a compendium of adjustment notes with their respective number, date and a negative amount and a compendium of 'General Journal' with their dates and a negative amount and, in two cases, the description 'Doubtful Debt'. It is evidence of the state of APE's electronic record at 10 July 2014. Counsel for APE reassured⁸⁸ that the one thing that that document does not do is show which payments are applied to which invoices. It does not directly assist with the issue of whether goods described in the nine relevant invoices were paid.
- [186] I am not satisfied that Statewide failed to pay for the supplies described in the nine relevant invoices. Because of the concessions made by the defendants I find that in respect of invoice numbers 10521 for \$968, 10577 for \$176, 10583 for \$1,452 and 10614 for \$484 that those remain unpaid. They total \$3,080.
- [187] There should be judgment for the plaintiff against the defendants for \$3,080 with interest in the sum of \$2,351.0 pursuant to s 58 of *the Civil Proceedings Act 2011* from 17 May 2007 to 11 December 2015.