

# MAGISTRATES COURT OF QUEENSLAND

CITATION: *Superior Homes Pty Ltd ACN 081 194 158 v GCOR Pty Ltd  
ACN 159 882 523 & Ors.* [2020] QMC 17

PARTIES: **SUPERIOR HOMES PTY LTD**  
**ACN 081 194 158**  
(Plaintiff)

v

**GCOR PTY LTD**  
**ACN 159 882 523**  
(First Defendant)

and

**VANESSA CORNISH**  
(Second Defendant)

and

**GARRY CORNISH**  
(Third Defendant)

and

**GARRY'S TILING PTY LTD**  
**ACN 627 128 769**  
(Fourth Defendant)

FILE NO/S: M5100 of 2019

DIVISION: Civil

PROCEEDING: Claim

ORIGINATING  
COURT: Brisbane

DELIVERED ON: 19 November 2020

DELIVERED AT: Brisbane

HEARING DATE: On the papers

MAGISTRATE: Magistrate Hay

ORDER:

[1] The plaintiff's claim against the first defendant and the

first defendant's counterclaim against the plaintiff are dismissed.

- [2] Pursuant to r. 292 of the *Uniform Civil Procedure Rules 1999* (Qld) summary judgment is entered for the plaintiff against:
1. the third defendant in the sum of \$57,057.92, together with interest thereon pursuant to s. 58 of the *Civil Liability Act 2003* (Qld);
  2. the fourth defendant in the sum of \$19,487.97, together with interest thereon pursuant to s. 58 of the *Civil Liability Act 2003* (Qld).
- [3] I direct that within 14 days of the publication of these reasons the plaintiff and the third and fourth defendants are to file and serve written submissions on the issue of costs and as to the appropriate calculation of interest, if not agreed, together with draft orders.
- [4] I direct that within 14 days the second defendant is to file and serve her written submissions on the issue of costs, if not agreed.
- [5] I direct that within 21 days of the publication of these reasons the second defendant is to file, and serve upon the plaintiff, her amended defence.

CATCHWORDS: AUSTRALIAN CONSUMER LAW – MISLEADING AND DECEPTIVE CONDUCT – Representations - Whether errors contained in invoices were representations – If so, whether the representations were misleading and deceptive, or likely to be so - If so, whether the second and third defendants were persons ‘involved’ in the conduct.

EQUITY – GENERAL PRINCIPLES – RESTITUTION – MONEY PAID BY MISTAKE – Payments made under Mistake of Fact – Change of Position – Whether plaintiff has established all four defendants received the payments – If so, whether sufficient facts alleged by second defendant to found the two conditions necessary to establish a *prima facie* change of position defence.

LEGISLATION: *Civil Liability Act 2003* (Qld) s. 58  
*Competition and Consumer Act 2010* (Cth) Schedule 2 – *Australian Consumer Law*: s. 2 ‘involved’, s.18, s. 236  
*Corporations Act 2001* (Cth), s 119, s601AD  
*Fair Trading Act 1989* (Qld), s 15, s 16  
*Fair Trading (Australian Consumer Law) Amendment Act*

2010 (Qld), s 18

- CASES: *Australian Financial Services and Leasing Pty Ltd v Hill Industries Ltd* [2014] HCA 14
- Clyde Contractors Pty Ltd v Northern Beaches Dev Pty Ltd* [2001] QCA 314
- David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353
- Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232
- Old Pork Pty Ltd v Lott* [2003] QCA 271
- Salomon v A Saloman & Co Ltd* [1897] AC 22
- Swain v Hillman* [2001] 1 All ER 91
- COUNSEL: S Hogg for the Plaintiff
- SOLICITORS: Everingham Lawyers for the Plaintiff
- Rhonda Sheehy & Associates for the First, Third and Fourth Defendants
- Second defendant – self represented.

- [1] The plaintiff, a builder, alleges that the corporate defendants (a tiling business) overcharged on invoices issued between 2 August 2013 and 26 September 2019 and in so doing engaged in misleading and deceptive conduct in breach of s. 18 of the Australian Consumer Law (ACL).<sup>1</sup> The plaintiff claims damages under s. 236 of the ACL or, in the alternative, restitution.
- [2] The plaintiff now applies for summary judgment.

## THE LAW

### Summary Judgment Applications

- [3] Applications for summary judgment are governed by rr. 292 and 293 of the UCPR. The applicant bears the onus of satisfying the court of two things, namely:
1. The respondent has no real prospect of succeeding on its claim or defence, as the case may be; and
  2. There is no need for a trial of the claim, or part of the claim.
- [4] If an applicant establishes a *prima facie* case against the respondent, then it is for the respondent to establish that there is an issue to be tried or some other good reason for the matter to go to trial.<sup>2</sup>

<sup>1</sup> Pursuant to s. 16 of the *Fair Trading Act 1989* (Qld).

<sup>2</sup> *Clyde Contractors Pty Ltd v Northern Beaches Dev Pty Ltd* [2001] QCA 314, Williams JA at [17].

- [5] In *Deputy Commissioner of Taxation v Salcedo*<sup>3</sup> Williams JA, with whom McMurdo P and Atkinson J agreed, affirmed the approach taken in *Swain v Hillman*<sup>4</sup> in respect of the meaning of the phrase ‘no real prospect of succeeding’:

*“The words ‘no real prospect of succeeding’ do not need any amplification, they speak for themselves. The word ‘real’ distinguishes fanciful prospects of success or ... they direct the court to the need to see whether there is a ‘realistic’ as opposed to a ‘fanciful’ prospect of success.”*<sup>5</sup>

- [6] Per Atkinson J:

*“If there is no real prospect that a party will be successful in all or part of a claim, and there is no need for a trial, then ordinarily the other party is entitled to judgment. These rules benefit both parties as neither faces the expense of taking a matter to trial when the result of such a trial is inevitable as there is no real prospect of one of the parties being successful. There are also obvious advantages to the administration of justice if matters that can and ought to be dealt with summarily, are so dealt with.”*<sup>6</sup>

- [7] In summary “once a prima facie case has been made out entitling the applicant to judgment then an evidentiary onus shifts to the respondent” but the overall onus of proof remains with the applicant.<sup>7</sup>

### **Partners’ Liability**

- [8] It is trite to observe, but necessary in the context of the pleaded defences, that individuals in a partnership are jointly and severally liable for the debts incurred by a partner on behalf of the partnership business.

### **Directors’ Liability**

- [9] A company comes into existence when it is registered by ASIC<sup>8</sup> and ceases to exist when it is deregistered by ASIC.<sup>9</sup> It is recognised as a separate legal entity i.e. separate from its members and shareholders.
- [10] Directors and shareholders of corporations are not automatically personally liable for the debts of a company. They are protected by the ‘corporate veil.’<sup>10</sup> However statutory provisions, such as those found under the *Corporations Act 2001* (Cth) and the ACL, can pierce the corporate veil and render directors of a company liable for statutory breaches e.g. of their director’s duties.<sup>11</sup>

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<sup>3</sup> *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232.

<sup>4</sup> [2001] 1 All ER 91.

<sup>5</sup> *Salcedo* supra at [11].

<sup>6</sup> *Salcedo* supra at [47].

<sup>7</sup> *Old Pork Pty Ltd v Lott* [2003] QCA 271 Jones J at [41].

<sup>8</sup> Section 119 of the *Corporations Act 2001* (Cth).

<sup>9</sup> Section 601AD(1) of the *Corporations Act 2001* (Cth).

<sup>10</sup> *Salomon v A Saloman & Co Ltd* [1897] AC 22. Courts have been reluctant to pierce the corporate veil, but will do so where it is a sham or façade to either evade, or frustrate the enforcement of, the law.

<sup>11</sup> There may also be tortious and equitable remedies imposed on directors, but they are not relevant to the present proceedings.

- [11] The plaintiff in these proceedings relies upon s. 236 of the ACL which enables recovery of damages against a director provided it can be shown that the director was a *'person involved in the contravention'*.

### **Australian Consumer Law – misleading and deceptive conduct**

- [12] Sections 15 and 16 of the *Fair Trading Act 1989* (Qld) (FTA) provide that:

#### **15 The Australian Consumer Law text consists of -**

- (a) schedule 2 to the Competition and Consumer Act 2010 of the Commonwealth; and
- (b) the regulations under section 139G of that Act.

#### **16 Application of Australian Consumer Law**

- (1) The Australian Consumer Law text, as in force from time to time -
  - (a) applies as a law of this jurisdiction; and
  - (b) as so applying may be referred to as the Australian Consumer Law (Queensland); and
  - (c) as so applying is a part of this Act.
- (2) This section has effect subject to sections 17, 18 and 19.

- [13] The ACL legislation covers a number of things including:
1. misleading, deceptive or unconscionable conduct: ss.18 to 22 of the ACL;
  2. unfair practices such as false or misleading representations or conduct: ss. 29 to 38 of the ACL;
  3. unsolicited supplies: ss. 39 to 43 of the ACL;
  4. pricing: ss. 47 and 48 of the ACL; and
  5. other unfair practices: ss. 49 and 50 of the ACL.

- [14] Section 18 of the ACL relevantly provides that:

- (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

- [15] It is relevant that these ACL provisions:-

1. only apply where the supply is in trade or commerce;
2. do not impose a monetary limit on the value of the supply;
3. do not concern themselves with the characteristics of the recipient of the supply (i.e. inter-business supplies are covered by these provisions);
4. by virtue of s. 29(2) in relation to goods, require the supplier to prove that testimonials were neither false nor misleading;
5. catch entirely innocent representations in the same way as negligent or fraudulent representations are caught;
6. do not require the maker of the representation to have intended that the purchaser will be induced by the representation;
7. do not make it necessary to show or presume reliance on the representation. Therefore regardless of whether the representations are (i) opinion rather than fact, (ii) mere puff, or (iii) where the purchaser has their own contrary

knowledge; the representations will fall within these provisions if they were “false or misleading”.<sup>12</sup>

[16] If a person suffers loss or damage because of a contravention of these provisions they can bring an action to recover that loss or damage: s. 236 of the ACL.

[17] It will be for the person alleging the contravention to prove they have suffered loss or damage because of the contravention: s. 236 of the ACL. For example: where the purchase would, or should have, proceeded anyway at the same price there is no loss. Accordingly the common law position in Queensland has been altered by these provisions under the ACL.<sup>13</sup>

[18] Section 236 of the ACL provides:

(1) If:

- (a) a person (the *claimant*) suffers loss or damage because of the conduct of another person; and
- (b) the conduct contravened a provision of Chapter 2 or 3;

the claimant may recover the amount of the loss or damage by action against that other person, or against any person involved in the contravention.

(2) An action under subsection (1) may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued.

[19] The word ‘*involved*’ is a defined term under the ACL<sup>14</sup> to mean:

***involved***: a person is involved, in a contravention of a provision of this Schedule or in conduct that constitutes such a contravention, if the person:

- (a) has aided, abetted, counselled or procured the contravention; or
- (b) has induced, whether by threats or promises or otherwise, the contravention; or
- (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
- (d) has conspired with others to effect the contravention.

## Restitution

[20] In *Pan Ocean Shipping Co Ltd v Creditcorp Ltd*,<sup>15</sup> Lord Goff of Chieveley said:

*“I am of course well aware that writers on the law of restitution have been exploring the possibility that, in exceptional circumstances, a plaintiff may have a claim in restitution when he has conferred a benefit on the defendant in the course of performing an obligation to a third party (see, eg, Goff and Jones on the Law of Restitution, 4th ed (1993), pp 55 et seq, and (for a particular example) Burrows on the Law of Restitution, (1993) pp 271-272). But, quite apart from the*

<sup>12</sup> QCAT MCD Bench Book Section D – Version 1.3 – 28 September 2015.

<sup>13</sup> At common law an innocent misrepresentation gives rise to a right to rescission (and a corresponding adjustment of the financial position between the parties to restore them to their respective positions before the contract was made). Only a negligent or fraudulent misrepresentation would result in a right to damages under the common law.

<sup>14</sup> Schedule 2, s. 2 – definitions.

<sup>15</sup> [1994] 1 WLR 161 at 166; [1994] 1 All ER 470 at 475.

*fact that the existence of a remedy in restitution in such circumstances must still be regarded as a matter of debate, it is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract."* [my emphasis]

- [21] The plaintiff submits that the leading Australian decision on factors relevant to whether a person can seek restitution for mistaken payment of money is *David Securities Pty Ltd v Commonwealth Bank of Australia*.<sup>16</sup> The plaintiff correctly contends that upon the plaintiff establishing a payment made under a mistake of fact, the onus is then on the defendant to show that it would be inequitable to order restitution.<sup>17</sup>
- [22] More recently the High Court revisited the question in *Australian Financial Services and Leasing Pty Ltd v Hill Industries Ltd*<sup>18</sup> which involved the making of payments under a mistake of fact where a defence of 'change of position' had been raised.
- [23] In that case a financial institution made payments to the defendants (suppliers of goods) on behalf of the financier's customer (a trade creditor of the defendants). The financier subsequently discovered fraud by its customer and sought to recover payments made to the defendants. In that case, the primary judge had concluded that the defendants conduct was commercially acceptable.<sup>19</sup>
- [24] Relevantly it was acknowledged that:
1. An action for monies had and received is a qualification to the otherwise overriding importance attached to security of actual receipts;<sup>20</sup>
  2. Both the commercial nature of the transactions, and the conduct of the parties in their business dealings, may be relevant to the question of whether it would be inequitable, in some cases, to deny recovery or require payment of monies.<sup>21</sup>
- [25] As noted in *Australian Financial Services and Leasing Pty Ltd v Hill Industries Ltd*:<sup>22</sup>

*"The defence of change of position is established where a defendant proves the existence of two conditions. The first condition is that the defendant has acted (that is, done something the defendant would not otherwise have done) or refrained from acting (that is, not done something the defendant would otherwise have done) in good faith on the assumption that the defendant was entitled to deal with the payment which the defendant received. The defendant need not for the purpose of meeting this condition have acted on knowledge derived from the payer. Whether the defendant needs also to have acted reasonably is a question which does not now arise for determination. The second condition is that, by reason of having so acted or refrained from acting, the defendant would be placed in a worse position if ordered to make restitution*

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<sup>16</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353. See also Plaintiff Applicant's Submissions filed 26 May 2020 at [39].

<sup>17</sup> Plaintiff Applicant's Submissions filed 26 May 2020 at [40].

<sup>18</sup> *Australian Financial Services and Leasing Pty Ltd v Hill Industries Ltd* [2014] HCA 14

<sup>19</sup> *Supra* at [55] and [65] – [76] per Justices Hayne, Crennan, Kiefel, Bell and Keane. See also Frnch CJ at [17] – [25].

<sup>20</sup> *Supra* per Justices Hayne, Crennan, Kiefel, Bell and Keane at [92].

<sup>21</sup> *Supra* per Justices Hayne, Crennan, Kiefel, Bell and Keane at [65] and [86].

<sup>22</sup> *Supra* per Justices Hayne, Crennan, Kiefel, Bell and Keane at [157] – [158].

*of the payment than if the defendant had not received the payment at all. The detriment constituted by that difference in position need not, in every case, be financial or pecuniary. If financial or pecuniary, it need not, in every case, be established with precision. It can be an opportunity forgone. It must, in every case, be shown by the defendant to be substantial.*

*Where the defence is so established, the prima facie entitlement of the defendant is to maintain the assumption on which the defendant acted and, on that basis, to retain the whole of the payment. That entitlement is qualified to the extent that retention of the whole of the payment can be shown to be disproportionate to the degree of the detriment. Where the detriment is financial or pecuniary, can be quantified, and is less than the amount received, the entitlement of the defendant to retain the payment is reduced pro tanto.” (Footnotes removed) [my emphasis]*

## THE FACTS

- [26] On 16 March 2000 the second and third defendant, a married couple, commenced a tiling business partnership trading in the name ‘G J Cornish and V G Cornish’. Its ABN was 44 797 890 (the **partnership**).<sup>23</sup>
- [27] In or about mid-2012, the second and third defendant ceased trading under the partnership.<sup>24</sup>
- [28] On 13 August 2012 the first defendant was registered. The second and third defendants were its directors. The second defendant was also the company secretary.<sup>25</sup>
- [29] One year later invoices began to be issued for work performed by the third defendant on behalf of the first defendant.
- [30] Between 2 August 2013 and 16 July 2016 (inclusive) invoices were issued by the first defendant, incorrectly citing the partnership ABN, but correctly citing the first defendant’s ACN. (**Schedule A invoices**)<sup>26</sup>
- [31] Between 28 July 2016 and 29 June 2018 invoices were issued by the first defendant. (**Schedule B invoices**).<sup>27</sup> Save that:
1. on 9 October 2016 an invoice was issued in the name of the first defendant, again incorrectly citing the partnership ABN, but correctly citing the first defendant’s ACN. (It therefore forms part of the **Schedule A invoices**)<sup>28</sup>
  2. the last invoice issued in the Schedule B invoices i.e. the invoice dated 29 June 2018, cited new bank account details.
- [32] On 6 February 2017 the second and third defendants, who were married, separated.<sup>29</sup>

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<sup>23</sup> Statement of claim filed 20 December 2019 at [6], Defence of 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed 29 January 2020 at [2] and Reply & Answer filed 13 March 2020 at [2].

<sup>24</sup> Affidavit of the Second Defendant filed 26 June 2020 at [9]. See also Reply and Answer filed 13 March 2020 at [2].

<sup>25</sup> Affidavit of J M Wallace filed 15 April 2020 at JMW-1 pp. 5 to 7.

<sup>26</sup> As per the Statement of claim filed 20 December 2019. See also Affidavit of P Coffin filed 15 April 2020.

<sup>27</sup> As per the Statement of claim filed 20 December 2019. See also Affidavit of P Coffin filed 15 April 2020.

<sup>28</sup> As per the Statement of claim filed 20 December 2019. See also Affidavit of P Coffin filed 15 April 2020.

<sup>29</sup> Affidavit of Second Defendant filed 26 June 2020 at [2] and [8].

- [33] On 27 June 2018 the fourth defendant was registered. The third defendant is its sole director.<sup>30</sup>
- [34] Between 12 July 2018 and 17 September 2019 invoices were issued by the fourth defendant. (**Schedule C invoices**).<sup>31</sup> The third defendant admits being responsible for the issuing of these invoices.<sup>32</sup>
- [35] The first defendant is deregistered, so the plaintiff no longer maintains its claim against it.<sup>33</sup> The plaintiff accepts that the second and third defendant's partnership had ceased trading prior to the issue of the invoices.<sup>34</sup> Nevertheless it still pursues them under the partnership,<sup>35</sup> but does so in the alternative to their alleged liability as directors who are statutorily liable for the conduct of the first and fourth defendants.<sup>36</sup>
- [36] The defence mounted on the part of the second defendant, a self-represented litigant, is not compliant with the requirements of UCPR. The plaintiff presses the deemed admissions arising from this non-compliance. However there is no incurable prejudice asserted by the plaintiff arising from the procedural defects in the second defendant's manner of pleading. Further it is clear on the face of it that the second defendant either does not admit, or she denies, the allegations contained in the plaintiff's statement of claim. This particularly apparent when the second defendant's defence is read in the conjunction with her affidavit/submissions.<sup>37</sup>
- [37] The second defendant's defence purports to rely on various irrelevant legal maxims such as *volenti non fit injuria*. Putting that issue to one side, doing the best that I can, it appears that the second defendant seeks to defend the claim on the following bases:
1. The invoices were issued by the first or fourth defendant, not her or the partnership;
  2. The payments were made to the first or fourth defendants, not her or the partnership;
  3. Her former husband was the person in charges of the affairs of the tiling business in its various iterations;<sup>38</sup>
  4. Her former husband is semi-illiterate, and that was within the knowledge of the plaintiff;<sup>39</sup>
  5. The plaintiff bore the onus of ensuring the invoices were correct before paying them;
  6. The amount invoiced was consistent with the amount quoted: '*...the completed jobs were within target...*'<sup>40</sup>

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<sup>30</sup> Affidavit of J M Wallace filed 15 April 2020 at JMW-1 pp. 9 to 10.

<sup>31</sup> As per the Statement of claim filed 20 December 2019. See also Affidavit of P Coffin filed 15 April 2020.

<sup>32</sup> Defence of 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed 29 January 2020 at [12].

<sup>33</sup> Plaintiff Applicant's Submissions filed 26 May 2020 at [6].

<sup>34</sup> Reply & Answer filed 13 March 2020 at [2].

<sup>35</sup> Statement of claim filed 20 December 2019 at [34] – [46]; Reply and Answer filed 13 March 2020 at [2] and [3]. See also Plaintiff Applicant's Submissions filed 26 May 2020 at [7] – [9].

<sup>36</sup> Pursuant to s. 18 of ACL and s. 16 *Fair Trading Act* 1989 (*Qld*).

<sup>37</sup> Affidavit of Second Defendant filed 26 June 2020.

<sup>38</sup> Affidavit of Second Defendant filed 26 June 2020 at [2], [3], [7], [8] and [34].

<sup>39</sup> Defence of 2<sup>nd</sup> Defendant filed 31 January 2020 at [28]. No response was pleaded to this allegation in the Reply and Answer filed 13 March 2020.

<sup>40</sup> Defence of 2<sup>nd</sup> Defendant filed 31 January 2020 at [29].

7. The plaintiff is deemed to have accepted the invoiced sum by paying it (some form of offer and acceptance).<sup>41</sup>
8. Between payment and the demand for repayment the second defendant's circumstances have changed.<sup>42</sup>

[38] The second defendant raises other matters in both her defence and her affidavit/submissions,<sup>43</sup> but they are misconceived and irrelevant to the issues to be determined on the plaintiff's claim.

[39] In their joint defence, the first, third and fourth defendants plead:

1. That the partnership:
  - (a) ceased trading in 2012;<sup>44</sup>
  - (b) no longer has legal standing;<sup>45</sup> and
  - (c) did not provide personal guarantees.<sup>46</sup>
2. That the first defendant is deregistered and is no longer capable of being sued;<sup>47</sup>
3. That the alleged representations:
  - (a) were not false. "*the Defendants admit that an error occurred in the calculations.*";
  - (b) were not intended, or likely, to be misleading.<sup>48</sup>
4. They otherwise do not admit the allegations.

## CONCLUSION

[40] In this case the plaintiff applies for summary judgment, therefore r. 292 of the UCPR is engaged.

[41] Whilst the plaintiff has established a *prima facie* case against the first defendant, given that it is now deregistered, it does not seek to pursue it. No submissions or evidence has been filed by, or behalf of, the first defendant in response to the plaintiff's application. Accordingly, pursuant to the draft orders sought by the plaintiff, I will dismiss both the claim against, and counterclaim made by, the first defendant.

[42] It not genuinely contested on the evidence that, despite the erroneous inclusion of the partnership's ABN, the invoices described in Schedule A were issued by the first defendant citing its correct ACN. The plaintiff admits that the partnership between the second and third defendant ceased trading prior to the issuing of the invoices in 2013. For these reasons I reject the plaintiff's contention that it has made out a *prima facie* case against the second and third defendant based on indebtedness arising from the partnership.

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<sup>41</sup> Defence of 2<sup>nd</sup> Defendant filed 31 January 2020 at [30] and [31].

<sup>42</sup> Affidavit of Second Defendant filed 26 June 2020 at [2] – [3] and [17] – [19].

<sup>43</sup> Affidavit of Second Defendant filed 26 June 2020.

<sup>44</sup> Defence of 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed 29 January 2020 at [2]. See also Reply and Answer filed 13 March 2020 at [2] of the Reply admitting that the partnership ceased trading in 2012.

<sup>45</sup> Defence of 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed 29 January 2020 at [3]. No response was pleaded to this allegation in the Reply and Answer filed 13 March 2020.

<sup>46</sup> Defence of 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed 29 January 2020 at [3]. No response was pleaded to this allegation in the Reply and Answer filed 13 March 2020.

<sup>47</sup> Defence of 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed 29 January 2020 at [1]. No response is pleaded to this legal conclusion in the Reply and Answer filed 13 March 2020.

<sup>48</sup> Defence of 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed 29 January 2020 at [5] and [7] - [12]. See also Reply and Answer filed 13 March 2020 at [1] and [4].

- [43] I am satisfied the plaintiff has established a *prima facie* defence against the first, third and fourth defendants. It has established:
1. that between 2 August 2013 and 29 July 2018:
    - (a) the second and third defendant were directors of the now deregistered first defendant;
    - (b) a person issued invoices in the name of the company for work undertaken by the third defendant on behalf of the first defendant;
    - (c) that the third defendant was the named contact on those invoices.
  2. that on 27 June 2018 the third defendant became a director of the fourth defendant;
  3. that between 12 July 2018 and 17 September 2019 the third defendant issued invoices in the name of the company for work undertaken by himself on behalf of the fourth defendant.
- [44] Neither the third nor fourth defendant have put on any evidence, nor made any submissions, to demonstrate that either of them have any prospect of succeeding on all, or in part, on their defence. Nor have they established a need for a trial against them. Despite this, the plaintiff has quite properly conceded the counterclaimed amount and I will offset it against the claim. For these reasons I will grant the plaintiff's application against the third and fourth defendants, adjusting the claimed amount accordingly.
- [45] I am not satisfied that the plaintiff has demonstrated a *prima facie* case against the second defendant. There is insufficient evidence to demonstrate that she was a person 'involved' in the conduct alleged within the meaning of that word as defined in the ACL to establish a claim in damages under that Act. Even if I am wrong about that, the second defendant has put on sufficient sworn evidence to establish an arguable case that she was not a person who would fall within the definition of the word '*involved*'. She says that she had no knowledge of the financial or trading affairs of her husband's business and was not involved in the affairs of the business at all (which presumably includes preparing, or sending invoices out for work done by the third defendant for the corporate entities). She gives sworn evidence that there is an affidavit filed by the third defendant in the Family Court to confirm that he was "*solely responsible for managing the financial affairs of the business.*"
- [46] As to the plaintiff's claim seeking restitution from the second defendant, I find that there is insufficient evidence to demonstrate that the plaintiff's payments were made to her or received by her.<sup>49</sup> Further, even if the plaintiff could overcome that hurdle, the second defendant has put on sufficient sworn evidence to establish an arguable case that it may be inequitable to order restitution given her change in position between payment of, and demand for, the monies.<sup>50</sup>
- [47] As such I intend to strike out the second defendant's defence and grant her leave to re-plead it by way of an amended defence. In so doing, noting that the second defendant is self-represented, I make the following observations about the other aspects of the second defendant's defence as currently formulated:

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<sup>49</sup> Affidavit of Second Defendant filed 26 June 2020 at [13]. See also Plaintiff Applicant Submissions filed 26 May 2020 at [38].

<sup>50</sup> Affidavit of Second Defendant filed 26 June 2020 at [2] – [3] and [17] – [19]. See also *Australian Financial Services and Leasing Pty Ltd v Hill Industries Ltd* (supra) per Justices Hayne, Crennan, Kiefel, Bell and Keane at [82] – [85], [88] and [92].

1. I note the allegation that the amounts invoiced were consistent with the amounts quoted i.e.: ‘...*the completed jobs were within target...*’.<sup>51</sup> To be relevant to these proceedings, the second defendant will need to plead the necessary facts to establish that the work was performed as a fixed price contract. On the pleaded admissions and sworn evidence before the court to date, there are no pleaded facts, nor any evidence, to support that proposition. The second defendant will need to ensure that she has evidence to support such a pleading, or she risks facing adverse costs orders for pleadings filed without an evidential basis.
2. The defences raised on the basis that:
  - (a) the plaintiff somehow bore the onus of ensuring that invoices raised by the first and fourth defendants were correctly calculated; or
  - (b) because they have been paid by the plaintiff, it has forfeited its right to claim damages or restitution for overcharging by the defendants: are misconceived.<sup>52</sup>

[48] For these reasons I dismiss the plaintiff’s application against the second defendant.

### **ORDERS**

[49] The plaintiff’s claim against the first defendant and the first defendant’s counterclaim against the plaintiff are dismissed.

[50] Pursuant to r. 292 of the UCPR summary judgment is entered for the plaintiff against:

1. the third defendant in the sum of \$57,057.92, together with interest thereon pursuant to s. 58 of the *Civil Liability Act 2003 (Qld)*;
2. the fourth defendant in the sum of \$19,487.97, together with interest thereon pursuant to s. 58 of the *Civil Liability Act 2003 (Qld)*.

[51] I direct that within 14 days of the publication of these reasons the plaintiff and the third and fourth defendants are to file and serve written submissions on the issue of costs and as to the appropriate calculation of interest, if not agreed, together with draft orders.

[52] I direct that within 14 days the second defendant is to file and serve her written submissions on the issue of costs, if not agreed.

[53] I direct that within 21 days of the publication of these reasons the second defendant is to file, and serve upon the plaintiff, her amended defence.

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<sup>51</sup> Defence of 2<sup>nd</sup> Defendant filed 31 January 2020 at [29].

<sup>52</sup> *Australian Financial Services and Leasing Pty Ltd v Hill Industries Ltd*, supra per Justices Hayne, Crennan, Kiefel, Bell and Keane at [92]