SUPREME COURT OF QUEENSLAND

CITATION:	*Eastern Well Service No 2 Pty Ltd v Campac (Aust) Pty Ltd* [2010] QSC 350
PARTIES:	**EASTERN WELL SERVICE NO 2 PTY LTD** **ABN 92 131 411 231** Applicant v **CAMPAC (AUST) PTY LTD** **ABN 77 110 067 733** Respondent
FILE NO/S:	8898 of 2010
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	6 September 2010
JUDGE:	Ann Lyons J
ORDER:	**Application dismissed**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – where applicant engaged to construct a mobile camp – where respondent was to build the camp by 12 August 2010 for the applicant – where delays occurred – where applicant seeks an interlocutory injunction requiring the respondent to deliver up the mobile camp or such part of it which has been constructed and to deliver up confidential information which was provided by it to the respondent in connection with the agreement to manufacture the camp – whether such interlocutory injunction should be granted.
COUNSEL:	G Beacham for the applicant P Hay for the respondent
SOLICITORS:	Holding Redlich Solicitors for the applicant Praeger Ellem Solicitors for the respondent

ANN LYONS J:

Background

[1] The applicant Eastern Well Service No 2 Pty Ltd (Eastern Well Service) was engaged by Santos to construct a 40 man mobile camp for supply to an area near Roma. Pursuant to the contract with Santos, the camp was to be completed by 12 August 2010. This camp was to be built for the applicant, by the respondent, Campac. There were problems with the process of manufacture and there were delays.

[2] There is a now a dispute between the parties about the delivery of the camp by the respondent and the sum owed by the applicant under the subcontract.

[3] By this amended application the applicant now seeks an interlocutory injunction requiring the respondent to:

(i) deliver up a 40 man mobile camp or such part of it which has been constructed, and

(ii) deliver up confidential information which was provided by it to the respondent in connection with the agreement to manufacture the camp.

The Agreement

[4] The applicant invited the respondent to participate in an expression of interest for a subcontract to perform the work. The tender package was provided to the respondent on 2 March 2010. Prior to being provided with those documents, the respondent executed a deed acknowledging the confidentiality of any drawings, plans and designs which were provided to it by the applicant. The deed also included an agreement to deliver up the confidential material on demand.

[5] On or about 6 April 2010, the respondent issued a tender quotation in respect of the work. On 22 April 2010 the parties agreed terms and pricing. The applicant then issued a purchase order to the respondent dated 30 April 2010 for the sum of $1,864,037.58 for the supply of the mobile buildings. The email correspondence between the parties indicates an agreement for certain payments at various stages of construction of the camp. In particular, there was agreement to a schedule and milestone definitions for progress payments under the subcontract.

[6] An employee of the applicant company acted as supervisor and construction manager in respect of the subcontract works and was present at Campac's workshop during that time.

[7] Campac issued Tax Invoice No 695 dated 4 May 2010, corresponding with the first 30 per cent progress payment, claiming payment of $615,132.41. It would seem from an exchange of email correspondence that a payment was made by Eastern Well on 14 May of $100,000, with a further sum of $678,829 paid on 28 May 2010. That sum, however, did not relate solely to the Santos Project. In an email dated 16 June from Campac to Eastern Well the director of Campac stated:

> "With regards to future payments, can you please forward a remittance advice/payment schedule so we can allocate funds correctly when received. As you are aware, we had to allocate funds

> received two weeks ago for the Santos Project (as no advise (sic) was given) and then yesterday go back and undo Bank Rec's etc just to reallocate part of these funds to another project, namely Chevron."

[8] Further invoices were subsequently issued in relation to the work done and the affidavit of Elliot Johnson indicates that as at 26 July 2010 an amount of $306,678.95 was overdue.

[9] Eastern Well alleges concerns about the quality of the completed buildings and alleges that there are defects in some of the buildings.[1]

[10] There is also a dispute in relation to the terms of the subcontract. Campac alleges that the applicant has repeatedly attempted to abandon the terms of the contract reached on or about 22 April in favour of a back-to-back contract based on Eastern Well's contract with Santos of 14 May 2010. The issue relates to whether the tender conditions provided during the tender process were contractual terms or whether the subcontract was to be back-to-back with the contract between Santos and the applicant.

[11] There were also issues about the sufficiency of the plans being provided by Eastern Well. Campac alleges the drawings provided were not complete and did not contain sufficiently detailed measurements.

The letter of 29 July terminating the Contract

[12] On 29 July 2010, the respondent by letter wrote terminating the contract. That letter stated:

> "Campac gives notice to Eastern Well of termination of this project effective immediately.
>
> Eastern Well staff are no longer welcome on Campac premises as from close of business today."

The applicant responded to this letter in the following terms:

> "Eastern Well accepts your notice and your actions in requiring our employees to vacate your premises as a repudiation of the arrangements between our parties and reserves its rights."

Subsequent events

[13] The applicant endeavoured to arrange to collect the partly completed mobile camp. Further correspondence ensued between the parties. It is clear that the respondent continued to undertake work on the camp and was insisting on the payment of certain invoices before it would discuss arrangements to have the camp picked up by the applicant.

[14] On 6 August 2010, the applicant wrote to the respondent confirming the contract was no longer on foot, seeking to make formal arrangement for the payment of a negotiated sum and the release of the partially completed mobile camp. On 20 August 2010, the respondent informed the applicant that the bunkhouses were complete and available for inspection and that once payment was finalised, the

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1 Affidavit of SP Couacaud, sworn 27 August 2010.

applicant could take delivery. It would seem that approximately 19 buildings have been substantially completed. The director of Campac, Jonathan Pattinson[2] states that since the termination, Campac has completed the manufacture of all the buildings the subject of the contract based on instructions received direct from Santos.

[15] Essentially, the essence of the dispute now is about the sum owing. The respondent originally claimed to be owed $500,000 however, after further invoices were issued and reconciliations were done, the current amount outstanding for the work done is alleged to be $464,402.73.

[16] Eastern Well submits that the cost of work done to date equates to $792,814.16 but that the value of the work still to be completed is $997,175.30. It also alleges that the cost of rectification is up to $74,000 and that the estimate to bring the buildings into compliance with the contract is $238,970.44.

[17] The affidavit material indicates that Santos has made part payment to Eastern Well for the buildings.

[18] The applicant also seeks the return of confidential information which was provided to allow Campac to manufacture the buildings. Campac submits that they have not used any information provided by Eastern Well other than in accordance with the agreement, denies any breach of confidentiality and advises that the electronic version of the plans has been deleted. It is also submitted that "as built" drawings sufficient to reproduce the buildings were never supplied and that even if the plans were provided they would not be used as they are inferior to Campac's own plans. Campac states it retains a printed copy of the plans should problems arise during the warranty period.

Should the relief be granted?

[19] The applicant seeks an urgent interlocutory injunction, however, there is no indication as to the urgency in relation to the relief sought other than that the date for completion of 12 August 2010 has passed. The applicant does not depose as to why damages would not be an adequate remedy.

[20] Rule 10 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR), provides that a proceeding must be started by application if an Act or these rules require or permit a person to apply to a court for an order or another kind of relief and the Act or rules do not state the type of originating process to be used or the type of originating process is required or permitted under the law. It is clear that in this case the originating application does not disclose the Act or law under which the proceedings are entitled to be commenced.

[21] Rule 11 of the UCPR provides that a proceeding may only be started by application if the main issue in the proceedings is an issue of law and a substantial dispute of fact is unlikely, there is no opposing party or there is insufficient time to prepare a claim due to the urgent nature of the relief.

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[2] Affidavit sworn 26 August 2010.

Is there a dispute of fact?

[22] It would seem clear that there is a substantial dispute of fact in relation to the return of the confidential documents, the value of the work done and the issue of present entitlement to the delivery of the mobile camp. The respondent contends it has not breached the confidentiality agreement and that it retains title in the buildings until all work undertaken by it has been paid.

[23] There is clearly a dispute about the terms of the contract. There is obviously a complex factual background and there were extensive contractual negotiations. The applicant contends that the terms of the agreement between the parties are to be found in the "Request for Tender". The respondent, however, contends that they are superseded by the terms found in the Quotation documents. Clause 6.4 of the Request for Tender document provides for the parties to enter into post tender negotiations, including "to settle the final terms of the Contract and any pricing issues". Importantly, clause 6.4(d) of the Request for Tender provides that a contract in the form attached to the respondent's final offer will arise upon written acceptance of it by the applicant. The respondent contends that the written acceptance of the purchase order of 30 April 2010 constituted written acceptance.

[24] There is no doubt, therefore, that there are factual matters in dispute. The question is whether it is sufficiently certain that despite that factual dispute, the property in the camp has, in fact, passed to the applicant.

Delivery up of the mobile camp

[25] The applicant argues that the property in the partially completed camp has passed to the applicant. The applicant submits that as the contract provided for milestone payments by reference to the stage of completion of the camp and that as the applicant inspected and indeed had a full time supervisor at the building site, there is an inference that the parties intended the property in the partially complete camp to pass as various stages were reached.

[26] The applicant relies on s 8 of the *Sale of Goods Act* 1896 (Qld):

> "(1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.
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> …
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> (3) When by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods."

[27] The applicant submits that "future goods" means goods to be manufactured by the seller after the making of the contract of sale. Pursuant to the *Sale of Goods Act*, therefore, it is argued that the contract for the manufacture and sale of a chattel is a contract for the sale of goods within the meaning of the Act and is a contract for the sale of future goods.

[28] Therefore, the applicant argues that the provisions of the *Sale of Goods Act* at s 19 and s 20 are such that for property in goods to pass under the contract of sale, the goods must be ascertained. Property then passes at the time it is intended to pass.

> "**20 Property passes when intended to pass**
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> (1) When there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intended it to be transferred.
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> (2) For the purpose of ascertaining the intention of the parties regard is to be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

[29] The rules for ascertaining the intention of the parties as to the time at which property passes are then set out in s 21 of the Act which provides that "when there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained" and that property then passes at the time at which it is intended to pass.

[30] Furthermore, the rules for determining the intention of the parties as to the time at which property under a contract for the sale of goods passes are set out in s 21 of the *Sale of Goods Act*. In particular, r 5 provides:

> "**21 Rules for ascertaining intention**
> Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer—
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> **Rule 5**
> (1) When there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer.
> (1A) Such assent may be express or implied, and may be given either before or after the appropriation is made.
> (2) When, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, the seller is deemed to have unconditionally appropriated the goods to the contract."

[31] The applicant relies in particular on the decision in *Seath v Moore*[3] where Lord Watson held:

> "… Where it appears to be the intention, or in other words the agreement, of the parties to a contract for building a ship, that at a particular stage of its construction, the vessel, so far as then finished, shall be appropriated to the contract of sale, the property of the vessel as soon as it has reached that stage of completion will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchase will, *accessione*, become his property. It also appears to me to be the result of these decisions that such an intention or agreement ought (in the absence of any circumstances pointing to a different conclusion) to be inferred from a provision in

[3] (1886) 11 App Cas 350 at 380.

> the contract to the effect that an instalment of the price shall be paid at a particular stage, coupled with the fact that the instalment has been duly paid, and that until the vessel reached that stage, the execution of the work was regularly inspected by the purchaser, or someone on his behalf."

[32] Accordingly, the applicant submits that as the partially completed goods passed through the stages described in the contract, the goods are appropriated to the contract and by that process become ascertained. Accordingly, the passing of property creates an immediate right to the possession in the purchaser. In particular, the applicant relies on the decision also of *Blyth Shipbuilding and Dry Docks Co.*[4] That decision particularly related to the *Sale of Goods Act*.

> "But before the Act it was competent to the parties to agree that the thing in its various stages of construction might be appropriated to the contract, and that the property in the thing as it existed from time to time should pass before completion of the whole. I do not understand that in this respect the Act has made any alteration of the law.
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> …
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> But in the cases to which I am referring, I apprehend that the contract is not in strictness merely a contract for the sale of a complete ship. It is in truth a contract for the sale from time to time of a ship in its various stages of construction or of materials to be used in its various stages of construction or of materials to be used in the construction of a ship, the seller, however, being under an obligation of working up the things sold into a complete ship for the purpose of putting them into a deliverable state. It is therefore a contract for the sale of unascertained goods which by appropriation with consent are from time to time ascertained, and there is nothing in s. 16 to prevent the property from thereupon passing. They are not, however, in a deliverable state. Until they are, the property will not, therefore, pass, having regard to the terms of s. 18, unless a different intention appears. Such an intention may be expressed or it may be inferred. Cases in which the intention has been inferred are *Woods v. Russel*; *Clarke v. Spence*; and *Wood v. Bell.* It is unnecessary for me to consider these cases in detail, because the effect of them has been summarized by Lord Watson in the case of *Seath v. Moore.* After referring to the three cases Lord Watson said this: 'The English decisions to which I have referred appear to me to establish the principle that, where it appears to be the intention, or in other words the agreement, of the parties to a contract for building a ship, that at a particular stage of its construction, the vessel, so far as then finished, shall be appropriated to the contract of sale, the property of the vessel as soon as it has reached that stage of completion will pass to the purchaser, and subsequent additions made to the chattel thus vested in the purchaser will, accessione, become his property.'" (footnotes deleted)

[33] Accordingly, the applicant argues that the property in the partly completed camp has passed to the applicant.

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[4] [1926] 1 Ch 494.

Has the property in the Camp passed to the applicant?

[34] Whilst the applicant argues that it has a right to the goods pursuant to the *Sale of Goods Act* because the goods have become ascertained, the respondent argues that it has a right to retain the goods to allow it to complete the work under the contract and because it has a seller's lien.

[35] The respondent relies on the High Court decision in *Hewett v Court*[5] in this regard. That decision found that the Western Australian *Sale of Goods Act* did not apply because the purchaser in that case was, in fact, held to have an equitable lien. The respondent argues that as Santos has paid the applicant for components of the work, it is Santos and not the applicant who has an equitable lien over a portion of the mobile buildings, given that Campac has now completed the buildings based on instructions from Santos.

[36] The applicant, however, argues that a lien would not arise where the contract is ended by the seller's repudiation. The respondent, however, contends that whilst there was a letter of termination sent on 29 July 2010, the respondent was still evidencing an intention that it was ready and willing to perform the contract because it was continuing to have discussions about completion up until 25 August 20210. It is argued, therefore, that the question is whether, viewed objectively, this conduct evidenced an intention not to be bound by the contract.

[37] Whilst the applicant has established a serious question to be tried, it is clearly arguable that the applicant's claim for possession is subject to a defence by the respondent.

[38] The applicant argues, however, that the contest can be resolved by an interlocutory order for delivery of the camp subject to the applicant paying the sum claimed to be owed by the applicant to the respondent of $464,402.73 into court.

The balance of convenience

[39] It is clear that the camp was due to be delivered to Santos on 12 August 2010.

[40] The affidavit of Bill Sankey[6] indicates that the applicant has had a 15 year commercial relationship with Santos. I accept that the failure to deliver on time has caused tension between those two parties and that this failure may cause reputational harm.

[41] It is also clear that the respondent has set out in clear terms what it is currently owed by the applicant, namely $464,402.73. That appears to be based on work done up to the date of termination of 29 July 2010. It would also seem that the respondent states it has, in fact, now completed the buildings.

[42] On 20 August 2010 the respondent made a payment claim for this amount pursuant to the *Building and Construction Industry Payments Act* 2004 (Qld). The respondent is, therefore, able to access the scheme for payment pursuant to that Act.

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5 (1986) 46 ALR 87 at 110.

6 Sworn 6 September 2010.

[43] The applicant argues that the balance of convenience favours the granting of the injunction and relies on the decision of Kaye J in the Victorian Supreme Court decision of *Freight & Logistic Service Pty Ltd v Pogroske &* Anor.[7] Kaye J in that case considered that issue in the following terms:

> "14. The plaintiff seeks an interlocutory injunction, by which it seeks to enforce the agreement constituted by the letter of 27 September 2007. In his affidavit, Mr Davies recites his instructions from his client that the plaintiff is suffering irreparable harm by the actions of the defendants in not releasing the plaintiff's customers' goods. The plaintiff has been threatened with legal action by its customers. The plaintiff is in jeopardy of losing its customers' accounts, which provide a substantial part of the revenues of the plaintiff. Further, if the plaintiff's customers are not able to access their goods readily, the plaintiff may not be able to recover its fees from its customers because they are likely to refuse payment. In addition, the plaintiff's reputation as a freight forwarder will be harmed. The freight forwarding business is a competitive market, which is sensitive to the perceived reputation of the participants.
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> 15. In order to be entitled to an interlocutory injunction, the plaintiff must establish that there is a serious issue to be tried, and that the balance of convenience is in favour of the grant of the injunction. The relief sought is by way of mandatory injunction and, if the relief is granted, the plaintiff will have been successful in obtaining the principal relief which it seeks in the proceeding.
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> 16. Until recently, it was considered that, where a plaintiff seeks a mandatory interlocutory injunction, the plaintiff must show a 'high degree of assurance' that it will succeed at trial. However, in Tymbook Pty Ltd v State of Victoria, Maxwell P and Charles JA, constituting the Court of Appeal, held that there was no special test which must be applied in such a case. Rather, their Honours endorsed the approach of Hoffman J in Films Rover International Limited v Cannon Film Sales Limited, and held that the approach which should be taken was that which involved the 'lower risk of injustice' should the decision of the Court, at the interlocutory stage, turn out to be 'wrong'. Thus, in Tymbook, their Honours stated:
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> > '... whether the relief sought is prohibitory or mandatory, the Court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been "wrong", in the sense of granting an injunction to a party who fails to establish his right at the trial, or in failing to grant an injunction to a party who succeeds at trial.'
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> 17. Nevertheless, I am conscious that, if the plaintiff succeeds before me, it will gain access, on behalf of the its clients, to goods held by the defendants, without paying for those goods, thus depriving the defendants of the benefit of the lien which is expressed in the terms of trading between the plaintiff and Bon McArthur Pty Ltd. In view of that circumstance, in my view, a higher onus of persuasion falls on

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7 [2007] VSC 392.

> the plaintiff to justify the grant to it, at this preliminary stage, of the relief sought in this application."(footnotes deleted)

[44] Accordingly, it is clear that there is a high onus on the applicant in the current case to satisfy me that lower risk of injustice favours the granting of the injunction in the terms sought. The balancing exercise required was examined by Kaye J in the following terms:

> "27. Thus, I am satisfied that the plaintiffs have established that there is a serious issue to be tried. Indeed, the defendants did not contend to the contrary. For the reasons which I have already expressed, I also accept that the defendants do have an arguable defence to the claim for the plaintiffs based on the letter of 27 September, but I also agree with Mr Davies that, on the materials before me, and for the purpose of this application, that defence is not strong. The question, then, is whether the balance of convenience favours the grant of the injunction sought by the plaintiff. In particular, in the terms stated by the Court of Appeal in Tymbook Pty Ltd v State of Victoria, is there a lower risk of injustice if I grant the injunction in circumstances which turn out to be 'wrong', or if I do not grant the injunction in circumstances in which the plaintiff is entitled to succeed at trial.
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> 28. In my view the balance of convenience, stated in those terms, strongly favours the grant of an injunction. If the plaintiff is not able to obtain access to its customers' goods, the plaintiff will suffer substantial harm which may not be able to be met by an appropriate order for damages. As I have stated, Mr Davies has recited his instructions from his client, stating that the plaintiff may become liable to legal action against it by its customers, it may lose its customers' accounts, it may not be able to recover fees owing to it by its customers, and its reputation as a freight forwarder will be harmed. While it might be possible for the plaintiff to be able to identify, and claim damages for, some of those matters, nonetheless it would have some difficulty in establishing the value of the loss of its reputation, and in identifying precisely what customers it has lost as a result of the problems which it is experiencing with obtaining the release of its customers' goods from the control of the defendants.
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> 29. On the other hand, it was submitted on behalf of the defendants that, if I grant the injunction claimed by the plaintiff, the defendants would be deprived of the right to rely on the lien to which it is entitled according to the terms of trading with the plaintiff. There are, however, a number of answers to that proposition. First, there is no evidence that the plaintiff will be unable to pay the account of the debt claimed to be due by it to the defendants. There is no suggestion that the plaintiff has, hitherto, been delinquent in its account with Bon McArthur Pty Ltd, or that the plaintiff does not have the financial resources to pay that account to the defendants. Further, it must be borne in mind that, according to the terms of the agreement contained in the letter of 27 September, it was only contemplated that the plaintiff acknowledge the debt which was said to be owing to Bon McArthur. The letter itself did not require the payment of the

> debt before the goods were collected; rather, it required the acknowledgement of that debt in order to secure release of the goods. As I have already stated, Mr Hunt does not depose that the terms of the letter itself contain any error; he has only sworn that the amount which is set out in the letter was mistaken.
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> 30. Further, in their letter to the plaintiff's solicitors, dated 3 October 2007, the defendants' solicitor stated that his clients 'have no difficulty with releasing the goods'. The defendants' solicitor, in that letter, only required that the plaintiff acknowledge that the amount of debt owed to Bon McArthur was approximately $122,007.13. Thus, again, the defendants were prepared to release the goods of the plaintiff's customer, upon receiving acknowledgement, but not necessarily payment, of the amount owed to McArthur Express by the plaintiff. In those circumstances, it is clear that, at relevant times, the defendants were prepared to release the plaintiff's customers' goods, while the plaintiff was indebted to McArthur Express in a sum which, according to the defendants, exceeded $100,000. That circumstance significantly undermines the proposition that, if I were to grant the injunction sought by the plaintiff, the defendants would thereby suffer the loss of McArthur Express' rights under the lien which they were otherwise entitled to assert over the plaintiff's customers' goods.
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> 31. For those reasons, I conclude that the balance of convenience strongly favours the grant of the mandatory injunction sought by the plaintiff. In the circumstances which I have described I do not consider that I should require, as a condition of granting that relief, that the plaintiff should be required to pay the Court the amount of the debt asserted by the defendants, as submitted by Mr Ahern.
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> 32. However, as discussed in submissions with counsel, I do consider that, in order to be entitled to injunctive relief, the plaintiff should give to the Court the undertaking which was discussed in the course of argument, namely, that in any proceedings between itself and the defendants in relation to the debt owed by the plaintiff to the defendants, the plaintiff will not maintain that the terms of the letter dated 27 September 2007 preclude the defendants from claiming from the plaintiffs a debt greater than that stated in the letter, namely $40,000. Mr Davies acknowledged in the course of argument that the plaintiff would not seek to maintain that the letter, on its proper construction, constituted an agreement that the debt between the parties was no more than $40,000, or that it would give rise to an estoppel preventing the defendants from asserting that the debt owed by the plaintiff to McArthur Express was greater than $40,000."

[45] In my view, there are a number of significant difficulties facing the applicant in the present case.

[46] The respondent has continued to manufacture the buildings and they are now essentially completed and ready for delivery. The Purchase Order for the completed camp was $1,864,037.58. The affidavit of Elliot Johnson states that the amount

paid by Eastern Well as at 20 August 2010 was comprised of two sums; one of $615,132.41 and a further amount of $65,328.20, which is a total of $680,460.61.

[47] It is clear that the work was then terminated on 29 July but that work continued and as at 20 August Campac states an amount due and owing as at that date on the basis of work done post termination is $464, 402.73. That was on the basis that the works completed at that stage amounted to $1,144,863.34 of the total.

[48] It is clear, however, that since 20 August 2010, when the application in this matter was initially filed, further work has occurred. The respondents now state that as at 6 September 2010, the buildings have been fully completed. Accordingly, the value of the completed works on the basis of the value set out in the Purchase Order would, on my calculations, be in the vicinity of $1.8 million. It would seem to me then that the payment into court of $464,402.73, when the value of the further works completed since 20 August 2010 is in the vicinity of a further $700,000, does not address the risk of injustice. In simple terms, it would seem that Eastern Well has paid $680,000 to date and is prepared to pay a further $464,000 into Court (which totals $1.14 million) but that the value of the completed camp totals $1.8 million.

[49] It is clear that the ultimate customer for the camp is Santos. Santos has, in fact, made part payment for the buildings to Eastern Well. Santos, it would appear, has been substantially involved in the completion work on the buildings post termination. There is an argument that Santos under its contract can, in certain circumstances, “step through” Eastern Well and deal directly with Campac to purchase the buildings.

[50] It is also clear, that any further fit out is best performed whilst the buildings are in the workshops where they were manufactured. I also accept that if the buildings are delivered up to the applicant, the manufacturing and defect issues raised by the applicant become problematic for Campac to dispute.

[51] Unlike Kaye J in the *Freight & Logistics* case, I am not satisfied that the balance of convenience favours the grant of the interlocutory injunction. In my view, the applicant has not discharged the substantial onus on it in relation to the balance of convenience. I accept that there are concerns about its reputation, however, in balancing that with the other factors I do not consider it is sufficient. Furthermore, I consider that there are significant factual disputes which militate against the remedy of the injunction sought by the applicant. In addition, the applicant has not established any particular urgency which indicates why an injunction is required or established why damages would not be an appropriate remedy.

[52] The application should be dismissed.