SUPREME COURT OF QUEENSLAND

CITATION:	*Birbilis Bros Pty Ltd v Bunnings Group Ltd* [2023] QSC 256
PARTIES:	**BIRBILIS BROS PTY LTD (SUBJECT TO A DEED OF COMPANY ARRANGEMENT)** ACN 115 942 311 (plaintiff) **v** **BUNNINGS GROUP LTD** ABN 26 008 672 179 (defendant)
FILE NO/S:	BS No 7403 of 2021
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 November 2023
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers. Application filed 17 July 2023; applicant's written submissions filed 17 July 2023; respondent's written submissions filed 26 July 2023, applicant's written submissions in reply filed 9 August 2023.
JUDGE:	Kelly J
ORDERS:	**1. The plaintiff has leave to file and serve a second further amended claim substantially in the form of the proposed second further amended claim exhibited and marked "TN–3" to the affidavit of Tarrek Naji filed 17 July 2023 and a second further amended statement of claim substantially in the form of the proposed second further amended statement of claim attached to the plaintiff's written submissions in reply filed 9 August 2023 save that the words "By reason of the defendant's breach of the supply agreement" should be deleted from paragraph 103 of the proposed second further amended statement of claim.** **2. The plaintiff is to file and serve the second further amended claim and second further amended statement of claim by 16 November 2023.** **3. I will hear the parties as to costs and further directions.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COURT SUPERVISION –

AMENDMENT – ORIGINATING PROCESS, PLEADINGS ETC – where the plaintiff was a manufacturer of joinery products and the defendant is a national retailer that sells, inter alia, joinery products – where the plaintiff has sued the defendant for damages for breach of contract – where the plaintiff has applied for leave to file and serve a second further amended claim and a second further amended statement of claim – where the defendant opposes leave on the basis that the proposed pleading does not does not plead all necessary material facts to establish the alleged causes of action and does not provide necessary particulars – where the main issues concern the sufficiency of the pleas of ostensible authority and damages – whether the plaintiff should be given leave to file and serve a second further amended claim and a second further amended statement of claim

Competition and Consumer Act 2010 (Cth), sch 2 s 237
Uniform Civil Procedure Rules 1999 (Qld), r 153

Agius v New South Wales [2001] NSWCA 371
Armagas Ltd v Mundogas SA [1986] 1 AC 717
Awad v Twin Creeks Properties Pty Ltd [2012] NSWCA 200
Bahr v Nicolay (No 2) (1988) 164 CLR 604; [1988] HCA 16
Baird v Magripilis (1925) 37 CLR 321; [1925] HCA 49
Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd (1975) 133 CLR 72; [1975] HCA 49
Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd [1985] 2 Lloyd's Rep 36
Foran v Wight (1989) 168 CLR 385; [1989] HCA 51
Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd [1964] 2 QB 480
Graham & Linda Huddy Nominees Pty Ltd v Byrne [2016] QSC 221
Kelly v Fraser [2013] 1 AC 450
Mango Boulevard Pty Ltd v Spencer [2009] QSC 389
Marks v GIO Australia Holding Ltd (1998) 196 CLR 494; [1998] HCA 69
Meridian Global Funds Management Asia Ltd v Securities Commission [1995] 2 AC 500
Northside Developments Pty Ltd v Registrar-General (1990) 170 CLR 146; [1998] HCA 69
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451; [2004] HCA 35
Sellars v Adelaide Petroleum NL; Poseidon Ltd v Adelaide Petroleum NL (1994) 179 CLR 332; [1994] HCA 4
Simmons v New South Wales Trustee and Guardian [2014] NSWCA 405
Wilh. Wilhelmsen Investments Pty Ltd v SSS Holdings Pty Ltd (2019) 285 IR 390

COUNSEL: P Zappia KC and N Condylis for the plaintiff
S Couper KC and P Nevard for the defendant

SOLICITORS: McLachlan Thorpe Partners for the plaintiff
King & Wood Mallesons for the defendant

An application for leave to amend

[1] The plaintiff has applied for leave to file and serve a second further amended claim and a second further amended statement of claim ('the proposed pleading')[1]. When the application was filed, trial dates had been set and the trial was imminent.

[2] The defendant opposed leave on the basis that "the Court should not grant leave to a plaintiff to amend a pleading where the proposed amended pleading does not plead all necessary material facts to establish the alleged causes of action and does not provide necessary particulars so that a defendant knows the case which it has to meet".[2] The defendant's opposition also referenced the fact that the proceeding had been set down for an imminent trial.[3] The trial dates were later vacated for reasons unconnected with this application.

[3] Ultimately, the defendant opposed leave "unless and until [the plaintiff] can plead a viable pleaded case with the requisite clarity to prevent surprise at trial".[4] The effect of that submission was that the plaintiff should not be allowed to progress the issues raised by the proposed pleading through the interlocutory steps to trial. A case must be "very clear indeed" to prevent a plaintiff submitting its case for determination by the court in the usual manner. For the purpose of determining this application, I have considered it appropriate to accept the truth of the allegations in the proposed pleading and the ranges of meaning which the assertions of fact in the proposed pleading are capable of bearing.[5]

Background matters

[4] The plaintiff, which is now subject to a Deed of Company Agreement, manufactured joinery products. Mr Birbilis was the plaintiff's managing director. The defendant is a national retailer which sells, inter alia, joinery products. The plaintiff has sued the defendant for damages for breach of contract. The alleged contract is a written agreement dated 16 October 2019, entitled "supply agreement" ('the contract'). An issue in dispute concerns whether the contract is binding upon the parties.

[5] The plaintiff's case may be relevantly outlined as follows. Up until the contract, the defendant is alleged to have acted through its employees Mr Michael Mazzarolo ('Mr Mazzarolo') and Mr George Latter ('Mr Latter'). The contract is alleged to have been executed by Mr Birbilis, for the plaintiff, and Mr Latter, for the

---

1 By 'the proposed pleading', I mean the version of the second further amended statement of claim attached to the plaintiff's reply submissions filed on 9 August 2023.
2 Defendant's outline of submissions [12].
3 Ibid [13].
4 Ibid [35].
5 *Simmons v New South Wales Trustee and Guardian* [2014] NSWCA 405, [200]; *Agius v New South Wales* [2001] NSWCA 371, [24].

defendant. At the time the contract was executed, Mr Mazzarolo's title within the defendant's organisation was "National In Home and Commercial Joinery Manager" and Mr Latter's title was "National Supply & Install Manager – In Home Services". Mr Birbilis dealt with Mr Mazzarolo and Mr Latter from 2016. From 16 August 2016 onwards, Mr Birbilis dealt with Mr Mazzarolo in his capacity as the defendant's head of a newly established commercial joinery business. Between in or about August 2017 and in or about October 2017, the defendant, including by Mr Latter, placed orders with the plaintiff for joinery products. By August 2019, discussions between Mr Birbilis and Mr Mazzarolo had commenced in respect of a long-term contract for the supply by the plaintiff of joinery products to the defendant. Mr Latter ultimately took carriage of negotiating the terms of the contract, with the knowledge and approval of Mr Mazzarolo. The contract was for ten years (with a five-year option) during which the defendant agreed to purchase from the plaintiff the greater of "at least 33 percent [of its national kitchen product budget] or $5 million dollars (excluding GST) per year of product". The parties performed the contract until in or about May 2021. The performance included the plaintiff expending monies to develop capacity and capability to meet the supply orders. On 7 May 2021, Mr Mazzarolo first raised an issue with the contract and its validity and advised Mr Birbilis by email to the effect that if the plaintiff wished to continue dealing with the defendant, the parties would have to enter into a new agreement. From 7 May 2021, the defendant did not place any further orders with the plaintiff, which subsequently went into administration.

[6] Following the exchange of written submissions, the predominant issues on this application concerned the sufficiency of the pleas of ostensible authority and damages. There are some further miscellaneous issues which I have dealt with at the end of these Reasons.

Ostensible authority

[7] Before considering the arguments, it is convenient to set out some principles concerning ostensible authority. A starting point is *Freeman & Lockyer v Buckhurst Park Properties (Mangal) Ltd* ('*Freeman & Lockyer*').[6] In that case, a director who had assumed the powers of managing director with the company's concurrence, though he was not appointed to that office, bound the company to a contract he entered on its behalf. The company was a property development company, and the contract was with a firm of architects. The act of engaging architects was considered to fall within the ordinary scope of the authority of the managing director of such a company.

[8] Diplock LJ went on to make the following classical statement:[7]

> "An 'apparent' or 'ostensible' authority, … is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the 'apparent' authority, so as to render the principal liable to perform any obligations imposed upon him by such contract. To the

---

6 [1964] 2 QB 480, 503.
7 Ibid 503.

> relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract".

[9] Diplock LJ made the following further observations:

> "The representation which creates 'apparent' authority may take a variety of forms of which the commonest is representation by conduct, that is, by permitting the agent to act in some way in the conduct of the principal's business with other persons. By so doing the principal represents to anyone who becomes aware that the agent is so acting that the agent has authority to enter on behalf of the principal into contracts with other persons of the kind which an agent so acting in the conduct of his principal's business has usually 'actual' authority to enter into".[8]
>
> "The commonest form of representation by a principal creating an 'apparent' authority of an agent is by conduct, namely, by permitting the agent to act in the management or conduct of the principal's business. Thus, if in the case of a company the board of directors who have 'actual' authority under the memorandum and articles of association to manage the company's business permit the agent to act in the management or conduct of the company's business, they thereby represent to all persons dealing with such agent that he has authority to enter on behalf of the corporation into contracts of a kind which an agent authorised to do acts of the kind which he is in fact permitted to do usually enters into in the ordinary course of such business."[9]

[10] The High Court has accepted that Diplock LJ's judgment in *Freeman & Lockyer* correctly states the law.[10]

[11] *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* ('*Crabtree*'),[11] involved an alleged contract of sale by the plaintiff to the defendant of a printing machine. The defendant was a company. The managing director of the defendant company was Bruce McWilliam Jnr. His father Bruce McWilliam Snr was chairman of directors. Another son of Bruce McWilliam Snr, Peter McWilliam, had been a director but resigned when he became bankrupt. The father and sons all engaged in the defendant's business. The alleged contract arose out of the acceptance of the defendant's order form which was headed with the defendant's name and at the bottom appeared the printed signature "B.McWilliam" followed by the word "per" and a line for a written signature. B McWilliam was

---

8 Ibid.

9 Ibid 505.

10 *Crabtree-Vickers Pty Ltd v Australian Direct Mail Advertising & Addressing Co Pty Ltd* (1975) 133 CLR 72; *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 159.

11 (1975) 133 CLR 72.

described as "public officer". The order form described the equipment and was signed after the word "per" by Peter McWilliam. The completed form was handed to the plaintiff's sales manager. At the trial, it was found that the brothers were the only fulltime executives of the defendant. It was further found that Peter's duties had not changed or diminished since his resignation, and he had been authorised to gather information concerning the buying of certain printing machines, but was not authorised to buy them. The decision to purchase a machine rested with the board, or at least with Bruce Snr, Bruce Jnr and Peter and no one had power to make a purchasing decision without the concurrence of Bruce Snr. The trial judge found that Peter had no ostensible authority to enter into the contract. That decision was affirmed by the High Court.

[12] The joint judgment[12] reasoned as follows:[13]

> "[The trial judge] implicitly found that the appellant believed that Peter McWilliam had actual authority to enter into the contract and there can be no doubt that that was so. He also found that in the circumstances the representation or holding out that Peter McWilliam had actual authority could not be made merely by Peter McWilliam himself … There are circumstances where the actual representation of authority may be made by the agent but in such cases it will be found that the relevant representation is made by the principal (or by the person to whom the principal has given actual authority) either by a previous course of dealing or by putting the agent in a position or by allowing him to act in a position from which it can be inferred that his actual representation of authority in himself is in fact correct. It is therefore always necessary to look at the conduct of the principal (or the person to whom he has actually delegated authority).
>
> …
>
> The finding of fact that only the board of directors or at least the three McWilliam men could make the decision to purchase the machine meant that Bruce McWilliam junior in this respect did not have actual authority to manage the business of the respondent either generally (because of this exception to his powers as managing director) or in respect of the matter to which the contract relates. He did not have actual authority to make the representation that Peter McWilliam had authority to do that act. To find that he did would involve the finding that neither Bruce McWilliam junior nor Peter McWilliam had authority to make the contract but that Bruce McWilliam junior had actual authority to represent that Peter McWilliam had authority to make the contract. In the absence of a finding of some ulterior purpose in the company such a finding could not be made. Bruce McWilliam junior being the managing director upon whom under the articles all powers of management could be conferred had, undoubtedly in our opinion, ostensible authority to make the contract. If with this ostensible authority he actually authorized Peter McWilliam to make the contract, there would have

---

12 Gibbs J, Mason J and Jacobs J.

13 (1975) 133 CLR 72, 78–80.

> been an exercise by him of ostensible authority, provided the appellant believed that the authority was being exercised by Bruce through Peter. Therefore, if with the managing director's actual authority, Peter McWilliam placed the order … there was weighty evidence upon which the appellant could conclude that Bruce McWilliam junior was exercising his ostensible authority as managing director … However, the finding that Bruce McWilliam junior did not give actual authority to Peter to sign the order in his name prevents a finding that the contract was made on the ostensible authority of the managing director.
>
> On the other hand, if the managing director had had actual authority to make the contract then in that position he had authority to hold out Peter McWilliam as having authority to make the contract. He would have had actual authority to manage the business of the company in the relevant respect and actual authority in such a position as managing director to represent that another officer of the company had authority to make the contract. The position of a managing director is not one where persons dealing with the company would regard his power to delegate as limited in respect of a contract to purchase machinery. But the finding of fact is that this particular managing director did not have power to manage the affairs of the respondent generally (because of the limitation on his power) or in respect of the purchase of this machinery. He therefore had no authority to make the representation which would give Peter McWilliam ostensible authority, In other words, a person with no actual, but only ostensible, authority to do an act or to make a representation cannot make a representation which may be relied on as giving a further agent an ostensible authority. Hence the stress by Diplock L.J, on the need that the person or persons making the representation must have actual authority to make the representation."

[13] In *Crabtree*, the High Court emphasised that the outcome of that case turned on the findings of fact made by the trial judge. Relevantly, the joint judgment observed:[14]

> "The result turns on particular findings of fact. First there was a finding that the managing director did not have full powers of management and secondly there is the finding that the contract was not made by him or with his actual assent and knowledge. The question then became whether Peter McWilliam, not being the managing director, or being one who could be regarded as having the general management of the company, had been held out by the company as having authority to make a contract of such magnitude and the conclusion upon this was adverse to the vendor. No previous course of dealing either with or known to the appellant support any apparent authority in Peter McWilliam and the size of the contract in relation to the known size and financial condition of the respondent required at least that the appellant deal with the general management of the company."

---

14 Ibid 81.

[14] In *Pacific Carriers Ltd v BNP Paribas*,[15] the High Court observed:

> "[36] ... Where an officer is held out by a company as having authority, and the third party relies on that apparent authority, and there is nothing in the company's constitution to the contrary, the company is bound by its representation of authority. 'The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract.' It is not enough that the representation should come from the officer alone. Whether the representation is general, or related specifically to the particular transaction, it must come from the principal, the company. That does not mean that the conduct of the officer is irrelevant to the representation, but the company's conduct must be the source of the representation. In many cases the representational conduct commonly takes the form of the setting up of an organisational structure consistent with the company's constitution. That structure presents to outsiders a complex of appearances as to authority. The assurance with which outsiders deal with a company is more often than not based, not upon inquiry, or positive statement, but upon an assumption that company officers have the authority that people in their respective positions would ordinarily be expected to have. In the ordinary case, however, it is necessary, in order to decide whether there has been a holding out by a principal, to consider the principal's conduct as a whole.
>
> ....
>
> [38] A kind of representation that often arises in business dealings is one which flows from equipping an officer of a company with a certain title, status and facilities. ..." (footnotes omitted)

[15] In *Armagas Ltd v Mundogas SA*,[16] a company which appointed a person to the position of "chartering manager and vice president" and then allowed him to act as such in the conduct of its business, was found to have relevantly represented that the person had such authority to bind the principal to a contract which a person in that position usually had.[17] Robert Goff LJ observed:[18]

> "… no doubt that ostensible authority would embrace the making of such representations concerning the subject matter of any such contract as might reasonably be understood to fall within such usual authority."

---

15 (2004) 218 CLR 451, 466 [36] and [38] per the Court (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

16 [1986] 1 AC 717, 732.

17 Ibid 733.

18 Ibid 732.

[16] A representation establishing an ostensible authority usually occurs in one of three ways. The representation may be express (whether oral or written), implied from a course of dealing or inferred from "permitting the agent to act in some way in the conduct of the principal's business with other persons".[19] The holding out or course of conduct may involve broader conduct or circumstances than merely describing the agent as holding a position, title or office. Where the course of conduct or holding out is not limited to the circumstance of the agent holding a position, title or office, the authority normally found in the holder of the position, title or office will be material but is to be looked at as part and parcel of the whole course of conduct. Ultimately, the question is whether, in all of the circumstances, there has been a holding out of the agent as possessing the necessary authority.[20] The totality of the principal's conduct, which may involve significant passive elements, then falls to be considered.[21]

[17] The plaintiff submitted that the proposed pleading founded three cases of ostensible authority. I have dealt with each case in turn.

The first case

[18] The first case is that Mr Mazzarolo had actual authority to make representations as to who from the defendant had authority to enter the contract. Mr Mazzarolo is said to have had actual authority to make a representation that Mr Latter was authorised by the defendant to enter the contract. The plaintiff submits that a person with actual authority can make a representation about another person's authority and thereby clothe that person with ostensible authority. It contends that it was entitled to rely upon the representation made by Mr Mazzarolo because he was the person with actual authority to manage that part of the defendant's business to which the contract related.

[19] As regards the first case, the proposed pleading relevantly contains the following material allegations:

> "17. On about 2 August 2019, Mr Birbilis and Mr Mazzarolo discussed the plaintiff entering into a long-term supply arrangement with the defendant (August 2019 Discussion).
>
> …
>
> 18. During the August 2019 Discussion:
>
> (a) Mr Birbilis indicated to Mr Mazzarolo that the plaintiff wanted a long-term supply agreement with the defendant under which the plaintiff would supply the defendant with an agreed amount of Products each year and generate a defined margin above costs on those orders;
>
> (b) Mr Mazzarolo said he supported the defendant entering into a long term supply agreement with the plaintiff,

---

19 Francis Reynolds and Peter George Watts, *Bowstead & Reynolds on Agency* (Sweet and Maxwell, 22nd ed, 2020) [8-013].

20 Ibid [20.21].

21 Ibid [201.18].

provided the plaintiff moved to a nested base manufacturing process and adopted, Cabinet Vision, a software program used by the defendant which would better facilitate orders for supply of Products to be placed and met; and

(c) Mr Birbilis said the plaintiff was prepared to adopt the Cabinet Vision software and to acquire the machinery necessary for the plaintiff to transition to a nested based manufacturing process, provided the term of the supply agreement covered the projected lifespan of the new machinery.

19. During the August 2019 Discussion:

(a) Mr Birbilis asked Mr Mazzarolo whom he should deal with about the proposed long-term supply agreement with the defendant; and

(b) Mr Mazzarolo told Mr Birbilis to speak with Mr Latter and negotiate the terms of the proposed long-term supply agreement with Mr Latter (Authority Representation).

…

20. During the August 2019 Discussion, and prior to about 7 May 20212, Mr Mazzarolo did *not* inform Mr Birbilis that Mr Latter did not have authority to negotiate and commit the defendant to a long-term supply agreement with the plaintiff, or that his authority to do so was in any way limited (the Authority Omission)."

[20] Those allegations are made against the background of these earlier allegations:

"3. Michael Mazzarolo (Mr Mazzarolo):

(a) was at all material times employed by the defendant;

(b) in the course of his employment by the defendant, had the following titles:

…

(ii) between (at least) February 2017 and November 2019, 'National In Home and Commercial Joinery Manager';

…

(c) was at all material times responsible for managing the national Commercial Joinery Business;

…

(e) in his role as national manager of the defendant's Commercial Joinery Business, was responsible for

sourcing and engaging suppliers of Products to the defendant;

…

(f) in his role as national manager of the defendant's Commercial Joinery Business, had the defendant's authority, by reason of the matters alleged in (a) to (e) above, to enter into contracts and commitments on the defendant's behalf for supply of Products to the defendant;

(g) in his role as national manager of the defendant's Commercial Joinery Business, had the defendant's authority, by reason of the matters alleged in (a) to (e) above, to authorise other employees of the defendant to enter into contracts and commitments on the defendant's behalf for the supply of Products to the defendant;

(h) in his role as national manager of the defendant's Commercial Joinery Business, had the defendant's authority, by reason of the matters alleged in (a) to (e) above to make representations to the plaintiff as to which persons were authorised to execute contracts on behalf of the defendant for the supply of Products by the plaintiff to the defendant."

[21] Paragraph 35(v) then repeats the allegation that Mr Mazzarolo held a senior position with the defendant's commercial joinery business which included sourcing suppliers of products for that business and references paragraph 3.

[22] There is no complaint about the pleading of what is styled "the Authority Representation". There is also no complaint about paragraphs 3(b), (g) and (h). By reason of those paragraphs, read together with paragraph 35(v), there is a sufficiently clear pleading that, in his role as "National In Home and Commercial Joinery Manager", Mr Mazzarolo had actual authority to authorise Mr Latter to execute the contract. In relation to the actual authority of Mr Mazzarolo, the plaintiff has alleged everything which it might reasonably be expected to allege. It is difficult to discern how the defendant is placed in a position of real embarrassment or disadvantage by an allegation to the effect that, in his role with the defendant, Mr Mazzarolo was responsible for engaging suppliers. In that regard, in *Freeman & Lockyer*,[22] Diplock LJ said:

> "An 'actual' authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties. Its scope is to be ascertained by applying ordinary principles of construction of contracts, including any proper implications from the express words used, the usages of the trade, or the course of business between the parties. To this agreement the contractor is a stranger; he may be totally ignorant of the existence of any authority on the part of the agent. Nevertheless, if the agent does enter into a

22 [1964] 2 QB 480, 502.

contract pursuant to the 'actual' authority, it does create contractual rights and liabilities between the principal and the contractor."

The second case

[23] The second case is premised on the allegation that Mr Mazzarolo had ostensible authority to make a representation as to who had authority to enter the contract on behalf of the defendant.[23] That case arises out of paragraphs 5 to 16. To the extent they are material, those paragraphs make these allegations:

> "…
>
> 6. On 16 August 2016, Mr Mazzarolo represented to Mr Birbilis that (August 2016 Representations):
>
> (a) Mr Mazzarolo was in charge of the defendant's newly established Commercial Joinery Business;
>
> (b) Mr Mazzarolo was managing and supervising 160-170 trade sales representatives and other employees of the defendant who were selling Products to project builders, commercial tradespeople, and persons in the housing industry;
>
> (c) Mr Mazzarolo was in charge of sourcing and securing suppliers of Products for the defendant;
>
> (d) sales in the defendant's Commercial Joinery Business could potentially surpass the defendant's retail joinery sales of more than $400 million per annum;
>
> (e) Mr Mazzarolo wanted the plaintiff to supply Products to the defendant; and
>
> (f) the defendant would consider the plaintiff as a potential supplier of Products for its Commercial Joinery Business.
>
> …
>
> 7. On 21 September 2016, Mr Mazzarolo, Mr Latter, and an employee of the defendant named Simon Worthington, attended the plaintiff's factory in Crestmead, and inspected it for the purposes of ascertaining the plaintiff's manufacturing processes and capacity to supply Products to the defendant (Factory Visit).
>
> …
>
> 8. During the Factory Visit, Mr Mazzarolo, in the presence of Mr Latter and Mr Worthington, represented to Mr Birbilis that (Factory Representations):

---

23 *Wilh. Wilhelmsen Investments Pty Ltd v SSS Holdings Pty Ltd* (2019) 285 IR 390, 405 [85]; *Kelly v Fraser* [2013] 1 AC 450, 459–460 [13]–[16]; *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd* [1985] 2 Lloyd's Rep 36, 43.

(a) Mr Mazzarolo was in charge of the defendant's Commercial Joinery Business;

(b) Mr Mazzarolo wanted the plaintiff to supply Products to the defendant for its Commercial Joinery Business;

(c) Mr Latter worked under Mr Mazzarolo;

(d) Mr Mazzarolo would like Mr Birbilis to build a relationship with Mr Latter as they would be working together moving forward;

(e) Mr Mazzarolo wanted the plaintiff to provide a quote to the defendant to supply it Products for a large project in Wollongong, New South Wales;

(f) Mr Mazzarolo expected that by February 2017, the defendant would be placing orders with the plaintiff for the supply of Products for 20 to 50 dwellings per month; and

(g) the plaintiff could share information concerning the defendant's sales volumes with suppliers of raw materials to enable the plaintiff to obtain the best pricing for raw materials used in manufacturing Products.

…

9. Between about 23 August 2016 and 11 December 2017:

…

(d) Mr Mazzarolo and Mr Latter negotiated 'Trade Packs' containing the defendant's terms of purchase and supply with Mr Birbilis to be executed by the plaintiff for the purpose of enabling the plaintiff to be a supplier of Products to the defendant;

…

10. In the circumstances pleaded at paragraph 9:

(a) the plaintiff provided the defendant with quotes for the supply of Products ….

…

(b) the defendant placed orders with the plaintiff for the supply of Products;

…

(c) the plaintiff provided the defendant with invoices for the supply of Products ….

(d) the defendant paid the invoices alleged at subparagraph (c) above.

…

13. Mr Mazzarolo participated in the conduct pleaded at paragraphs 6 to 10 above;

    (a) in the course of his employment by the defendant;

    (b) as part of his role and responsibilities as national manager of the defendant's Commercial Joinery Business; and

    (c) on behalf of the defendant, as its representative.

    …

14. Mr Latter participated in the conduct pleaded at paragraphs 7 to 10 above:

    (a) in the course of his employment by the defendant;

    (b) as part of his roles and responsibilities within the defendant's Commercial Joinery Business; and

    (c) on behalf of the defendant, as its representative.

    …

15. In the circumstances pleaded in paragraphs 6 to 14 above, a course of dealing was established between the plaintiff and the defendant, whereby:

    (a) the defendant, via employees of its Commercial Joinery Business, including Mr Mazzarolo, [and] Mr Latter … , requested the plaintiff to quote for the supply of Products on particular projects;

    (b) Mr Birbilis and employees of the defendant's Commercial Joinery Business, including Mr Mazzarolo, [and] Mr Latter … , would communicate about the terms on which the plaintiff would quote for the supply of Products to the defendant; and

    (c) where the plaintiffs quote was successful, the plaintiff supplied Products to the defendant for its projects, rendered invoices on a costs-plus basis, and received payment from the defendant.

16. In the circumstances pleaded in paragraphs 5 to 15 above, at all material times Mr Birbilis reasonably believed that Mr Mazzarolo;

    (a) managed and oversaw the defendant's national Commercial Joinery Business;

    (b) managed and supervised employees of the defendant's Commercial Joinery Business, including Mr Latter who reported to Mr Mazzarolo;

(c) was in charge of sourcing and securing suppliers for the supply of Products to the defendant for its national Commercial Joinery Business;

(d) was authorised by the defendant to enter into contracts with suppliers on the defendant's behalf for supply of Products to the defendant;

(e) was authorised by the defendant to authorise personnel whom he supervised and managed to enter into contracts with suppliers on the defendant's behalf for supply of Products to the defendant;

(f) was authorised by the defendant to make representations to the plaintiff as to which persons were authorised to execute contracts on behalf of the defendant for the supply of Products by the plaintiff to the defendant including the representation alleged in paragraph 19(b) below."

[24] Paragraph 35(v) adds these particulars:

> "Mr Mazzarolo held and was held out by the defendant as holding a senior position with the defendant's Commercial Joinery Business which position including sourcing suppliers of Products for the defendant's Commercial Joinery Business as pleaded at paragraphs 3,6,7,8,9,10,11,13,15,16,17, and 18 above. During 2019, when it came time for the defendant to enter into a supply agreement with the plaintiff, Mr Mazzarolo as a senior representative of the defendant made the authority representation alleged in paragraph 19(b) hereof and thereafter knowingly permitted Mr Latter to negotiate and execute the Supply agreement on behalf of the defendant. Further, having made the authority representation Mr Mazzarolo did not at any time prior to the execution of the Supply Agreement withdraw the authority representation."

[25] With reference to paragraph 35, the defendant styled the pleading of ostensible authority as containing a "bare conclusion … and a series of particulars".[24] The proposed pleading was criticised because it "[did] not … plead representations of [the defendant], upon which [the plaintiff] relies".[25] That submission did not have adequate regard to paragraphs 5 to 16 of the proposed pleading which plead a series of representations and omissions made during a course of dealing involving the plaintiff and the defendant and Mr Birbilis' reasonable belief about Mr Mazzarolo based on that course of dealing and those representations.

[26] The defendant complains that merely to allege that Mr Mazzarolo had ostensible authority to make a representation that Mr Latter had authority "is not a means by which ostensible authority of Mr Latter can be established".[26] That complaint does not fairly encapsulate the second case as pleaded. The pleading of the second case

---

24 Defendant's outline of submissions [27].
25 Ibid [32].
26 Defendant's outline of submissions [34(b)].

includes a clearly identified previous course of dealing which included Mr Mazzarolo participating "as part of his role and responsibilities as national manager of the defendant's commercial joinery business".[27] It may also be observed in relation to the second case, that the proposed pleading is not constrained by any concession to the effect that Mr Mazzarolo lacked actual authority.

[27] In *Crabtree*, the joint judgment observed:[28]

> "There are circumstances where the actual representation of authority may be made by the agent but in such cases it will be found that the relevant representation is made by the principal (or by the person to whom the principal has given actual authority) either by a previous course of dealing or by putting the agent in a position or by allowing him to act in a position from which it can be inferred that his actual representation of authority in himself is in fact correct. It is therefore always necessary to look at the conduct of the principal (or the person to whom he has actually delegated authority)."

[28] Fundamentally, the plaintiff contends that where the circumstances involve a course of dealing with a person with ostensible authority, who participated in the course of dealing as part of his role and responsibilities, it is at least arguable that the person with ostensible authority can make a representation as to another person's authority and thereby clothe that person with ostensible authority. The plaintiff cites *Egyptian International Foreign Trade Co v Soplex Wholesale Supplies Ltd* ('*Egyptian International*'),[29] where Browne-Wilkinson LJ relevantly said:

> "It is obviously correct that an agent who has no actual or apparent authority either (a) to enter into a transaction or (b) to make representations as to the transaction cannot hold himself out as having authority to enter into the transaction so as to effect the principal's position. But, suppose a company confers actual or apparent authority on X to make representations and X erroneously represents to a third party that Y has authority to enter into a transaction: why should not such a representation be relied upon as part of the holding out of Y by the company? By parity of reasoning, if a company confers actual or apparent authority on A to make representations on the company's behalf but no actual authority on A to enter into the specific transaction, why should a representation made by A as to his authority not be capable of being relied on as one of the acts of holding out. There is substantial authority that it can be …"

[29] On the basis of the statements in *Crabtree* and *Egyptian International*, the plaintiff's contention is arguable and open on the pleaded facts. The second case as pleaded should be allowed to proceed to trial.

---

27 Proposed pleading [13(b)].
28 (1975) 133 CLR 72, 78-80.
29 [1985] 2 Lloyd's Rep 36, 43.

The third case

[30] The third case is to the effect that the defendant, in all the circumstances, held out Mr Latter as having ostensible authority to enter the contract. There is no dispute that bestowing a title on an employee and permitting the employee to make representations may constitute representations by the principal.[30] The defendant's essential complaint is that the proposed pleading does not "plead representations of [the defendant] upon which [the plaintiff] relied.[31] That complaint involves an unnecessarily narrow reading of paragraph 35 of the proposed pleading. When regard is had to paragraphs 35(i), (vi), (viii), (ix), read together with paragraph 36, it is tolerably clear that the plaintiff's case is that the representations upon which it relied involved the defendant bestowing a title on Mr Latter which ordinarily carried with it authority to enter into agreements and thereafter permitting him to conduct negotiations with the plaintiff.

The further complaints directed to paragraphs 35 and 36

[31] At paragraph 35 of the proposed pleading, the plaintiff alleges that the defendant held out to the plaintiff that Mr Latter was authorised to negotiate and enter into the contract. Extensive particulars of that allegation are provided as follows:

> "i. Mr Latter occupied a position within the defendant that ordinarily carried with it the authority to enter into agreements on behalf of the defendant with suppliers of Products such as the plaintiff.
>
> ii. The plaintiff refers to the factory visit alleged in paragraph 7 hereof during which Mr Latter as a representative of the defendant attended with other senior employees of the defendant to inspect the plaintiff's factory for the purpose of ascertaining whether the plaintiff would be able to supply Products to the defendant.
>
> iii. The plaintiff refers to the factory representations alleged in paragraph 8 in which Mr Mazzarolo represented to Mr Birbilis that he should build a relationship with Mr Latter as they would be working together moving forward.
>
> iv. Further, commencing during 2017, the plaintiff and defendant contracted for the supply of Product by the plaintiff to the defendant, in the circumstances pleaded at paragraphs 9 to 10 above. Those circumstances included the defendant permitting Mr Latter as its representative to negotiate 'Trade Packs' on behalf of the defendant with Mr Birbilis by which the plaintiff was retained as a supplier of Products to the defendant. They also included the defendant permitting Mr Latter as its representative to negotiate and enter into contracts on behalf of the defendant for the supply of Products by the plaintiff to the defendant.

---

30 Refer to defendant's outline of submissions [32]; Plaintiff's outline of submissions in reply [13(a)].

31 Defendant's outline of submissions [32].

v. Mr Mazzarolo held and was held out by the defendant as holding a senior position with the defendant's Commercial Joinery Business which position including sourcing suppliers of Products for the defendant's Commercial Joinery Business as pleaded at paragraphs 3,6,7,8,9,10,11,13,15,16,17, and 18 above. During 2019, when it came time for the defendant to enter into a supply agreement with the plaintiff, Mr Mazzarolo as a senior representative of the defendant made the authority representation alleged in paragraph 19(b) hereof and thereafter knowingly permitted Mr Latter to negotiate and execute the Supply agreement on behalf of the defendant. Further, having made the authority representation Mr Mazzarolo did not at any time prior to the execution of the Supply Agreement withdraw the authority representation.

vi. At the Supply Agreement meeting held at the defendant's offices Mr Latter, in circumstances where he had been permitted by the defendant to negotiate the terms of Supply Agreement, made the representations alleged in paragraphs 30(d) and (e), hereof to Mr Birbilis.

vii. That the plaintiff was desirous of a supply agreement and that Mr Latter was negotiating a supply agreement on the defendant's behalf was known to at least Mr Mazzarolo and Mr Hayes, in the circumstances pleaded at paragraphs 26-27 above.

viii. Execution of the Supply Agreement occurred at the defendant's premises, in the circumstances pleaded at paragraphs 29-30 above.

ix. Neither Mr Mazzarolo, Mr Hayes or any other person on behalf of the defendant told Mr Birbilis or any other person on behalf of the plaintiff prior to the execution of the Supply Agreement that Mr Latter did not have authority to enter into the Supply Agreement on behalf of the defendant or about any limits concerning Mr Latter's authority to do so or that if the plaintiff wished to enter into a supply agreement with the defendant such an agreement would require director approval."

[32] The defendant made detailed submissions as to "difficulties with the particulars to paragraph 35" of the proposed pleading.[32] Those submissions tended to construe the particulars in isolation from other paragraphs of the proposed pleading. I deal with those submissions as follows:

(a) A complaint was made that paragraph 35(i) left the defendant to guess as to which position occupied by Mr Latter was said to ordinarily carry with it the relevant authority. That complaint should be rejected as paragraph 35(i), read with paragraph 4(m), is referencing Mr Latter's position as National Supply & Install Manager.

---

32 Defendant's outline of submissions [34].

(b) A complaint was made that paragraph 35(i) did not identify when, how and by whom the position was "represented" to the plaintiff. That complaint is based upon a misconstruction of paragraph 35(i) which involves the discrete allegation that Mr Latter occupied a relevant position within the defendant, which ordinarily carried with it authority of a certain kind.

(c) A complaint was made that paragraph 35(i) did not disclose "the facts by which" the position ordinarily carried with it the alleged authority. That complaint is essentially concerned with matters for evidence.

(d) A complaint was made that paragraph 35(iv) fails to "specify the facts by which [the defendant] (as principal) allegedly 'permitted' Mr Latter to 'negotiate "Trade Packs" on behalf of the defendant' and 'negotiate and enter into contracts on behalf of the defendant for the supply of products by the plaintiff'. It is tolerably clear that the alleged permission was either an express or implied permission given by Mr Mazzarolo. In that regard, earlier paragraphs of the proposed pleading allege that during a factory visit, Mr Mazzarolo, in the presence of Mr Latter relevantly represented to Mr Birbilis that Mr Mazzarolo wanted the plaintiff to supply products to the defendant for its commercial joinery business and wished for Mr Birbilis to build a relationship with Mr Latter as they would be working together. To the extent that a similar complaint was directed to paragraph 35(vi), I deal with that complaint in the same way.

(e) A complaint was made that paragraph 35(vii) "appears to be an irrelevant allegation". However, this particular clarifies that Mr Mazzarolo and Mr Hayes are alleged to have known that the plaintiff desired to enter into a supply agreement and that Mr Latter was negotiating the contract on the defendant's behalf. The particular cannot be said to be irrelevant in circumstances where the plaintiff elsewhere alleges that Mr Mazzarolo, after having made the authority representation, knowingly permitted Mr Latter to negotiate and execute the contract on behalf of the defendant.

(f) A complaint was made that paragraph 35 (viii) does not "identify any basis upon which convening the so-called 'Supply Agreement Meeting" at offices of the [defendant] was a representation made by [the defendant] or a person duly authorised thereby". The complaint involves a misconstruction of the paragraph which makes no allegation of a representation made by convening the Supply Agreement Meeting but merely identifies that the contract is alleged to have been executed at the defendant's premises during the Supply Agreement Meeting.

(g) A complaint was made that paragraph 35(ix) does not identify any representation made by the defendant or someone authorised by it. The complaint involves a misconstruction of the paragraph which does not seek to make an allegation of a representation but rather to make clear that the plaintiff's case includes the allegation that it was never advised prior to the execution of the contract that Mr Latter did not have authority to enter into the contract or as to the limits of any authority held by Mr Latter in relation to the contract.

[33] The defendant submitted that the plea of reliance as contained in paragraph 36, was inadequate because it comprised a simple reference to reliance upon "the matters

pleaded at paragraph 35…". It may be accepted that reliance is an important requirement of any claim based upon ostensible authority. The defendant described paragraph 35 as "pivotal" and submitted that "in order to avoid surprise and thus prejudice to [the defendant] at trial, the material facts underpinning the allegation in paragraph 35 ought to be pleaded with clarity and precision".[33] I do not accept that there is any material inadequacy in the way that reliance has been pleaded and particularised. The particulars to paragraph 35 make express reference to the authority representation and earlier paragraphs of the proposed pleading,[34] all of which constitute the material facts underpinning the allegations in paragraph 35.

Damages

[34] The paragraphs of the proposed pleading concerned with loss and damage may be set out as follows:

> "98. By reason of the defendant's breach of the Supply Agreement, the plaintiff lost the financial benefit of the Supply Agreement being performed according to its terms.
>
> 99. In the circumstances pleaded at paragraphs 81-82 the plaintiff has suffered loss and damage of (at least) $19 million (ex GST).
>
> ….
>
> 100. Further or alternatively to paragraph 99 above:
>
> (a) in the circumstances pleaded at paragraphs 52 and 62 hereof Mr Mazzarolo's First Annual Budget Representations, and/or Mr Latter's repetition and confirmation of those representations, had the effect of informing the plaintiff of the national budget for Products for the purposes of clause 6(d) of the Supply Agreement;
>
> (b) the First Annual Budget Representations for the period October 2019 to October 2020 was $50 million;
>
> (c) for the purposes of clause 6(d) of the Supply agreement, the First Annual Budget Representations reflected the defendant purchasing Products valued at $15 million from the plaintiff;
>
> ….
>
> (d) the value of Products pleaded at sub-paragraph (c) is greater than $5million (ex GST);
>
> (e) pursuant to clause 6(d) of the Supply Agreement, the plaintiff was entitled to receive the greater amount; and

---

33 Defendant's outline of submissions [26].

34 Proposed pleading [35] particular (v) references paragraphs 3, 6, 7, 8, 9, 10, 11, 13, 15, 16, 17 and 18.

(f) in the circumstances, during the first year following the Commencement Date of the Supply Agreement, the plaintiff has suffered loss and damage of $5.7 million (ex GST).

101. Further or alternatively to paragraph 100 above:

(a) in the circumstances pleaded at paragraph 38 above, the Supply Agreement entitled the plaintiff to receive 33% of the defendant's national budget for Products, in respect of which it was entitled to make a margin of 38 per cent above costs;

(b) the defendant informed the plaintiff about its national budget for Products for the periods October 2019 to 2020, October 2020 to 2021, October 2021 to 2022, October 2022 to 2023, and October 2023 to 2024 in the circumstances pleaded (and claimed) at paragraphs 52 and/or 62 above;

(c) in the circumstances pleaded at paragraphs 52 and/or 62 above, the defendant informed the plaintiff that its national budget for Products for the October 2019 to October 2020 was $50 million, October 2020 to 2021 was $75 million, October 2021 to 2022 was $150 million and October 2022 to October 2023 was $230 million;

(d) for the purposes of clause 6(d) of the Supply agreement, the matters pleaded at sub-paragraph (c) reflected the defendant purchasing Products from the plaintiff valued at:

(i) $15 million for the first year,

(ii) $25 million for the second year;

(iii) $50 million for the third year;

(iv) $75 million for the fourth year;

(v) 33 per cent of the defendant's national budget for the Products (ex GST) for each year until 16 October 2029; and

(vi) Alternatively to (v), 33 per cent of the defendant's national budget for the Products (ex GST) for each year until 16 October 2034.

(e) the value of Products pleaded at sub-paragraph (d) is greater than $5 million (ex GST);

(f) pursuant to clause 6(d) of the Supply Agreement, the plaintiff was entitled to receive the greater amount; and

(g) in the circumstances, during the first to fourth years following the Commencement Date of the Supply

Agreement, the plaintiff has suffered loss and damage of (at least) $62.7 million (ex GST).

….

102. Alternatively to paragraph 101 above:

(a) in the circumstances pleaded at paragraph 39 above, the Supply Agreement required the defendant to do all such things as were reasonably necessary to enable the plaintiff to have the benefit of the Supply Agreement, and was obliged to act in good faith and act fairly when dealing with the plaintiff;

(b) those obligations required the defendant to inform the plaintiff of its customer national budget for Product for the purposes of clause 6(d) of the Supply Agreement; and

(c) the best information about the defendant's customer national budget for Product for the purposes of clause 6(d) of the Supply Agreement that is presently available to the plaintiff, is that pleaded at paragraph 101 above.

103. By reason of the defendant's breach of the Supply Agreement the plaintiff entered administration and became the subject of a deed of company arrangement, under the provisions of the *Corporations Act 2001* (Cth) with a consequential inability to continue in business. …"

[35] The defendant submitted that several aspects of the damages pleading were deficient and likely to cause surprise at trial.

[36] The first complaint was to the effect that the plaintiff had pleaded that it "lost the financial benefit" of the contract "being performed according to its terms" but had not pleaded any material facts capable of establishing that it would have performed the contract but for the defendant's breach.[35] This first complaint did not engage with r 153 of the *Uniform Civil Procedure Rules 1999* (Qld) ('the UCPR') which is in the following terms:

"**153 Condition precedent**

(1) An allegation of the performance or occurrence of a condition precedent necessary for the case of a party is implied in the party's pleading.

(2) A party who denies the performance or occurrence of a condition precedent must specifically plead the denial."

[37] Rule 153 has been described as a rule which "avoids the necessity for a plaintiff to expressly allege the satisfaction or performance of all conditions precedent".[36] In

---

35 See, by way of example, defendant's outline of submissions [38], [42] and [43].

36 *Mango Boulevard Pty Ltd v Spencer* [2009] QSC 389, [66].

Foran v Wight,[37] Mason CJ explained the requirement that a plaintiff be ready and willing to perform a contract in the following way:

> "Properly understood, the English and Australian cases … support the view that the readiness and willingness requirement goes to the existence of the plaintiff's cause of action. … Absent proof of readiness and willingness, the plaintiff had no cause of action. The prevailing rules and forms of common law pleading in the eighteenth and nineteenth centuries, which necessarily reflected the principles of substantive law as applied by the courts, demonstrated that the courts treated readiness and willingness as being material to the existence of the plaintiff's cause of action. The plaintiff was required to aver in his declaration the material elements in his cause of action. These elements included satisfaction or performance of all conditions precedent. Thus the plaintiff was required to aver performance of any condition precedent to, or concurrent with, performance of the defendant's promise. Just as the plaintiff was required to plead and prove readiness and willingness in a suit for specific performance, so at common law he had to plead and prove that he was ready and willing in an action for damages for breach of contract. It followed that proof that the plaintiff was ready and willing to perform his obligation on which performance of the defendant's promise was expressed to be conditioned was regarded as being essential to the plaintiff's cause of action."

[38] That a plaintiff was ready and willing to perform a contract, is properly regarded as a condition precedent to an entitlement specific performance or damages for breach of contract. For the purpose of r 153 of the UCPR, it is accepted that a party claiming specific performance of a contract does not need to plead the condition that it was ready and willing to perform.[38] As a matter of principle, there is no reason why the position should be any different where the party sues for damages rather than specific performance. It is up to the defendant to deny the implied allegation of fulfillment of the condition precedent in its defence.[39]

[39] The second complaint is to the effect that the claim for loss and damage includes a claim in respect of a five-year option period which was said to involve a loss of opportunity claim. The defendant submits that the plaintiff has not complied with the pleading requirements for a loss of opportunity claim as outlined by Jackson J in the following passage in *Graham & Linda Huddy Nominees Pty Ltd v Byrne* ('*Huddy*'):[40]

> "First, it is necessary for a plaintiff who alleges loss of a valuable commercial opportunity to plead that the loss it has suffered is a loss of a valuable commercial opportunity, identifying the opportunity with some particularity. Second, it is also necessary that the plaintiff pleads what it would have done, where what the

---

37 (1989) 168 CLR 385, 401–2.

38 *Baird v Magripilis* (1925) 37 CLR 321, 330–331; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604, 620, 641 and 659.

39 *Baird v Magripilis* (1925) 37 CLR 321, 331.

40 [2016] QSC 221, [50].

> plaintiff would have done if the defendant had not been in breach of duty is a necessary causal condition to deciding factual causation. Third, it is necessary for a plaintiff who alleges such a loss to plead the percentage or proportion of the opportunity that was lost, in assessing value on the possibilities, in order to plead the amount of the damages claimed, as is specifically required. Fourth, where a plaintiff alleges a loss of a 100 per cent possibility or the certainty that they would have obtained the hoped for or expected benefit under a transaction which did not occur, it is to be expected that the plaintiff will allege with some particularity the facts by which that certain outcome would have been achieved."

[40] It is necessary to recall what type of claim constitutes a "loss of opportunity claim". In *Sellars v Adelaide Petroleum NL* ('*Sellars*'),[41] the joint judgment[42] observed:

> "In the realm of contract law, the loss of a chance to win a prize in a competition resulting from breach of a contract to provide the chance is compensable, notwithstanding that, on the balance of probabilities, it is more likely than not that the plaintiff would not win the competition. As the contract contained a promise to provide the chance, the breach of the contract resulted in the loss of the chance and that loss was for relevant purposes an actual loss, in the sense in which Dixon and McTiernan JJ. used that expression in *Fink v. Fink.* And, where there has been an actual loss of some sort, the common law does not permit difficulties of estimating the loss in money to defeat an award of damages. The damages will then be ascertained by reference to the degree of probabilities, or possibilities, inherent in the plaintiffs succeeding had the plaintiff been given the chance which the contract promised …
>
> … And there can be no doubt that a contract to provide a commercial advantage or opportunity, if breached, enables the innocent party to bring an action for damages for the loss of that advantage or opportunity. So in the *Commonwealth v Ammann Aviation Pty Ltd*, Mason CJ and Dawson J, Brennan J and Deane J concluded that a lost commercial advantage or opportunity was a compensable loss, even though there was a less than 50% likelihood that the commercial advantage would be realized."

[41] Later in *Sellars*, Brennan J observed:[43]

> "The cases where a plaintiff seeks damages only for breach of a contractual promise to afford the plaintiff an opportunity to acquire a benefit are in a different category from cases under s 82(1) and cases in tort where damage is the gist of the cause of action. In a case like *Chaplin v Hicks* the relevant loss is identified by the contractual promise to afford the plaintiff an opportunity to acquire a benefit or to avoid a detriment. A breach of the promise to afford that opportunity *necessarily* establishes that the loss flows from the

---

41 *Sellars v Adelaide Petroleum NL; Poseidon Ltd v Adelaide Petroleum NL* (1994) 179 CLR 332, 349.
42 Mason CJ, Dawson, Toohey and Gaudron JJ.
43 Ibid 359.

> breach. In contract cases, a plaintiff may be entitled to nominal damages for loss of the opportunity promised even though the plaintiff fails to prove what, if any, value performance of the unfulfilled promise would have had. But in cases arising under s 82(1) of the Act, as in cases of tort where damage is the gist of the action, a lost opportunity may or may not constitute compensable loss or damage. In such cases, *the existence and causation* of a compensable loss cannot be proved by reference to an antecedent promise to afford an opportunity."

[42] The plaintiff places much reliance upon *Huddy* which concerned a failed proposed acquisition by the plaintiffs of a property. The plaintiff sued their solicitor in negligence and for breach of a contractual of duty of care in connection with negotiations to purchase the property. It was alleged that by reason of the wrong doing, the plaintiffs had suffered a "lost opportunity to acquire the freehold to [the property]".[44] The defendant complained that the pleading was deficient because, relevantly, the alleged loss involved an assumed counterfactual scenario that, but for the alleged breaches of contract or negligence, the property would have been acquired. That counterfactual was not pleaded. Jackson J relevantly observed:[45]

> "… in a case like the present, where the breaches of contract and negligence alleged are breaches of duty … and the relevant causal conditions include 'what the [plaintiff] who suffered harm would have done if the [defendant] had not been so in breach' the question is what the particular plaintiff would have done. This part of the assessment must be made on the balance of probabilities.
>
> Once it is established that there was a valuable commercial opportunity that the plaintiff has lost, and the assessment is of the value of that opportunity on the possibilities as required by the *Sellars* approach, there is nothing that precludes a plaintiff from pleading and proving that the past hypothetical transaction they would have pursued, but lost the opportunity to make, would have occurred certainly so that they have lost a 100 per cent 'possibility'."

[43] The defendant refers to paragraph 99(ii) of the proposed pleading in support of its contention that the plaintiff is seeking to advance a loss of opportunity claim. That paragraph is in these terms:

> "The plaintiff's damages (of $19m) reflects its entitlement to receive 38 per cent of $5 million each year during the 10-year term of the Supply Agreement, and a further sum (of $9.5 million) reflecting its entitlement to receive 38 per cent of $5 million each year during the 5-year term option period."

[44] In my consideration, the defendant's focus on this paragraph is misplaced. The plaintiff's case, made clear by earlier paragraphs, is that it in fact exercised the option to extend the contract for a further five years and the contract was "duly

---

44 *Huddy*, [17].
45 *Huddy*, [44]–[45].

extended to 15 years".[46] In that sense, the opportunity is alleged to have been exercised, not lost.

[45] The plaintiff submits that, properly characterised, its claim for damages is a claim to an entitlement pursuant to cll 6(d) and 8(d) of the contract. One aspect of that entitlement was the right to derive profit from supplying a dollar value of product exceeding $5 million per year, depending on the defendant's annual budget. That contention does not convert the plaintiff's claim to a loss of opportunity claim requiring it to plead and establish, as a matter of causation, material facts that it could, and would, have taken the opportunity lost by reason of the defendant's breach. I agree with the plaintiff's submissions that *Huddy* is distinguishable as it involved a claim in negligence and for breach of a contractual duty of care and the loss of an alleged opportunity which was external to the contract. In *Huddy*, the nature of the claim required the plaintiffs to plead a counterfactual scenario. *Huddy* did not involve, as this case does, the breach of a contractual promise to provide the plaintiff with an identified benefit. The plaintiff has pleaded the 38 per cent profit margin on the minimum $5 million of orders. It has pleaded the budget for years one to four. There will need to be disclosure in relation to the defendant's actual budgets for the years between the contract and the date of the trial. Following disclosure, the plaintiff should be able to provide precise particulars of the 33 per cent of the further annual budgets for the purpose of cl 6(d) of the contract. There will remain some years within the 15-year contractual term where budgets have not yet been prepared. The plaintiff will be able to provide particulars as to the quantification of the loss for three years after disclosure.

Miscellaneous issues

[46] In the latter part of the proposed pleading, the plaintiff seeks to plead claims to the effect that, in the event that Mr Latter was not authorised to enter into the contract, the defendant ratified the contract, waived any right to object to its validity and is precluded by the doctrines of approbation and reprobation and estoppel from asserting that the contract is not binding. These claims arise out of events following the execution of the contract. Those events included text messages and emails and a number of meetings. The events are detailed over approximately 25 to 30 paragraphs of the proposed pleading.

[47] The defendant submits that the proposed pleading is deficient because it fails to allege sufficient facts to establish that the ratifying conduct was engaged in by "someone in fact authorised by [the defendant]".[47] The submission as initially put was that "there can be no ratification unless the subsequent actor has the necessary authority to bind the principal by the agreement".[48] Ultimately, the defendant's submission was made in terms that "… ratification, waiver and … approbation and reprobation [can] only be made out if effected by a person with actual authority".[49] As will be apparent from these quoted extracts, the defendant's submissions conflate "necessary" authority with "actual" authority. It further appeared to be submitted, implicitly if not explicitly, that the actual authority required to ratify was

---

46 Proposed pleading [58]–[60].
47 Defendant's outline of submissions [54].
48 Ibid.
49 Ibid.

actual authority to do the act the subject of ratification. The correct position is described in *Bowstead & Reynolds on Agency*[50] as follows:

> "Ratification can clearly be effected by an agent, subject to the normal principles of authority. The agent who ratifies requires only authority to ratify, not authority to have performed the act ratified. Conversely, the mere fact that an agent has authority to perform an act of the type purportedly being ratified does not entail that the agent has authority to retrospectively approve the transaction of another agent. The authority may in appropriate cases be apparent."

[48] On my reading of the proposed pleading it is sufficiently clear that the plaintiff seeks to advance a case, based on post contractual conduct, to the effect that Mr Mazzarolo, Mr Marc Hayes (the defendant's national sales manager for its commercial joinery business), Ms Lisa Stoeckler (project coordinator for the defendant) and Mr Jason MacMartin (national product development manager for the defendant) each had apparent authority to ratify the contract or engage in conduct sufficient to amount to waiver, approbation and reprobation. I accept the plaintiff's submission that acts of ratification, waiver and approbation and reprobation can be committed by a corporation (such as the defendant) by agents acting within their apparent authority.[51] In my consideration the proposed pleading, with sufficient clarity and detail, identifies sufficiently clear acts performed by the defendant's agents possessed with apparent authority of what might be described as "adoption" of the contract involving, variously, the placing of orders, receipt of invoices, provision of budgets pursuant to the contract.

[49] In relation to the plea of estoppel, the defendant submitted that there was "ambiguity" about the extent to which the plaintiff wished to allege that the defendant "permitted" its agents to make representations. It seemed to be suggested that, to establish an estoppel, it was necessary for the plaintiff to prove that the defendant, as principal, acted through an agent with actual authority to permit persons without authority to make a representation.[52] This complaint sought to impose an undue burden upon the plaintiff in respect of its estoppel plea. In my consideration, the material facts underpinning the estoppel plea are set out with adequate clarity. The essence of the estoppel is that the plaintiff made an assumption which was induced by the acts and omissions of the defendant's employees. The plaintiff is not obliged to plead actual permission to engage in the conduct that gave rise to the assumptions.

[50] In relation to paragraph 103 of the proposed pleading, it is not apparent why it is material to allege that the alleged breach of the contract was causative of the plaintiff entering into administration. The plaintiff accepts that no damages are claimed based upon the plaintiff going into administration. The allegation is not a material fact in support of the damages claim. As presently formulated, that part of paragraph 103 creates false issue which could well prove to be productive of undue expense. I would delete the opening words at paragraph 103 "by reason of the defendant's breach of the supply agreement".

---

50 Francis Reynolds and Peter George Watts, *Bowstead & Reynolds on Agency* (Sweet and Maxwell, 22nd ed, 2020) [2-068].

51 *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, 506.

52 Defendant's outline of submissions [58].

[51] Finally, paragraph 112 of the proposed pleading is in the following terms:

> "Further and alternative to paragraph 111 above, the plaintiff is entitled under s 237(1) of the ACL to such remedial orders as the court considers just including an order that all material times Supply Agreement was binding upon the defendant and damages for breach of the Supply Agreement as alleged in paragraphs 99-101 above."

[52] The defendant submitted that an order binding the defendant to the contract, as if the misleading representations were true, is not within the scope of s 237 of the *Competition and Consumer Act 2010* (Cth) ('the ACL') "as a matter of its proper construction".[53] Plainly s 237 forms part of remedial and protective legislation which is to be construed so as to give "the fullest relief which the fair meaning of its language will allow".[54]

[53] In *Awad v Twin Creeks Properties Pty Ltd*,[55] Allsop P observed:

> "Relief under the TPA, s 87, should be viewed not by reference to general law analogues but by reference to the rule of responsibility in the statute that is directed against misleading and deceptive conduct. Whether or not to grant a form of rescission under s 87, or to limit a plaintiff to damages under s 82, is a question in the nature of a discretion to be approached by reference to the facts of the particular case, the policy and underpinning of the TPA and the evaluative assessment of what is the appropriate relief to compensate for, or to prevent the likely suffering of, loss or damage 'by' the conduct."

[54] Whether any, and if so, what relief the court should grant in the exercise of the discretion conferred by s 237 will be better informed by argument made by reference to the evidence adduced and the facts found at the trial. I do not consider it appropriate for this Court to be making findings about "the proper construction" of s 237, without the benefit of the facts found at trial.

Orders

1. The plaintiff has leave to file and serve a second further amended claim substantially in the form of the proposed second further amended claim exhibited and marked "TN–3" to the affidavit of Tarrek Naji filed 17 July 2023 and a second further amended statement of claim substantially in the form of the proposed second further amended statement of claim attached to the plaintiff's written submissions in reply filed 9 August 2023 save that the words "By reason of the defendant's breach of the supply agreement" should be deleted from paragraph 103 of the proposed second further amended statement of claim.
2. The plaintiff is to file and serve the second further amended claim and second further amended statement of claim by 16 November 2023.
3. I will hear the parties as to costs and further directions.

---

53 Defendant's outline of submissions [51].
54 *Marks v GIO Australia Holding Ltd* (1998) 196 CLR 494, 528 [99].
55 [2012] NSWCA 200, [43]–[45].