

THE DISTRICT COURT
OF NEW SOUTH WALES
CIVIL JURISDICTION

Wednesday, 18 April 2012

09/336806 (formerly 3779/09) COATES HIRE OPERATIONS PROPRIETARY LIMITED ACN 074 126 971, ABN 99 074 126 971 v RIVERCORP PROPRIETARY LIMITED ACN 002 793 259, ABN 43 002 793 259 (then under external administration) & JOHN PHILIP BROSNAN & STEPHEN McCANN

09/336806 (formerly 3779/09) STEPHEN McCANN v RIVERCORP PROPRIETARY LIMITED & JOHN PHILIP BROSNAN & ANTHONY JERARD ROWE

JUDGMENT

O'TOOLE DCJ

1. In a Statement of Claim for Sale of Goods and Services – Goods sold and delivered, the plaintiff, Coates Hire Operations Proprietary Limited, alleges that it entered into a Credit Agreement in respect to the supply of hired goods to the first defendant, Rivercorp Proprietary Limited. Coates claims that their Credit Agreement consisted of a written Credit Application, dated 8 November 2002, and an acceptance by the supply of hired goods to Rivercorp on credit. Coates claims:

It was a term or condition of the Credit Agreement that [Rivercorp] would pay to [Coates] for hired goods supplied by [Coates] on the then current terms and conditions of sale of [Coates] as detailed on the invoice or docket for the goods supplied with any alterations as may be notified to [Rivercorp] at point of sale. [Coates] craves leave to refer to [its] current terms as set out in its invoice or docket when produced [to this Court].
2. Coates claimed that Rivercorp defaulted in payment of the cost of hired goods, amounting to \$111,122.77, supplied within "the agreed time frames" on one hundred and thirty one invoices, dated between 31 May 2008, and 28 February 2009. Coates lists those invoices in paragraph 4 of its original Statement of Claim (exhibits D, G; paragraph 14, Grant Morris' affidavit; *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).
3. Coates claims that the second defendant, John Philip Brosnan, and the third defendant, Stephen McCann, guaranteed Rivercorp's obligations to Coates pursuant to the Credit Agreement on the terms and conditions set out in the Agreement. Coates claims that Brosnan and McCann "agreed to indemnify [it] pursuant to the Credit Agreement against any loss ... of any nature as a result of any default by [Rivercorp]".

4. Coates claimed liquidated damages from Rivercorp, from Mr Brosnan and from Mr McCann "for money payable ... for goods hired ... and for costs in connection with recovery of amounts overdue pursuant to the Guarantee and/or the Indemnity."
5. Coates claims that it "incurred legal costs, stamp duty (where applicable) and expenses". Coates particularised those "Costs Incurred" as "Mercantile and Agency costs: \$3,750.00 [sic]." Coates supported that Claim with TAX INVOICE 6449, dated 26 August 2009, from Oceanic Mercantile Proprietary Limited for \$3,178.64, plus GST, totalling \$3,495.50: "For all Mercantile and Agency work in all aspects of debt recovery including location of additional defendants and any commission payable in the matter of RIVERCORP PTY LTD" (exhibit E: emphasis in original; *Plaintiff's Schedules of Interest*, 26 March 2011, 29 March 2012).

Stephen McCann's Defences against Coates' original Statement of Claim

6. On 9 February 2010, Mr McCann verified his original Defence against the original Statement of Claim, denying his liability to Coates. Mr McCann denied that he had guaranteed Rivercorp's obligations under the Credit Agreement and denied that he had agreed to indemnify Coates against loss, resulting from any default by Rivercorp, pursuant to the Credit Agreement.
7. On 27 April 2010, Mr McCann verified his Amended Defence against Coates' original Statement of Claim. He requires Coates to prove his liability to it, the terms and conditions of its Credit Application and Credit Agreement with Rivercorp, the Goods Hired and Rivercorp's defaulting the Agreement. Mr McCann requires Coates to prove that he guaranteed Rivercorp's obligations and that he agreed to indemnify Coates against loss, resulting from default by Rivercorp, pursuant to the Agreement.
8. On 3 November 2010, Mr McCann verified his Further Amended Defence against Coates' original Statement of Claim. He pleads that it was an implied term of the Guarantee in the Credit Application Form that
 10. [Coates] would notify the Guarantors of any material and adverse change to the nature of the risk assumed by the Guarantors pursuant to the guarantee to enable the Guarantors to either affirm or discharge their obligations under the guarantee ...

[The] Term is implied at law; see *Ankar Pty Limited v national Westminster Finance (Australia) Ltd*, (1986) 162 CLR 549
 11. On or about 31 July 2008, [Rivercorp] notified [Coates] that an administrator of [Rivercorp] was to be appointed ...

Invoices from National Hire Trading Pty Limited dated 31 July 2008 are billed to Rivercorp ... (in administration) ...

Invoices [from Coates] ... dated after 31 July 2008 are billed to Rivercorp ... (in administration) ...

12. On ... 3 September 2008 ... [Rivercorp] passed a resolution ... that [it] was insolvent ... and that an administrator ... should be appointed ...

13. On ... 3 September 2008, [Rivercorp] was placed under external administration ...

Annexure A to the Further Amended Defence identifies the invoices from National Hire Trading, a stranger to this litigation, and part of Coates' incomplete invoices, amounting to some twenty nine thousand dollars (exhibits D, G; paragraph 14, Grant Morris' affidavit; *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).

Coates' Reply to Stephen McCann's Defences against its original Claim

9. Coates replies that on 8 November 2002, Mr McCann signed the Guarantee in its Account Application Form (exhibits A, C). Paragraph 2 of Coates' Reply alleges:

a. it was an express term of the Guarantee ... that the Guarantors agreed to all terms and conditions as provided with the Account Application Form (emphasis added);

b. Clause [11] of the terms and conditions provided with the Account Application Form provided that, to the full extent permitted by Law, [Coates] excludes all implied terms and conditions and warranties including ... conditions and warranties implied by Commonwealth or State legislation (emphasis added);

c. ...

d. in the alternative, a term would not be implied in the Guarantee that [Coates] would notify the Guarantors of any material and adverse change to the nature of the risk assumed by the Guarantors pursuant to the Guarantee ...

e. in the ... alternative, there was no material and adverse change to the nature of the risk assumed by the Guarantors pursuant to the Guarantee ...

10. Paragraphs 5 and 7 of Coates' Reply reiterate its allegations regarding "an express term of the Guarantee ... " and "Clause [11] of the terms and conditions provided with the Account Application Form ... " Coates pleads that:

a. under the Guarantee ... [McCann] agreed to give an unconditional and irrevocable indemnity to [Coates] against loss, damage, costs and expenses suffered by [Coates] as a result of any default ... [by Rivercorp] under any hire agreements (emphasis added);

b. [McCann] does not, and did not at any time have, an entitlement to affirm or discharge his obligations to [Coates] under the Guarantee ...

Stephen McCann's First Cross Claim against Anthony Rowe

11. On 30 April 2010, Mr McCann verified his First Cross Claim against Mr Rowe, Mr Brosnan and Rivercorp. Mr McCann claimed an indemnity under their share sale Agreement, dated 23 April 2003 (exhibit 4). Alternatively, Mr McCann claimed an indemnity under their [draft] Deed of Settlement and Release (exhibit 11), executed "on or about December 2007".

12. The First Cross Claim seeks orders for " ... the payment of a sum, by way of an indemnity, by ... Rowe to McCann equal to any sum ordered to be paid by McCann to Coates ... [and] for the payment of McCann's costs, on an indemnity basis ... against Rowe ... "

Stephen McCann's Amended Cross Claim against Anthony Rowe

13. On 11 November 2010, Mr McCann verified his Amended Cross Claim against Mr Rowe. The Cross Claim seeks a declaration that Mr Rowe is liable to indemnify Mr McCann for any liability to Coates for damages, costs or interest in these proceedings. Mr McCann seeks Leap Frog orders that Mr Rowe pay Coates whatever sum Mr McCann is ordered to pay Coates for damages, costs or interest in these proceedings (paragraphs 19-23, *Submissions of McCann Re Cross Claim*).

Anthony Rowe's Defence against Stephen McCann's Amended Cross Claim

14. On 25 November 2010, Mr Rowe verified his Defence against Mr McCann's Amended Cross Claim. He denies that the indemnity he gave Mr McCann in their Agreement for sale of Rivercorp's shares (exhibit 4) has any force or effect. Mr Rowe alleges that their [draft] Deed of Settlement (exhibit 11) releases him from liability to Mr McCann under their share sale Agreement.

Stephen McCann's Reply to Anthony Rowe's Defence

15. On 9 November 2010, Mr McCann verified his Reply to Mr Rowe's Defence against the Amended Cross Claim. The Reply denies that the [draft] Deed of Settlement and Release (exhibit 11) releases Mr Rowe from liability to Mr McCann for any money Mr McCann is ordered to pay Coates in these proceedings.

The facts

16. The Court's voluminous paper and electronic files of Coates' original Statement of Claim record the chequered history of this litigation. Public records of Rivercorp rectify anomalies in the parties' Dramatis Personae, Agreed Chronology, Agreed Facts, Agreed Statements of Facts and "common ground" regarding the Cross Claim and their proceedings in the Supreme Court of New South Wales (exhibits 3, 9, 11; *Plaintiff's letter to the Court*, 29 March 2012).
17. The following events are undisputed as to their occurrence but not as to their alleged effect on the parties' commercial arrangements. The evidence does not enable me to determine the dates nor the sequence of all those events.

18. On 15 June 1984, Rivercorp was incorporated. The Australian Securities and Investments Commission registered Rivercorp as a proprietary company, limited by two hundred shares, in New South Wales (exhibit 3).
19. The Riv Group Proprietary Limited ACN 137 759 454 was Rivercorp's Ultimate Holding Corporation. The Riv Group's registered office was in Unit J1 at 39 Jones Street in Ultimo, an inner western suburb of Sydney (exhibits C, F; page 4, exhibit 3).
20. Stephen McCann is an electrician. Between 5 December 1984, and 23 March 1987, and between 12 December 2000, and 23 April 2003, Mr McCann was Rivercorp's sole director and secretary. Rivercorp employed Mr McCann and his wife, Monica Casement (page 3, exhibit 3; exhibits 4, 11).
21. Between 4 December 1992, and 2 November 2003, Rivercorp's registered office was in care of Cassim Calligeros Simos, who occupied the ground floor of 154 Elizabeth Street in the City of Sydney (page 1, exhibit 3; page 9, Statement of Claim).
22. Until November 1994, Rivercorp's principal place of business was on Hunter Street in Hornsby, on Sydney's North Shore. On 16 October 1997, Rivercorp moved its principal place of business to Level 3 of 22-36 Mountain Street in Ultimo (page 1, exhibit 3).
23. Between mid 2001, and 30 June 2002, Mr McCann acquired Rivercorp's two hundred shares. He agreed to sell sixty six shares to Mr Brosnan and sixty six shares to Mr Rowe. They recorded their agreement by signing a Deed, dated 1 July 2002 (exhibit H; pages 2, 3, exhibit 3; exhibits 9, 11; paragraphs 1, 4, Stephen McCann's affidavit).
24. Between 2 July 2002, and 22 April 2003, Mr McCann retained sixty eight shares in Rivercorp and remained Rivercorp's sole director and secretary. He argued with Mr Brosnan and Mr Rowe about the operation of Rivercorp (exhibit H; page 6, exhibit 3; exhibits 9, 11; paragraphs 4, 5, 7, McCann's affidavit; paragraph 3, *Submissions of McCann* on Statement of Claim).
25. Between September 2002, and January 2003, Rivercorp employed Jacqueline Steele, now known as Jacqueline Wahlin, as its Administration Officer. She performed clerical work under Mr Brosnan's direct daily supervision. He provided her with the information, which he instructed her to include, in Rivercorp's applications to its suppliers for credit. Routinely, she witnessed his signing documents (exhibits C, F; paragraphs 1-4, 8, 9, 11 and Annexure A to Jacqueline Steele Wahlin's affidavit).

26. Coates invites prospective hirers of its plant and equipment to apply for credit on the terms and conditions in its Account Application Form. The face of the Application includes the following:

... Coates Hire Operations Pty. Limited A.B.N. 99 074 126 971

REGION HEADQUARTERS ...

SOUTHERN REGION 120 SOUTH GIPSLAND HIGHWAY 03 8791 3200
 (VIC. SA & TAS) DANDENONG 3175 FAX 03 8794 7424 ...

ACCOUNT APPLICATION FORM

Company or Business Name ...

Address ...

Postcode

Postal Address ...

Postcode

Type of Business ...

Phone ...

Fax ...

ABN ...

Directors

Address

Phone

(or Proprietors) (Full Names)

1.
 2.

REFERENCES (3 within the last 12 months)

- | | | | | |
|----|----------------------------|-------------|------------|-------|
| 1. | Banker/s ... | Contact ... | Branch ... | Phone |
| 2. | (another hire Company) ... | | | |
| 3. | ... | | | |
| 4. | ... | | | |
| 5. | ... | | | |

GUARANTEE

I/We, being Director/s and/or Guarantor(s) of the above Company, request Coates ... ("the Owner") to enter into hire and/or sale agreements from time to time with the Company and in consideration of the Owner so doing I/We (jointly and severally) unconditionally guarantee to the owner the due payment by the company of all moneys payable to the Owner by the Company and the due performance by the Company of all its obligations under any such hire agreements to the intent that should the Company default I/We shall pay such moneys and all loss or damage to the Owner on demand. I/We (jointly and severally) unconditionally and irrevocably agree to indemnify and keep indemnified the Owner against all loss, damage, costs and expenses whatsoever which the owner may suffer or incur as a result of any default on the part of the Company in relation to its obligations under any hire agreements. My/Our obligations are principal obligations and the Owner shall not be required first to proceed against the Company. This guarantee is continuing and irrevocable until the whole of the Company's obligations have been paid or satisfied ... I/We by the execution of this application agree to all terms and conditions as shown on the reverse of this application and consent to Coates ... seeking information from another credit provider or credit reporting agency about my consumer credit worthiness in relation to an application for commercial or consumer credit.

Dated this ... day of ... 20 ...

Guarantor(s) Signature ...

Name ...

Guarantor(s) Signature ...

Name ...

Witness Signature ...

Name ...

ARE ORDER NUMBERS REQUIRED Yes No IF SO THE SUPPLY OF SUCH IS THE CLIENT'S RESPONSIBILITY

A HIRE ACCOUNT, IF GRANTED, DOES NOT OBLIGE COATES ... TO SUPPLY ANY GOODS
MONTHLY ESTIMATED HIRE \$ (NOTE: THIS IS NOT A CREDIT LIMIT.)
ACCOUNTS ARE DUE AND PAYABLE WITHIN THIRTY (30) DAYS OF THE DATE OF INVOICE.
THIS ACCOUNT MAY BE CANCELLED/SUSPENDED/VARIED WITHOUT NOTICE IF ACCOUNTS NOT PAID BY DUE DATE

OFFICE USE ONLY

APPROVED BY ACCOUNT NUMBER LETTER SENT

Coates' employee or agent, Kerry McIntyre, wrote her name on the face of the Form and requested its recipient for a reply by "FAX To ... (VIC) FAX ... 03 8794 7424" (exhibits A, C, F: emphasis in originals; paragraphs 1-4, 8, 9, 11 and Annexure A to Steele Wahlin's affidavit).

27. At 03:07 on Tuesday, 29 October 2002, Coates sent two facsimile pages from COATES M5 ARNCLIFF. P.2 copied Kerry McIntyre's handwritten name on the face of the Account Application Form and her request for a reply by facsimile to Coates' Southern Region Headquarters at Dandenong in Victoria (exhibits A, C, F; paragraph 4 and Annexure A to Steele Wahlin's affidavit).

28. Jacqueline Steele complied with John Brosnan's instructions by writing the following on P. 2 of the facsimile from COATES M5 ARNCLIFF:

Company or Business Name ... Rivercorp Pty Ltd ...
Address Unit J1 39 Jones St UltimoPostcode 2009
Postal Address PO BOX 840 Broadway Postcode 2007.
Type of Business Electrical + Data Communications
Phone 02 96920888 Fax 02 96920899
ABN 43. 002.793 259.

Directors

(or Proprietors) Full Names	Address	Phone
1. ... Stephen McCann ...	21 Panmule St Rouse Hill ...	0407 454012
2. ... John Philip Brosnan ...	28 Farr St Banksia ...	0418 929914 ...

REFERENCES (3 within the last 12 months)

1. Banker/s ... ANZ ... Branch Broadway ...
2. ...
3. Anixter ...
4. Solar Electrical ...
5. Network Connect ...

GUARANTEE

I/We, being Director/s and/or Guarantor(s)

Dated this ... 8th ... day of NOV ... 2002

Jacqueline Steele saw John Brosnan signing his name as

Guarantor(s) Signature ... John Brosnan Name ... John Brosnan ...

Ms Steele countersigned and wrote her own name as Mr Brosnan's

Witness Signature ... J Steele Name ... Jacqui Steele

Ms Steele answered the question: "ARE ORDER NUMBERS REQUIRED Yes ... "
(exhibit C: emphasis in original; exhibits D, F-H, 4, 9, 11; paragraphs 1- 4, 6, 7, 11
and Annexure A to Steele Wahlin's affidavit).

29. At 10:50 on Friday, 8 November 2002, Coates received two pages from facsimile number: "612-9212-4547 RIVERCORP PTY LTD". PAGE 02 copied Kerry McIntyre's handwritten name, her request for a reply by facsimile, Jacqueline Steele's and John Brosnan's representations on the face of Coates' Account Application Form (exhibits C, F; paragraph 4 and Annexure A to Steele Wahlin's affidavit).
30. At 11:48 on Friday, 8 November 2002, Coates received two pages from facsimile number: "612 9212 4547 97%". P.02 copies Kerry McIntyre's, Jacqueline Steele's and John Brosnan's handwritten names and words, illegible marks, which obscure part of his signature, oblique parallel lines and a cursive line, resembling a tilde, below his signature, followed by the name: "S M^cCANN" on the face of Coates' Account Application Form (exhibits C, F; paragraph 4 and Annexure A to Steele Wahlin's affidavit).
31. On Wednesday, 13 November 2002, Coates approved the Application for a Hire Account by dating and writing ACCOUNT NUMBER 105637 at the foot of P.02 of the facsimile from number "612 9212 4547 97%". Coates filed the facsimile and noted part of its content in its electronic Plant Hire System of recording its business (exhibits C, D, F; paragraph 4 and Annexure A to Steele Wahlin's affidavit; paragraph 4c, *Synopsis of Plaintiff's Submissions*, 23 March 2011).

The share sale Agreement, dated 23 April 2003

32. Mr McCann agreed to resign as Rivercorp's director and employee. Mr Brosnan agreed to purchase half Mr McCann's shares in Rivercorp. Mr Brosnan agreed to become Rivercorp's secretary and sole director. Mr Rowe agreed to purchase the remainder of Mr McCann's shares in Rivercorp. They engrossed their Agreement, which includes the following terms and conditions:
 3. Subject to the terms of this Agreement, [McCann] sells to the Purchasers ... the Shares for the Share Purchase Price on the Completion Date.
 4. The Share Purchase Price will be paid ... in instalments ...
 5. If the parties cannot agree on the Share Purchase Price by 9 May 2003 then the parties will appoint a Valuer ...

6. In the event that the Valuer has been prevented from making a determination ... then the Share Purchase Price will be \$255,000.

Settlement ...

9. [McCann] acknowledges that apart from as provided in this Agreement [he] will not have any outstanding rights or benefits in relation to [Rivercorp] as from the signing of this Agreement ...

Vendor's warranties

33. [McCann] warrants to the Purchasers [Rowe and Brosnan] as follows ...

33.6 that, except as is disclosed in writing to the Purchasers on or before the date of this Agreement, there are not now and will not be at the signing of this Agreement ...

- (b) any outstanding claims against [Rivercorp] other than as known or ought to have been known to either [Rowe] or [Brosnan] ...
- (d) any guarantee or indemnity given by [Rivercorp] other than as known or ought to have been known to either [Rowe] or [Brosnan] ...

Indemnities

36. 36.1 [McCann] indemnifies [Rivercorp] and also [Rowe and Brosnan] against all liabilities, demands or expenses which [Rivercorp] or [Rowe and Brosnan] may incur or pay:-

- (a) by virtue of any present or contingent liability of [Rivercorp] (whether known or unknown to [McCann]) as at the date of the Completion Date which has not been disclosed to [Rowe and Brosnan] or
- (b) by reason of any breach of any warranty or other term of this Agreement

36.2 To the extent required by [McCann] ... but at the cost of [McCann, Rowe and Brosnan] will contest ... or will cause [Rivercorp] to contest ... any claims or demands made against [Rowe and Brosnan] ... or [Rivercorp] ... for which [McCann] must indemnify [Rowe and Brosnan] ... or [Rivercorp] ... under ... sub-clause [36.1].

37. [Rowe and Brosnan indemnify McCann] against any liability (including liability for costs) for any claim against [McCann] and/or under any guarantee or indemnity give by [McCann] arising out of or incidental to the payment of moneys or obligations of [Rivercorp] ...

Restraint

40. In consideration of [Brosnan and Rowe] agreeing to purchase the Shares, [McCann] agrees that he will not without the consent in writing of [Brosnan and Rowe], be directly or indirectly engaged, concerned or interested in the capacity specified ... in the trade or business specified in ... [the share sale Agreement] ...

On 23 April 2003, Mr Rowe and Mr Brosnan dated and signed the share sale Agreement and a Deed of Guarantee and Indemnity. Mr Brosnan executed both documents for Rivercorp. About the same time, Mr McCann executed a copy of each document (page 3, exhibit 3; exhibit 4: emphasis in original; exhibit 11; paragraphs 5-7, McCann's affidavit; paragraph 3, *Submissions of McCann* on Statement of Claim).

33. On 24 October 2003, Frank Casement issued a statutory demand to Rivercorp, amounting to eighty thousand dollars. He alleged he had lent that sum to Rivercorp, recorded in its "Casement Loan Account" (exhibit 11).
34. On 3 November 2003, Mr Brosnan moved Rivercorp's registered office from Elizabeth Street in Sydney to the registered office of its Ultimate Holding Corporation, The Riv Group, in Unit J1 at 39 Jones Street in Ultimo (exhibits C, F, H; page 1, exhibit 3; exhibits 4, 9, 11).
35. In November 2003, Mr Brosnan commenced Rivercorp's proceedings 5750 of 2003 in the Supreme Court of New South Wales for an order, setting aside Frank Casement's statutory demand. The Supreme Court set aside the demand and ordered Mr Casement to pay Rivercorp's costs of those proceedings (exhibit 11).
36. On 1 April 2004, Mr Brosnan moved Rivercorp's principal place of business from Level 3 at 22-36 Mountain Street in Ultimo to the registered office on Jones Street in Ultimo, which Rivercorp shared with its Ultimate Holding Corporation, The Riv Group (exhibits C, F, H; page 1, exhibit 3; exhibits 4, 9, 11).
37. On 25 June 2004, Frank Casement issued a second statutory demand to Rivercorp, amounting to eighty thousand dollars. He alleged he had lent that sum to Rivercorp, recorded in its "Casement Loan Account" (exhibit 11).
38. On 3 September 2004, Rivercorp, Mr Brosnan and Mr Rowe commenced proceedings 4878 of 2004 in the Supreme Court. They claimed that Mr McCann was in breach of their share sale Agreement, dated 23 April 2003, and that Mr McCann and Monica Casement were in breach of duties to Rivercorp. Mr McCann and Ms Casement defended the Claim. He alleged that he had not been paid money to which the share sale Agreement entitled him. He and Ms Casement cross-claimed money, which Rivercorp had recovered from Frank Casement in Supreme Court proceedings 5750 of 2003 and 39874 of 2004. Rivercorp, Mr Brosnan and Mr Rowe defended the cross claim (exhibits H, 4 11; paragraph 7, *Submissions of McCann Re Cross Claim*).
39. On 6 October 2004, Anthony Jerard Rowe became John Brosnan's co-director of Rivercorp (page 2, exhibit 3).
40. Mr Brosnan and/or Mr Rowe commenced Rivercorp's proceedings 39874 of 2004 in the Supreme Court for an order, setting aside Frank Casement's second statutory

demand. The Supreme Court set aside the demand and ordered Mr Casement to pay Rivercorp's costs of those proceedings (exhibit 11).

41. On 4 November 2005, Frank Casement assigned the debt/s he had demanded from Rivercorp to Mr McCann (exhibit 11).

The draft Deed of Settlement and Release, dated 6 December 2007

42. Baron and Associates, Lawyers, drew a Deed of Settlement and Release, dated 6 December 2007, which includes the following:

Recitals

A. ...

B. ...

C. In 2003, various disputes arose between Brosnan and Rowe on the one part and McCann and [Monica] Casement on the other part relating to Rivercorp.

D. On 23 April 2003, Rivercorp, Brosnan and Rowe entered into an Agreement with McCann ... a dispute has arisen as to whether McCann received his entitlements under the April Agreement in particular clauses 3 – 6.

...

J. In 2004 ... Rivercorp, Brosnan and Rowe commenced proceedings number 4878 in the Supreme Court ... arising from an allegation that McCann ... had breached ... duties to Rivercorp and that McCann had breached a restraint of trade provision ...

K. McCann ... disputed the entitlement of ... Rowe to the relief claimed ...

...

N. The parties without any admissions of liability, agree to settle the claims between them on the terms set out in this deed.

Operative Part

The parties agree that:

1. Definitions and interpretation

1.1 Definitions

Claim means in relation to the subject matter of this deed, a claim, liability, demand, action, suit or proceeding for damages, costs, whether or not subject to a court order, injunctions, debt, restitution or other remedy, other than in respect of a breach of this document, whether or not:

(a) the claim, demand, action, suit or proceeding is:

(i) at law, under statute, in equity or otherwise;

(ii) present or future; or

(iii) presently within the contemplation of a party; or

(b) the facts or law giving rise to the claim, demand, action, suit or proceeding are presently within the belief or knowledge of a party.

First Statutory Demand Proceedings means the proceedings ... in the Supreme Court 5750 of 2003.

Second Statutory Demand Proceedings means the proceedings ... in the Supreme Court 39874 of 2004.

Supreme Court Proceedings means the proceedings ... in the Supreme Court 4878 of 2004 ...

2. Debt owed to McCann ...

Rivercorp, Brosnan, and Rowe agree that they jointly and severally owe McCann ... a debt in the amount of the Settlement Sum.

3. Payment

3.1 Payment by instalments

(a) The parties agree that Rivercorp, Brosnan and Rowe shall pay McCann ... the Settlement Sum in ... instalments ...

7. Release by Rowe

7.1 Release upon execution of this deed

Upon execution of this deed by Rowe, Rowe releases and discharges McCann ... from all Claims (including the costs orders for ... the ... Statutory Demand Proceedings) against McCann ... which Rowe:

1. now has;
2. at any time had;
3. may have; or
4. but for this deed, could or might have had.

8. Release by McCann

8.1 Release upon execution of this deed

Upon execution of this deed by McCann, McCann releases and discharges ... Rowe from all Claims (including any Claims in relation to the [23] April [2003] Agreement) ... which McCann:

- (a) now has;
- (b) at any time had;
- (c) may have; or
- (d) but for this deed, could or might have had ...

15. Indemnity by Rowe

- (a) Rowe indemnifies McCann ... against all Claims.
- (b) Rowe's indemnity is a continuing obligation.
- (c) This indemnity survives the termination of this deed.

16. Indemnity by McCann

- (a) McCann indemnifies ... Rowe against all Claims ...
- (b) McCann's indemnity is a continuing obligation.
- (c) This indemnity survives the termination of this deed ...

18. Bar to further proceedings

A party may plead this deed as a full and complete defence to an action, suit, or proceedings commenced, continued or taken by the other or on that other party's behalf in relation to any of the matters referred to in this deed, this settlement and the [Statutory Demand proceedings and the Supreme Court 4878 of 2004] Proceedings...

20. Acknowledgments

- (a) The parties enter into this deed fully and voluntarily on their own information and investigation.
- (b) Each party is aware that it or its advisers, agents or lawyers may discover facts different from or in additions to the facts that they now know or believe to be true with respect to the subject matter of this deed.

The parties intend to and do, fully, finally, absolutely and forever settle under this deed any Claim, which now exists, may exist or have ever existed [sic] between them.

21. General ...

21.5 Entire agreement

- (a) This deed embodies the entire agreement between the parties.
- (b) This deed supersedes all previous agreements on this subject matter ...

Mr McCann and his wife, Monica Casement, signed the draft Deed (exhibit 11: emphasis in original).

Coates' invoices to RIVERCORP PTY LTD

- 43. Coates drew forty nine invoices, dated between 31 May and 4 August 2008, to RIVERCORP PTY LTD Post Office Box 840 Broadway NSW 2007. Coates stored part of those invoices in its Plant Hire record of its Hire Account No. 00105637 (exhibits C, D, F; paragraph 4, Steele Wahlin's affidavit; paragraphs 1-4, 14, Morris' affidavit; paragraph 4, Statement of Claim; paragraph 11 and Annexure A to Further Amended Defence against Claim; invoices 1-27, 31-52, *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).
- 44. Coates expected Rivercorp to appoint an Administrator/s. About the same time, Coates established its Pace Plan System of recording its business (exhibits D, G; pages 4, 7, 8, exhibit 3).
- 45. On 3 September 2008, Robert Moodie and John Morgan, who practised as Rodgers Reidy, Chartered Accountants, were appointed as Rivercorp's Administrators under a Deed of Company Arrangement. Rodgers Reidy wrote to Rivercorp's creditors:

Mr Robert Moodie and Mr John Morgan ... were appointed as Joint & Several Administrators of [Rivercorp] on 3 September 2008 pursuant to Section 436A of the Corporations Act.

... As Administrators we are now responsible for the day to day management of [Rivercorp]. We are currently examining the trading position of the Company with a view to assessing its future viability.

The effect of our appointment is to place a moratorium on the payment of unsecured creditors' accounts in relation to trading and other debts incurred up to the date of our appointment, until creditors make a decision about [Rivercorp's] future. That decision will be made at a second meeting of creditors ... [who] will receive notice of that meeting in due course ...

Suppliers are requested to observe the following procedures:-
 1. Close accounts in the name of the Company in respect of goods supplied and services rendered prior to our appointment; and
 2. Open new accounts styled "Rivercorp Pty Limited (Administrators Appointed)" for goods supplied and services rendered from 3 September 2008.
... we request creditors to complete the attached Proof of Debt Form and return it to this office showing the full amount outstanding as at 3 September 2008. Please also provide invoices or other supporting documentation supporting your claim.

In respect of point 2, suppliers of good and services from 3 September 2008 should render their accounts to us at the address shown below. Orders placed by the Joint and Several Administrators must be authorised by an Administrator or one of our authorised signatories whose specimen signatures appear below.

Creditors should note that purchases from 3 September 2008 will be supplied only on the basis that no "set off" will be allowed in respect of pre-administration claims.

With regard to unexecuted or partly executed orders outstanding as at 3 September 2008, we request suppliers to obtain confirmation of their orders from this office, before proceeding. Any creditors who believe they have retention of title claims over goods supplied, should contact this office immediately.

The first meeting of creditors must be convened within 8 business days after our appointment. Accordingly, We enclose the following ... Notice of Meeting of Creditors to be held on 15 September at 11.00 ... Informal Proof of Debt for Voting Purposes ...

On 10 September 2008, Coates wrote on Rogers Reidy's circular: "PLEASE OPEN ADMINISTRATION APPOINTED A/C" (exhibit 2; pages 4, 7, 8, exhibit 3).

46. Between 29 September and 31 October 2008, The Australian Securities and Investments Commission recorded Mr Moodie's and Mr Morgan's Appointments as Rivercorp's Administrators and its creditors' meetings (pages 7, 8, exhibit 3).
47. National Hire Trading drew three invoices, dated 31 July 2008, to Rivercorp in Administration (page 4, exhibit 3; paragraph 4, Statement of Claim; paragraph 11 and annexure A to Further Amended Defence against the Claim; invoices 28-30, *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).

Coates' invoices to *Rivercorp Pty Ltd (in Administration)*

48. Coates retrieved data from its Plant Hire record of its Hire Account No. 00105637. Coates drew seventy nine invoices, dated between 19 August 2008, and 28 February 2009, to *Rivercorp Pty Ltd (in Administration) PO Box 840 Broadway NSW 2007*. Coates stored part of those invoices in its Pace Plan record of its Customer Code: *RIVE8438* (exhibits C, D, F; exhibit G: italics in original; paragraph 4, Steele Wahlin's affidavit; paragraph 4, Statement of Claim; paragraph 11 and Annexure A to Further Amended Defence against Claim; invoices 53-131, *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).
49. About November 2008, Ben Pettitt commenced full time employment as Coates' temporary Credit Recoveries Officer. In July 2009, Coates confirmed Mr Pettitt's employment as its Senior Recoveries Officer. Coates directed Mr Pettitt to recover \$111,122.77, which National Hire Trading and Coates had claimed in their invoices to Rivercorp in Administration (paragraph 2, exhibit B; exhibits D, G; MFI 4, exhibit 1;

paragraph 14, Morris' affidavit; paragraph 4, Statement of Claim; paragraph 11 and Annexure A to Further Amended Defence against Claim; *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).

50. On Thursday, 6 August 2009, Mr Pettitt searched Coates' archive and electronic records and wrote the following warning in its

Debtors Chase History ... Rivercorp Pty Ltd (in Administration) ...

NOTE: No [Purchase Orders] on file received from Administrators [of Rivercorp] or authority to charge hires. Lets [sic] see as per prev note what the Admin says in relation to pymt, if no luck, check with [Coates'] Branches if we have [Purchase Orders] or the post Admin amt will need to be [written] off.

On 7 August 2009, Mr Pettitt informed Coates that its "current hires will be picked up & finalised today" (paragraphs 2, 3, exhibit B; MFI 4, exhibit 1; emphasis in original).

51. Mr Pettitt sent emails to Coates' employees or agents at its premises in Seven Hills, Penrith and Brookvale, New South Wales

... requesting any [Purchase Orders] and/or [correspondence] to help us prove our claim for payment with Administrator.

On 10 August 2009, Coates informed Mr Pettitt that it holds no Purchase Orders from Rivercorp's then Administrators. Mr Pettitt advised Coates: "Therefore if Admin chooses not to pay this entire debt will need to be [written off]" (MFI 4, exhibit 1).

Coates' original Statement of Claim

52. Coates consulted Emanuela Oliveri, who practises as Oliveri Lawyers. On 25 August 2009, Mr Oliveri signed and Coates' commercial agent, Justin Napiza, verified its original Statement of Claim for liquidated damages of \$111,122.77, interest and costs. The Court filed the Claim, appointed 14 April 2010, for its pre-trial conference and 15 September 2010, for its status conferences and directed Coates to notify the then defendants, Rivercorp (in Administration), John Brosnan and Stephen McCann accordingly.

53. Coates did not serve its Statement of Claim on Rivercorp (*Plaintiff's letter to the Court*, 29 March 2012).

54. Coates instructed Oceanic Mercantile to find John Brosnan and Stephen McCann. Oceanic provided Coates with Mr Brosnan's address in Arncliffe, south west of Sydney, and an address for Mr McCann at Avoca Beach, on New South Wales' mid North Coast (exhibits C, E, F; paragraph 4, Steele Wahlin's affidavit; James Stephen Twigg's Affidavit of Service; page 9, Statement of Claim).

55. On 6 September 2009, Coates' commercial agent, James Stephen Twigg, served its Statement of Claim on John Brosnan. Mr Twigg swore an affidavit of service, and provided Coates' commercial agent, John Nolan, with the affidavit.
56. On 9 September 2009, Mr Pettitt telephoned Rivercorp's Administrator/s. Mr Pettitt advised Coates: "We need to find out if any likelihood of a dividend" from Rivercorp (MFI 4, exhibit 1).
57. About September 2009, Coates employed Grant Morris as its National Credit Manager (paragraph 1, Morris' affidavit).
58. About 20 October 2009, Oceanic Mercantile was asked for further and better particulars of the invoices, listed in paragraph 4 of Coates' Statement of Claim. Oceanic informed Mr Pettitt accordingly (MFI 4, exhibit 1; paragraph 14, Morris' affidavit; *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).

Coates' Motion on Notice for Default Judgment on its original Statement of Claim

59. On 23 October 2009, Mr Oliveri lodged and the Court filed Coates' Motion on Notice for Default Judgment on its Statement of Claim for liquidated damages from Rivercorp, John Brosnan and Stephen McCann. Coates' commercial agent, John Nolan, swore that Rivercorp owed Coates \$114,872.77, interest under the *Uniform Civil Procedure Rules*, amounting to \$5,617.03, Filing Fees of \$1,024.00, service fees of \$50.00 and Mr Oliveri's fees of \$1,137.00. Mr Oliveri supported Coates' Motion with his own affidavit, with Mr Nolan's affidavit and with James Twigg's Affidavit of Service on Mr Brosnan.
60. On 23 October 2009, the Court considered Coates' Motion on Notice and supporting affidavits ex parte. The Civil Registrar certified the Court's default judgment against "RIVERCORP PTY LTD [sic] ACN 002 126 971", John Brosnan and Stephen McCann for \$122,700.80. Coates did not notify Rivercorp of the judgment. Coates did not attempt to execute its judgment against Rivercorp (*Plaintiff's letter to the Court*, 29 March 2012).
61. On 2 November 2009, Mr Pettitt sent an email to Coates' Branches, requesting its correspondence with Rivercorp and informed Oceanic Mercantile accordingly. Between 3 and 11 November 2009, Coates' employee or agent, Jim Marshall, sent its business records from its premises at Mackay in Queensland to Mr Pettitt. Oceanic Mercantile asked Mr Pettitt for the invoices, amounting to \$111,122.77, listed in

paragraph 4 of Coates' original Statement of Claim, and asked him to "chase notes & statement", supporting the Claim. Mr Pettitt asked Coates for the remainder of its correspondence regarding Rivercorp "to enable us to forward onto Oceanic" (MFI 4, exhibit 1; paragraph 14, Morris' affidavit; *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).

Stephen McCann's original Defence against Coates' original Statement of Claim

62. Mr McCann consulted Gil Baron, who practises as Baron and Associates, Lawyers. On 9 February 2010, Mr Baron signed and certified Mr McCann's Defence against Coates' original Statement of Claim. The following day, the Court filed the Defence.
63. On 22 March 2010, Robert Moodie was appointed liquidator of Rivercorp (pages 4, 7, exhibit 3).

Stephen McCann's Amended Defence against Coates' original Statement of Claim

64. On 27 April 2010, Mr Baron signed and certified and the Court filed Mr McCann's Amended Defence against Coates' original Statement of Claim.
65. On 30 April 2010, Mr McCann requested this Court to issue its Subpoena to Rivercorp's liquidator, Robert Moodie, to Produce Documents. On 10 May 2010, Mr Moodie produced the liquidator's records. None of those records is a Purchase Order to Coates (exhibit 6; paragraphs 12-16, McCann's affidavit).
66. On 30 April 2010, Mr McCann requested this Court to issue its Subpoena to Rivercorp to Produce Documents. On 10 May 2010, Rivercorp or its liquidator produced its records. None of those records is a Purchase Order to Coates (exhibit 6; paragraphs 16, 17(i), 17(ii), McCann's affidavit).

Stephen McCann's First Cross Claim against Anthony Rowe

67. On 30 April 2010, Mr Baron signed, certified and lodged Mr McCann's First Cross Claim against Anthony Rowe, John Brosnan and Rivercorp (in Administration). On 3 May 2010, the Court filed the Cross Claim.
68. About 10 May 2010, Mr Baron served a Notice on Mr Oliveri under Rule 21.10 of the *Uniform Civil Procedure Rules*, requiring Coates to Produce For Inspection the invoices, listed in paragraph 4 of its original Statement of Claim. Coates produced invoices, "billed to Rivercorp" for the period between 31 May and 4 August 2008, amounting to \$64,802.38, and two Purchase Orders (paragraphs 13, 17(i), 17(ii),

McCann's affidavit; paragraph 14, Morris' affidavit; *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).

69. Coates presented the facsimile Account Application Form, which it had received from number "612 9212 4547 97%" at 11:48 on 8 November 2002, to the Commissioner for Stamp Duties. About 13 May 2010, the Commissioner acknowledged receipt of Coates' payment of \$385.00 in duty on an INITIAL AMOUNT of \$111,000.00 and stamped P.02 of the facsimile accordingly (exhibits C, F).
70. On 17 June 2010, Coates' employee, Amie Bransgrove, swore or affirmed an affidavit. Annexure A to Ms Bransgrove's affidavit copies P.02 of the facsimile, received by Coates from number "612 9212 4547 97%" at 11:48 on 8 November 2002 (exhibit C; paragraphs 9-11, 16, McCann's affidavit; paragraphs 1-4, 6, 7, 11 and Annexure A to Steele Wahlin's affidavit).
71. On 14 September 2010, Grant Morris affirmed an affidavit, supporting Coates' original Statement of Claim for liquidated damages of \$111, 122.77, interest and costs (exhibits D, G; *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).
72. On 16 September 2010, Clive Locke of counsel appeared for Coates. One Little appeared for Mr McCann. They estimated, or accepted the Court's estimate, that the hearing of Coates' original Statement of Claim and of Mr McCann's First Cross Claim was to occupy one day. The Court appointed 3 December 2010, to hear both Claims.
73. On 6 October 2010, Mr Oliveri provided Mr Baron with copies of invoices, listed in paragraph 4 of Coates' original Statement of Claim. About the same time, Mr Oliveri served Mr Baron with Amie Bransgrove's affidavit and its annexure A (exhibit C; paragraph 9, McCann's affidavit; paragraphs 1-4, 6, 7, 11 and Annexure A to Steele Wahlin's affidavit; paragraph 4, *Submissions for the defendant/cross-claimant*, 28 October 2010).
74. Kate MacDonald is an attorney, employed by Baron and Associates. Michelle Novotny is a Forensic Document and Handwriting Examiner. They discussed P.02 of the facsimile face of Coates' Account Application Form, copied in annexure A to Amie Bransgrove's affidavit. Ms MacDonald provided Ms Novotny with samples of Mr McCann's handwriting on his taxation returns for the 2001 and 2002 financial years (exhibits C, F; exhibit 7; MFI 7, exhibit 10; paragraph 2, MacDonald's affidavit;

paragraphs 9-11, 16, McCann's affidavit; paragraphs 1-4, 6, 7, 11 and Annexure A to Steele Wahlin's affidavit).

75. At 18:53 on 20 October 2010, Ms MacDonald asked Ms Novotny "for a quotation for a forensic opinion ... whether it is in fact Mr McCann's signature appearing on the Guarantee purportedly obtained by Coates ... " Ms MacDonald informed Ms Novotny of Mr McCann's instructions to Baron and Associates: "Mr McCann has no recollection of signing" the Guarantee on Coates' Account Application Form (exhibits C, F; MFI 7, exhibit 10; paragraphs 4, 6, 7, 11 and Annexure A to Steele Wahlin's affidavit; paragraphs 2, 3, MacDonald's affidavit; paragraph 10, McCann's affidavit; paragraphs 2, 7-13, 16-17, *Outline of Plaintiff's Submissions*, 22 March 2011).
76. At 07:53 on 21 October 2010, Ms Novotny advised Ms MacDonald: "In order to undertake a detailed examination of the questioned signature, it will be necessary to have the ... original questioned document; and ... many further undisputed specimen signatures written by Mr McCann, including ... originals dated as close as possible to the purported date of the questioned signature" (exhibits C, F, 10; paragraphs 2, 3, MacDonald's affidavit).

Stephen McCann's Further Amended Defence to Coates' original Statement of Claim

77. On 25 October 2010, the Court filed Mr McCann's Motion on Notice for leave to amend his Amended Defence against Coates' original Statement of Claim. On 25 October 2010, Mr Baron swore an affidavit, supporting Mr McCann's Motion (paragraph 4, *Submissions for the defendant/cross-claimant*, 28 October 2010).
78. On 28 October 2010, Mr McCann swore an affidavit, foreshadowing his evidence to this Court and confirming his instructions to Baron and Associates regarding the facsimile Account Application Form, copied in annexure A to Amie Bransgrove's affidavit. Mr McCann maintains: "The signature appearing next to 'S McCann' only slightly resembles [his] signature." He does not recall signing the Guarantee on the Form (exhibits C, F; MFI 7, exhibit 10; paragraph 10, McCann's affidavit; paragraphs 4, 6, 7, 11 and Annexure A to Steele Wahlin's affidavit; paragraphs 2, 3, MacDonald's affidavit; paragraphs 16, 17, *Outline of Plaintiff's Submissions*, 22 March 2011).
79. On 29 October 2010, Mr Locke appeared for Coates. Laina Chan of counsel appeared for Mr McCann. Ms Chan spoke to her *Submissions for the defendant/cross-claimant*, dated 28 October 2010, on Mr McCann's Motion for leave to amend his Amended

Defence against Coates' original Statement of Claim. The Court permitted Mr McCann to plead his Further Amended Defence. The Court refused Coates' motion for an order, severing the Statement of Claim from the First Cross Claim. The Court confirmed that it had fixed both the Claim and the Cross Claim for hearing on 3 December 2010.

80. On 29 October 2010, Mr Baron served a Notice under Rule 21.10 of the *Uniform Civil Procedure Rules* on Mr Oliveri. The Notice requires Coates to Produce For Inspection the "Original Account Application Form and Guarantee purportedly signed by Stephen McCann dated 8 November 2002" (exhibits C, F, 5; MFI 7, exhibit 7; exhibit 10; paragraphs 2-5, exhibit B; paragraphs 4, 5, MacDonald's affidavit).

Coates' Reply to Stephen McCann's Further Amended Defence

81. On 2 November 2010, Coates' commercial agent, Justin Napiza, verified its Reply to Mr McCann's Further Amended Defence against its original Statement of Claim.
82. On 3 November 2010, Mr Baron signed and certified and the Court filed Mr McCann's Further Amended Defence against Coates' original Statement Claim. Marcus Wicken, who is employed by Oliveri Lawyers, signed, certified and lodged Coates' Reply to the Defence.

Stephen McCann's Amended Cross Claim against Anthony Rowe

83. Mr Baron signed and certified Mr McCann's Amended Cross Claim against Mr Rowe.
84. On 12 November 2010, Mr Oliveri appeared for Coates. Ms Chan appeared for Mr McCann. Andrew Martin of counsel appeared for Mr Rowe. The Court filed and gave Mr McCann leave to plead his Amended Cross Claim against Mr Rowe. The Court confirmed that it had fixed 3 December 2010, to hear the original Statement of Claim and the Amended Cross Claim "without any severance of issues." The parties estimated, or accepted the Court's revised estimate, that the hearing was to occupy three days. The Court directed Mr McCann, Mr Rowe and Mr Grant [Morris] to attend the hearing for cross examination.
85. On 12 November 2010, Mr Baron protested to Mr Oliveri:
- ... during the hearing [in the District Court] ... today you alluded, for the first time, to the fact that you will not be relying upon the Affidavit of Amie Bransgrove but an identical affidavit sworn by another employee of [Coates].
- In light of the fact that this matter will be heard in 3 weeks we request that you serve the further affidavit forthwith. [Mr McCann] reserves his right to challenge your entitlement to rely on [the affidavit].

In relation to our Notice to Produce served on 29 October 2010 ... you have not produced the original purported guarantee. Accordingly we assume that your client [Coates] is not in possession of same ...

Mr Locke confirms that Coates never produced "the original ... guarantee" (exhibits C, F, 5; MFI 7, exhibit 7; exhibit 10; paragraphs 2-5, exhibit B; paragraphs 4, 5, MacDonald's affidavit).

86. Mr Baron served Mr McCann's affidavit. On 15 November 2010, Mr Oliveri protested to Mr Baron that Mr McCann was in breach of the Court's orders to serve evidence.

... No issue in relation to the authenticity of the signature on the Guarantee in the Account Application Form has been pleaded in the Further Amended Defence ... [Mr McCann's] affidavit is the first notice to [Coates] of such issue ...

... [Coates] will object to the affidavit ...

... In the event that the Court permits the affidavit ... to be relied upon ... [Coates] reserves its right to apply for an adjournment (for the purpose of obtaining a report from a handwriting expert) ...

Mr Oliveri confirmed that Coates required Mr McCann for cross-examination on the affidavit (exhibit 8).

87. Mr Oliveri requested the Court to issue its Subpoena to John Brosnan to Attend to Give Evidence at the hearing. On 19 November 2010, the Court issued its Subpoena. Coates served the Subpoena on Mr Brosnan.

88. On 3 December 2010, Mr Locke appeared for Coates. Ms Chan appeared for Mr McCann. Mr Martin appeared for Mr Rowe. They were not ready to have the original Statement of Claim nor the Amended Cross Claim heard. Mr Locke informed the Court that Rivercorp was in liquidation, that Mr Brosnan is an undischarged bankrupt and that Mr Brosnan had attended the Court in response to the Subpoena to Give Evidence at the hearing.

89. Ms Chan informed the Court of her instructions that Mr McCann does not remember signing the Guarantee on Coates' Account Application Form. Ms Chan referred to "a handwriting expert" and complained that Coates had provided Mr McCann with "a very bad facsimile copy" of the Guarantee (transcript, 03/12/10, pages 8.40-50, 9.1-11; exhibits C, F, 7, 8; MFI 7, exhibit 10; paragraph 2, MacDonald's affidavit).

90. The parties estimated, or accepted the Court's revised estimate, that the hearing of the original Statement of Claim and the Amended Cross Claim was to occupy two or three days. The Court fixed 15 March 2011, to commence hearing the original Claim and the Cross Claim together and directed Coates to notify Mr Brosnan accordingly.

91. Between 7 and 13 December 2010, Mr Oliveri served a Notice on Mr Baron, requiring Mr McCann to Produce For Inspection:

All reports ... from a handwriting expert ... in respect of any signature on the Coates Hire Account Application Form dated 8th day of November 2002 ...

... All handwriting analyses ...

... All handwriting specimens to which reference is made in any report and/or analysis obtained by or on behalf of Stephen McCann from a handwriting expert ...

Mr Baron informed Mr Oliveri that there was no such written nor oral report. Mr Oliveri asked Mr Baron for Jacqueline Steele's "contact details". Mr Oliveri foreshadowed Coates' case that if the signature on the Guarantee purporting to be that of "S M^cCANN" were a forgery, Mr McCann was in breach of the duty, imposed by subsection (1) of section 316 of the *Crimes Act* 1900, to report that "serious indictable offence" (exhibits C, F; paragraphs 18-29, *Outline of Plaintiff's Submissions*, 22 March 2011).

92. On 15 March 2011, I had Coates' original Statement of Claim and Mr McCann's Amended Cross Claim called for hearing. Mr Locke appeared for Coates. Ms Chan appeared for Mr McCann. Mr Martin appeared for Mr Rowe.
93. Mr Locke confirmed that Rivercorp is in liquidation and that John Brosnan is an undischarged bankrupt. Mr Locke informed me that Mr Brosnan was outside the courtroom in response to the Court's Subpoena to Attend to Give Evidence.
94. At Mr Locke's request, I had Mr Brosnan called. Mr Brosnan appeared for himself and was unrepresented. Having heard from Ms Chan and Mr Martin, I excused Mr Brosnan from attending this hearing.
95. I filed and gave Mr Rowe leave to plead his Defence against Mr McCann's Amended Cross Claim.

Coates' amendments to its Statement of Claim

96. Between 15 and 23 March 2011, I gave Coates leave to amend its original Statement of Claim radically. Coates withdrew and I dismissed its Claim for damages from Rivercorp and from John Brosnan. Coates progressively reduced the bases for its Claim to its invoices for Goods Hired, amounting to \$109,979.11. Coates claimed judgment against Mr McCann for \$113,729.11, plus interest of \$4,055.22, filing fees, service fees and its attorney's fees (exhibits D, G; paragraph 4, Statement of Claim; paragraph 65, *Outline of Plaintiff's Submissions*, 22 March 2011).

97. On 23 and 24 March 2011, Mr Locke spoke to his *Outline of Plaintiff's Submissions* and *Synopsis of Plaintiff's Submissions*. Mr Locke pressed Coates' then Statement of Claim for judgment against Mr McCann for \$119,621.33, plus interest, and for liberty to apply regarding costs (paragraphs 65, 66, *Outline of Plaintiff's Submissions*, 22 March 2011).
98. On 24 March 2011, Ms Chan spoke to Mr McCann's *Submissions* on Coates' then Statement of Claim and on his Amended Cross Claim against Mr Rowe. Mr Martin spoke to the *First Cross-Defendant's written submissions* on the Statement of Claim and on Mr McCann's Amended Cross Claim.
99. Between 1 and 18 April 2011, Mr Locke sent my Associate emails and Schedules, which reduced the bases for Coates' Statement of Claim to its invoices, amounting to \$92,869.30, and increased its Claim for interest to \$20,370.00. Marcus Wicken, who is employed by Oliveri Lawyers, informed my Associate that Mr Locke intended those Schedules as Coates' ad hoc motion for further amendments to its Statement of Claim. Ms Chan and Mr Martin sent my Associate emails, addressing Mr Locke's and Mr Wicken's correspondence with the Court (*Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012; *Plaintiff's Schedules of Interest*, 26 March 2011, 29 March 2012).
100. Unfortunately, my Associate's email correspondence with the parties' legal representatives was deleted from the Court's server. Consequently, I did not receive part of counsel's submissions.
101. The Court's Civil Registrar informed my Associate that in a telephone conversation on 20 December 2011, Coates' attorney said it did not intend to amend the Statement of Claim on which I had given Mr Locke leave to rely during this hearing. Therefore, I had the Claim and Mr McCann's Amended Cross Claim relisted for the purpose of ascertaining the parties' intentions.
102. On 28 March 2012, Mr Locke, instructed by Mr Oliveri, appeared for Coates. Ms Chan, instructed by Kate MacDonald, appeared for Mr McCann. Mr Martin appeared for Mr Rowe.
103. Neither Mr Locke nor Mr Oliveri could explain the Civil Registrar's message to my Associate regarding Coates' Statement of Claim. Mr Locke pressed the amendments I had given him leave to make to Coates' Claim and foreshadowed the *Plaintiff's*

Amended Schedule of Invoices, which reduces their total to \$92,115.77, and the *Plaintiff's Amended Schedule of Interest*, which increases its Claim to \$27,711.00.

Coates' case at the conclusion of this hearing

104. Coates maintains that on 8 November 2002, it entered into a written "Credit Agreement" in which Rivercorp agreed to pay "for hired goods ... on the then current terms and conditions of sale ... as detailed" in Coates' invoices. Coates alleges that Mr McCann signed the Guarantee on its Account Application Form, indemnifying Coates "in respect of the obligations of Rivercorp to Coates" under their Credit Agreement. Coates submits that the unconditional, "continuing and irrevocable" Guarantee is a business record of Coates, which has been admitted into evidence pursuant to section 69 of the *Evidence Act 1995*, "without restriction on the use to which it may be put by the court" (exhibit C; paragraphs 2, 3, Statement of Claim; paragraphs 1-6, 10, 15-17, 55-57, 59-61, *Outline of Plaintiff's Submissions*, 22 March 2011; paragraphs 1-5, *Synopsis of Plaintiff's Submissions*, 23 March 2011).
105. Coates submits that the commercial purpose of the Guarantee was to provide for Coates to extend credit to Rivercorp in respect of the hiring of goods by Coates to Rivercorp. Coates maintains that Mr McCann is liable to it under the Guarantee for unpaid invoices, amounting to \$92,115.77, for goods hired by Coates to Rivercorp "during the period 31 May 2008 to 28 February 2009 [sic] inclusive". Coates seeks judgment against Mr McCann for \$95,612.27, including "Mercantile and Agency costs" of \$3,495.50, together with interest. Coates seeks liberty to apply regarding costs (exhibits C-G; paragraphs 13, 17(i), 17(ii), McCann's affidavit; paragraphs 2-4, Statement of Claim; paragraphs 3, 4, 6, 31, 65, 66, *Outline of Plaintiff's Submissions*, 22 March 2011; *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012; *Plaintiff's Schedules of Interest*, 26 March 2011, 29 March 2012; *Plaintiff's letter to the Court*, 29 March 2012).

The evidence

106. Coates pleads for this Court's leave to refer to the "written Credit Application" and "Credit Agreement", dated 8 November 2002, to "the terms and conditions set out in the Credit Agreement ... as to the Guarantee", and to "the then current terms and conditions of sale as detailed" on its invoices "as though the same were fully set out" in its Statement of Claim. None of those documents is in evidence in its entirety (exhibits A, C, D, F, G; paragraphs 2, 3, 9, Statement of Claim).

107. In giving Coates' Account Application Form a business like and commercially sensible interpretation, I infer that "all terms and conditions as shown on the reverse of this application" for a Hire Account are fundamental to the operation of the Guarantee on its face. At 03:07 on Tuesday, 29 October 2002, Kerry McIntyre invited the recipient of two facsimile pages from COATES M5 ARNCLIFF to treat by facsimile with Coates' Southern Region Headquarters in Victoria on the terms and conditions in the Form. P.1 of Coates' invitation to treat is not in evidence. The evidence is silent, therefore, on whatever Ms McIntyre or COATES M5 ARNCLIFF provided with the face of the Account Application Form" (paragraphs 1-4, exhibit B; exhibits A, C, F; paragraph 4 and Annexure A to Steele Wahlin's affidavit; paragraphs 1-3, Morris' affidavit; paragraphs 2, 3, Statement of Claim; paragraphs 2, 5, 7, Reply to Further Amended Defence against the Claim: emphasis added; paragraphs 5, 6, 15, *Outline of Plaintiff's Submissions*, 22 March 2011).
108. On Friday morning, 8 November 2002, John Brosnan accepted Kerry McIntyre's invitation to treat with Coates by making and by instructing Jacqueline Steele to make representations on P.2 of the facsimile from COATES M5 ARNCLIFF. Mr Brosnan represented The Riv Group's registered office: Unit J1 39 Jones Street, Ultimo, Postcode 2009, as Rivercorp's Address. He represented Post Office Box 840 Broadway NSW 2007, as Rivercorp's Postal Address. The telephone and facsimile numbers he represented as Rivercorp's are consistent with the Address in Ultimo and the Postal Address on Broadway, which Ms Steele wrote on P.2 of the facsimile from COATES M5 ARNCLIFF. Neither of those addresses was Rivercorp's registered office nor its principal place of business (exhibits C, D, G; page 1, exhibit 3; paragraphs 1-4, 8, 9, 11 and Annexure A to Steele Wahlin's affidavit; paragraphs 35-39, *Outline of Plaintiff's Submissions*).
109. Self evidently, there was no "original" handwriting on PAGE 01 nor on PAGE 02 of the facsimile from number "612-9212-4547 RIVERCORP PTY LTD" as they emerged from Coates' printer at 10:50 on Friday, 8 November 2002. PAGE 01 is not in evidence. PAGE 02, as printed by Coates, is not in evidence. However, Jacqueline Steele's and John Brosnan's representations, inviting Coates to treat on the terms and conditions in its Account Application Form, did not satisfy Coates' criteria for "consumer credit worthiness" of a Hire Account (exhibits C, F; paragraph 4 and

Annexure A to Steele Wahlin's affidavit; paragraphs 43-45, *Outline of Plaintiff's Submissions*, 22 March 2011).

110. Self evidently, there was no "original" handwriting on P.01 nor on P.02 of the facsimile from a different machine, number: "612 9212 4547 97%", as they emerged from Coates' printer at 11:48 on Friday, 8 November 2002. P.01 is not in evidence. P.02 invites Coates to treat on the terms and conditions in its Account Application Form and represents that "S M^cCann" signed PAGE 02 of the facsimile from number "612-9212-4547 RIVERCORP PTY LTD", which Coates had printed fifty eight minutes earlier (exhibits C, F; paragraph 4 and Annexure A to Steele Wahlin's affidavit; paragraph 45, *Outline of Plaintiff's Submissions*, 22 March 2011).
111. Between Friday afternoon, 8 November, and Wednesday, 13 November 2002, Coates evaluated the "consumer credit worthiness" of the facsimile Account Application Form from number "612 9212 4547 97%". On 13 November 2002, Coates' employee or agent approved the Application for a Hire Account by allocating its Number: 105637 to RIVERCORP PTY LTD Post Office Box 840 Broadway NSW 2007 (paragraphs 1-4, exhibit B; exhibits C, D, F, G: paragraph 4, Steele Wahlin's affidavit; paragraphs 1-3, Morris' affidavit; paragraph 15, *Outline of Plaintiff's Submissions*; paragraph 2, *Rowe's submissions on ... evidence adduced by Coates in ... further amended Statement of Claim*, 22 March 2011).
112. The evidence is silent on any LETTER SENT by Coates to RIVERCORP PTY LTD Post Office Box 840 Broadway NSW 2007. The evidence does not explain the origin nor the significance of barcode: WEST006690, which obscures part of Kerry McIntyre's invitation to treat by facsimile with Coates' Southern Region Headquarters at Dandenong in Victoria (exhibits A, C, F).
113. About 13 November 2002, Coates established its Hire Account Number 105637 for its OFFICE USE ONLY under the terms and conditions in its Account Application Form. Consequently, the Account did not oblige Coates to provide its credit nor "to enter into hire and/or sale agreements" with RIVERCORP PTY LTD Post Office Box 840 Broadway NSW 2007. The Account did not permit nor require Rivercorp to hire Coates' goods or services. The Account did not impose "obligations under any hire agreements" upon Coates nor on Rivercorp. Explicitly, Coates retained its right to cancel, suspend or vary the Account peremptorily "IF ACCOUNTS NOT PAID BY

DUE DATE" in breach of Rivercorp's "obligations under any such hire agreements" (exhibits C, F; paragraph 2, *Rowe's submissions on ... evidence ... in ... further amended Statement of Claim*, 22 March 2011).

114. It seems to me, therefore, that Mr McCann's liability under the Guarantee on the face of Coates' Account Application Form is contingent upon its proving that between 03:07 on Tuesday, 29 October 2002, and 11:48 on Friday, 8 November 2002, he agreed "to all terms and conditions as shown on the reverse of this application" by signing P.2 of the facsimile from COATES M5 ARNCLIFF or PAGE 02 of the facsimile from "612-9212-4547 RIVERCORP PTY LTD". Mr McCann's liability is contingent upon Coates' proving "all terms and conditions as shown on the reverse of this application" for a Hire Account and each Hire Agreement and Purchase Order, cited in the invoices on which it relies. Mr McCann's obligation to indemnify Coates is contingent upon its proving that Rivercorp breached a specific obligation/s, imposed by "any such hire agreement", and the loss or damage, suffered by Coates as a result of each breach (exhibits A, C, D, G).
115. There are three pages of "STANDARD CONDITIONS OF HIRE coates ... Hire Agreement ... " Page 1 of 3 recites clauses 1 to 6.2 of those Conditions, which include **Definitions** and the following:
- 4. **Hire and other charges:**
 - 4.1 Hire: The Customer will pay [Coates] the hire charges set out in the Hire Agreement ...
 - 5. **Customer's Hire Obligations:**
 - 5.1 **Possession and Use by Customer:** The Hire Agreement is personal to the Customer ...
- Conceivably, Page 1 of 3 is "on the reverse of this application" by prospective hirers of Coates' plant and equipment for a Hire Account (exhibit A; exhibit C: emphasis in original; exhibit F).
116. Page 2 of Coates' three pages of Standard Conditions of Hire recites their clauses 7 to 12.13 inclusive. Page 3 of 3 recites clauses 13 to 16.3. It is unlikely, therefore, that clause 11 of those Conditions is "shown on the reverse" of the Account Application Form. Consequently, I am not satisfied that on 29 October 2002, Kerry McIntyre or COATES M5 ARNCLIFF provided the recipient of P.2 of its facsimile with "all terms and conditions" precedent for the operation of the Guarantee on the face of its Application for a Hire Account (exhibit A; exhibit C: emphasis in original; exhibit F;

paragraph 4 and Annexure A to Steele Wahlin's affidavit; paragraphs 2, 3, Statement of Claim; paragraphs 2, 5, 7, Reply to Further Amended Defence against the Claim).

Coates' invoices

117. Coates claims that forty eight of its forty nine invoices to RIVERCORP PTY LTD Post Office Box 840 Broadway NSW 2007, and that seventy of its seventy nine invoices to *Rivercorp Pty Ltd (in Administration) PO Box 840 Broadway NSW 2007*, are unpaid in breach of their "Credit Agreement" and "the then current terms and conditions of sale ... as detailed on the invoice or docket for the goods supplied ... " Coates culled the *Plaintiff's Amended Schedule of Invoices* from its erratic Plant Hire and Pace Plan records of its Hire Account 00105637 (exhibits B, D, G; paragraphs 1-4, 15, Morris' affidavit; paragraphs 2, 3, Statement of Claim).
118. Each of Coates' invoices, listed in paragraph 4 of its original Claim, cites Hire Account No. 00105637 and a Hire Agreement/s, numbered by Coates. For example, invoices 3 and 4 in the *Plaintiff's Amended Schedule of Invoices* claim that it hired its CONTAINER (ASSET NO. 764574) to RIVERCORP PTY LTD Post Office Box 840 Broadway 2007, under their HIRE AGREEMENT No. 113829(ACCO). Coates claims that the HIRE COMMENCED on Friday morning, 20 July 2007. Invoice 49 in the *Amended Schedule* claims that the HIRE of the same ASSET NO. 764574 commenced on the same day under a different HIRE AGREEMENT No. 94383(ACCO). All three invoices claim that the HIRE CONTRACT [sic] CONTINUES EQUIPMENT STILL ON HIRE (exhibits D, G; *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).
119. Cumulatively, forty nine invoices to RIVERCORP PTY LTD Post Office Box 840 Broadway 2007, claim that between Friday morning, 20 July 2007, and 17:00 on Friday, 1 August 2008, Coates hired its goods or services. Forty two of those invoices allege that Coates accepted numbered Purchase Orders from Nathan, Owen Gary, Mario, John, Dave Dalton, Greg Upton, David White, Sanja, Grant, and Colin Robinson (exhibits C, D, G; paragraph 14, Morris' affidavit; paragraph 4, Statement of Claim; paragraph 11 and annexure A to Further Amended Defence against the Claim; *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).
120. Ten invoices to RIVERCORP PTY LTD Post Office Box 840 Broadway 2007, dated between 31 May 2008, and 31 July 2008, claim that Coates accepted Purchase Order

No. 12196 from Mario. The only "Mario" identified in the evidence is Mario Gualdi, who held twenty ordinary shares in Rivercorp at an unspecified time but presumably after 23 April 2003, when Mr McCann resigned as Rivercorp's director and agreed to sell its shares to Mr Brosnan and to Mr Rowe (exhibits C, D, G; page 6, exhibit 3; exhibit 4; paragraph 14, Morris' affidavit; invoices 3-5, 10, 13-15, 24, 26, 31, 35, 38, 39, 49, 58, 59, 62, 72, 74, 85-87, 96, 97, 105, 110-112, *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).

121. Seven invoices to RIVERCORP PTY LTD Post Office Box 840 Broadway 2007, dated between 31 May 2008, and 31 July 2008, claim that Coates accepted Purchase Order No. 12417GU from Nathan. Four invoices, dated between 30 June 2008, and 31 July 2008, claim that Coates accepted Purchase Order No. 12417 from Greg Upton (exhibits C, D, G; paragraph 4, Steele Wahlin's affidavit; paragraphs 1-4, 14, Morris' affidavit; paragraph 4, Statement of Claim; paragraph 11 and annexure A to Further Amended Defence against the Claim; invoices 1, 6, 7, 16, 17, 22, 32, 40, 41, 47, 48, *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).
122. One invoice to RIVERCORP PTY LTD Post Office Box 840 Broadway 2007, dated 30 June 2008, and one invoice, dated 31 July 2008, claim that Coates accepted Purchase Order No. 112462 from Sanja (exhibits D, G; invoices 19, 42, *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).
123. Cumulatively, seventy nine invoices to *Rivercorp Pty Ltd (in Administration) PO Box 840 Broadway NSW 2007*, claim that between 17.00 on Wednesday, 13 August 2008, and 17:00 on Saturday, 31 January 2009, Coates hired its goods or services. Twenty seven of those invoices cite Hire Agreements, dated between 7 February and 1 November 2008 (exhibit G; paragraphs 1-4, 14, Morris' affidavit; paragraphs 2, 3, Statement of Claim; paragraphs 1, 2, 5, 15-17, 55-57, 59-61, *Plaintiff's Outline of Submissions*; invoices 53-131, *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).
124. Seventy invoices to *Rivercorp Pty Ltd (in Administration) PO Box 840 Broadway NSW 2007*, cite numbered Purchase Orders. Coates alleges that it accepted those Purchase Orders from Colin Robinson, Dave Dalton, Brad Johnson, David White, Peter Dixon, Mario, Greg Upton, Owen Gary, John, Sanja, Nathan, Bryan Campbell and John (exhibits C, D, G; paragraph 14, Morris' affidavit; paragraph 4, Statement of

Claim; paragraph 11 and annexure A to Further Amended Defence against the Claim; *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).

125. Ten invoices to *Rivercorp Pty Ltd (in Administration) PO Box 840 Broadway NSW 2007*, dated between 31 August 2008, and 28 February 2009, claim that Coates accepted Purchase Order number 34608/12468 from Peter Dixon. Coates claims that Peter Dixon provided his mobile telephone number: 0407 744 022 and was "Served By Sebastian Mattarelli ... By Bryan Campbell ... By Shaun Savill" (exhibit G).
126. Fifteen invoices to *Rivercorp Pty Ltd (in Administration) PO Box 840 Broadway NSW 2007*, dated between 31 August and 19 December 2008, reiterate that Coates accepted Purchase Order No. 12417GU from Nathan. Coates claims that Nathan provided his mobile telephone number: 0414 519 142 and was "Served by Kerry McIntyre ... By Donna Rogers ... By Steve Jones" (exhibits D, G; invoices 70, 71, 73, 93, 94, 95, 106, 108, 109, 116, 117, 119, 120, 121, 122, *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).
127. Four invoices to *Rivercorp Pty Ltd (in Administration) PO Box 840 Broadway NSW 2007*, dated between 31 August and 10 September 2008, reiterate that Coates accepted Purchase Order No. 12417 from Greg Upton. Coates claims that Greg Upton was "Served By Terry ... By John" (exhibits D, G; invoices 60, 61, 78, 79, *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).
128. Six invoices to *Rivercorp Pty Ltd (in Administration) PO Box 840 Broadway NSW 2007*, dated between 31 August 2008, and 28 February 2009, reiterate that Coates accepted Purchase Order No. 112462 from Sanja. Coates claims that Sanja provided her telephone number: 9 692 0888 and was "Served by Donna [Rogers]" (exhibits D, G; invoices 19, 42, 69, 107, 118, 125, 128, 131, *Plaintiff's Schedule of Invoices*, 26 March 2011).
129. Twelve invoices to *Rivercorp Pty Ltd (in Administration) PO Box 840 Broadway NSW 2007*, dated between 31 August and 18 November 2008, reiterate that Coates accepted Purchase Order No. 12196 from Mario. Coates claims that Mario was "Served By Omar ... By Kerry McIntyre" (exhibits D, G; invoices 58, 59, 72, 74, 86, 87, 96, 97, 105, 110, 111, 112, *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).

130. Evidently, Coates sent its hundred and twenty eight invoices to Post Office Box 840 Broadway NSW 2007. None of the Hire Agreements and Purchase Orders, cited in those invoices, is in evidence. None of the invoices suggests that Coates communicated with Stephen McCann, directly or indirectly (exhibits D, G; paragraphs 8, 10, 11, McCann's affidavit; *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).
131. Coates did not adduce evidence from any of its employees or agents, who include Tracey, Mp, Terry, Julie, Sm, Paul Hoskins and Jon, named in its invoices. Coates does not explain its failure to call Kerry McIntyre, John Brosnan or anyone else with direct knowledge of the Hire Agreements and Purchase Orders, cited in its invoices (exhibits C, D, F, G, 3, 4, 7; MFI 7, exhibits 10, 11; paragraphs 9-11, 16, McCann's affidavit; invoices 1-27, 31-131, *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).

Grant Morris's evidence

132. Coates pressed a minor part of Grant Morris' affidavit successfully. Consequently, Mr Morris affirms: "Despite many requests [Rivercorp] has failed or refused to pay" the invoices, amounting to \$111,122.77, which he lists in paragraph 14 of his affidavit. His list includes the three invoices from National Hire Trading and Coates' incomplete invoices, identified in the *Plaintiff's Amended Schedule of Invoices*, which Mr Locke omitted progressively from paragraph 4 of the original Statement of Claim (paragraphs 1-4, 15, Morris' affidavit; paragraph 11 and Annexure A to Further Amended Defence against the Claim; *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).
133. On 16 March 2011, Coates called Mr Morris. As I understand his evidence, he relies on unspecified "Hire Agreements and related documents", exhibited to him on 14 September 2010, none of which is in evidence. His "knowledge of the matters affirmed" by him, including whatever "requests" were made by Coates for whatever Rivercorp "has failed or refused to pay", is confined to his responsibility since September 2009, for Coates' defective secondary and tertiary records of Hire Account No. 00105637 (exhibits D, G; paragraphs 1-4, 15, Morris' affidavit; paragraph 3, *Outline of Plaintiff's Submissions*, 22 March 2011).

Ben Pettitt's evidence

134. On 9 March 2011, Ben Pettitt swore an affidavit, supporting Coates' original Statement of Claim. Mr McCann required Mr Pettitt for cross-examination on the affidavit (exhibit B).
135. On 16 March 2011, Coates tendered Mr Pettitt's brief affidavit. In cross-examination, Mr Pettitt described his employment with Coates, which commenced years after the relevant events, and its Plant Hire and Pace Plan Systems of recording its business. Mr Pettitt explained his own notations in Coates' "Debtors Chase History ... Rivercorp Pty Ltd (in Administration) ... " (exhibit B; MFI 4, exhibit 1).
136. Unsurprisingly, Mr Pettitt confirms "that the original account application form cannot be located" by Coates. The Application for a Hire Account, approved on 13 November 2002, was an amalgam of P.2 of the facsimile from COATES M5 ARNCLIFF, PAGE 02 of the facsimile from number: "612-9212-4547 RIVERCORP PTY LTD" and P.02 of the facsimile from number: "612 9212 4547 97%", which Coates received between 10:50 and 11:48 on 8 November 2002 (exhibits B, C, F; paragraph 4 and Annexure A to Steele Wahlin's affidavit; paragraphs 43-45, *Outline of Plaintiff's Submissions*, 22 March 2011; paragraph 9, *Synopsis of Plaintiff's Submissions*, 23 March 2011; paragraph 3c, *Submissions of McCann* on Statement of Claim).

Stephen McCann's evidence

137. Ultimately, Coates did not press two evidentiary objections to Mr McCann's affidavit, which I had noted during counsel's interlocutory argument. On 16 March 2011, Mr McCann adhered to his affidavit.
138. The evidence does not enable me to determine when Coates served its original Statement of Claim on Mr McCann. However, in the first half of December 2007, he acted upon Baron and Associates' legal advice regarding the disputes arising from the share sale Agreement, dated 23 April 2003, and from proceedings in the Supreme Court (exhibits 4, 11).
139. In this Court, Mr McCann acted upon Mr Baron's legal advice in raising specific Defences against Coates' original Statement of Claim. When Mr McCann sighted a copy of P.02 of the facsimile from number: "612 9212 4547 97%", annexed to Amie Bransgrove's affidavit, he properly admitted a slight resemblance between his

signature and the marks, adjacent to his name: "S M^cCANN" (exhibits C, F; MFI 7, exhibit 10; paragraph 10, McCann's affidavit; paragraphs 2, 3, MacDonald's affidavit; paragraphs 1-4, *Submissions for the defendant/cross-claimant*, 28 October 2010; paragraphs 7-12, 17-30, *Plaintiff's Outline of Submissions*).

140. Mr McCann plausibly explained why he had not obtained a report from Michelle Novotny and his own uncertainty whether P.02 of the facsimile Account Application Form, printed by Coates at 11:48 on 8 November 2002, copies his signature. I accept Mr McCann's evidence that he does not recall signing the Guarantee on the Form, that he never communicated nor dealt with Coates directly, that he was not involved in Rivercorp's operation after 23 April 2003, and that he had acted upon his accountant's prudent advice to avoid signing Rivercorp's documents whenever possible (exhibits C, D, H, G, 3, 4, 7, 9, 11; paragraphs 1-4, 6-9, 11, Steele Wahlin's affidavit; paragraphs 8, 10, 11, Stephen McCann's affidavit; *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012; paragraphs 11-13, *Outline of Plaintiff's Submissions*, 22 March 2011; paragraphs 8, 9, *Synopsis of Plaintiff's Submissions*, 23 March 2011).

Kate MacDonald's evidence

141. On 14 March 2011, Kate MacDonald swore her brief affidavit, annexing her correspondence with Michelle Novotny. On 18 March 2011, Ms MacDonald confirmed her affidavit. Her explanation for the absence of a "forensic report" on the facsimile Account Application Form, approved by Coates on 13 November 2002, corroborates Mr McCann's evidence on the subject (exhibits C, F; exhibit 7; MFI 7, exhibit 10).

Michelle Novotny's evidence

142. Michelle Novotny swore an affidavit, annexing her correspondence with Kate MacDonald. At 17.30 on 14 March 2011, Mr Baron served Ms Novotny's affidavit on Mr Oliveri (exhibit 7; MFI 7, exhibit 10).
143. On 17 March 2011, Mr McCann moved the Court ad hoc for orders, abridging the time for serving Michelle Novotny's affidavit and for leave to adduce her oral evidence. Having heard from counsel, I exercised the Court's discretion by making those orders.
144. In the witness' box, Ms Novotny adhered to the advice she had given Ms MacDonald on 21 October 2010. As I understand Ms Novotny, the simple elements of Mr

McCann's signature could be copied relatively easily. Superficial similarities between the photocopies of Mr McCann's name and signature on exhibit 11 and the facsimile of his name and adjacent marks on exhibits C and F do not enable Ms Novotny to express an opinion whether he signed the "original" Account Application Form, approved by Coates on 13 November 2002 (paragraphs 48-54, *Outline of Plaintiff's Submissions*; paragraphs 4b, 7, *Synopsis of Plaintiff's Submissions*, 23 March 2011; paragraph 3d, *Submissions of McCann* on Statement of Claim).

145. Evidently, Coates did not qualify a handwriting expert. Coates argues that in determining the central issue in its Statement of Claim, "it is open to the court to embark upon a comparison of signatures and/or writings", photocopied in the documentary evidence, but "does not need to do so." For the following reasons, it does not seem to me that this Court should do so (exhibit 8; paragraphs 48-54, *Outline of Plaintiff's Submissions*; paragraph 6, *Synopsis of Plaintiff's Submissions*, 23 March 2011).
146. I agree with Ms Chan's description of exhibit C as "a very bad facsimile copy" of the face of Coates' Account Application Form. I accept Ms Novotny's evidence that none of exhibits C, F nor 11 enables a Forensic Document and Handwriting Examiner to detect the subtle features of handwriting which might enable her to opine whether Mr McCann signed or someone else copied his signature onto the "original" Application for a Hire Account, approved by Coates (transcript, 03/12/10, pages 8.40-50, 9.1-11; exhibits C, F, 7; MFI 7, exhibit 10; paragraph 2, MacDonald's affidavit; paragraphs 9-11, 16, McCann's affidavit; paragraphs 1-4, 6, 7, 11 and Annexure A to Steele Wahlin's affidavit; paragraphs 48-54, *Outline of Plaintiff's Submissions*; paragraph 6, *Synopsis of Plaintiff's Submissions*, 23 March 2011; paragraph 3b, *Submissions of McCann* on Statement of Claim).

Jacqueline Steele Wahlin's evidence

147. On 4 March 2011, Jacqueline Steele Wahlin swore an affidavit. On 18 March 2011, Coates withdrew its notice, requiring her to attend for cross-examination on her affidavit. Mr McCann pressed part of her affidavit successfully.
148. Ms Steele Wahlin's unchallenged description of her infrequent encounters with Mr McCann in the course of her employment with Rivercorp and her inability to recall ever witnessing his signature tends to corroborate his evidence regarding his advice

from his accountant. Ms Steele Wahlin's unchallenged allegation that she never countersigned a document as a witness without seeing the signatory's signing the document is consistent with the content and configuration of exhibits C and F. The evidence does not suggest that Mr McCann was present when Ms Steele Wahlin made the representations, specified by Mr Brosnan, nor that she sighted the facsimile from COATES M5 ARNCLIFF after she witnessed Mr Brosnan's signing its P.2 (paragraphs 1-4, 8, 9, 11 and Annexure A to Steele Wahlin's affidavit).

149. Coates submits that no one but "Rivercorp, its director and shareholders ... had any apparent financial interest in such an arrangement with Coates" and that Jacqueline Steele "would have been in a position to know if any persons other than McCann and Brosnan had signed" the facsimile Account Application Form, accepted by Coates. It is equally possible that Mr Brosnan or Rivercorp's Ultimate Holding Corporation, The Riv Group, had a financial interest in utilising Hire Account Number 105637 with Coates (exhibits C, F; page 4, exhibit 3; paragraphs 35-39, *Outline of Plaintiff's Submissions*, 22 March 2011).
150. Between 10:50 and 11:48 on Friday, 8 November 2002, John Brosnan and Jacqueline Steele provided Coates with The Riv Group's registered office, with Post Office Box 840 Broadway 2007, with telephone number: 02 9 692 0888, with facsimile number 02 9 692 0899, and with a facsimile number: 612-9212-4547, in the City of Sydney. None of those was a reliable, business like means of notifying Rivercorp of Hire Account Number 105637 during the five months in which Mr McCann remained its sole director and shareholder (exhibits C, D, F, G; page 4, exhibit 3; paragraphs 1-4, 8, 9, 11 and Annexure A to Steele Wahlin's affidavit; invoices 69, 107, 118, 125, 128, 131, *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012; paragraphs 35-43, *Outline of Plaintiff's Submissions*, 22 March 2011).
151. Between 3 November 2003, and 28 February 2009, Rivercorp shared The Riv Group's registered office in Unit J1 at 39 Jones Street in Ultimo. Between 1 April 2004, and 28 February 2009, Rivercorp shared The Riv Group's principal place of business in the same premises. Two invoices to RIVERCORP PTY LTD Post Office Box 840 Broadway NSW 2007, and six invoices to *Rivercorp Pty Ltd (in Administration) PO Box 840 Broadway NSW 2007*, dated between 30 June 2008, and 28 February 2009, claim that Coates accepted Purchase Order No. 112462 from Sanja. Sanja provided Coates with telephone number: 9 692 0888 for the premises on Jones Street in Ultimo,

which John Brosnan had represented as Rivercorp's Address, six years earlier (exhibits C, D, G, H; page 1, exhibit 3; exhibits 4, 9, 11; invoices 19, 42, 69, 107, 118, 125, 128, 131, *Plaintiff's Schedules of Invoices*, 26 March 2011, 29 March 2012).

Conclusion

152. I am not satisfied that Mr McCann signed the Account Application Form for a Hire Account, which Coates approved on 13 November 2002. If I were wrong in that conclusion, the evidence would not persuade me that Coates provided and that Mr McCann "agreed to all terms and conditions as shown on the reverse of this application" by signing the Application for a Hire Account (exhibits A, C, F).

The draft Deed of Settlement and Release

153. In giving the draft Deed a business like and commercially sensible interpretation, I infer that in December 2007, Mr McCann and Mr Rowe had in contemplation and intended to settle the "various disputes" between them "relating to Rivercorp", all "the claims between them", recited in clauses C, D, J, K and N of the draft Deed, and "all Claims" specified in the draft Deed's clauses 1.1, 7.1, 8.1, 20 and 21.5. Those disputes included Mr McCann's proceedings for "any outstanding rights or benefits" under his Agreement to sell Rivercorp's shares to Mr Rowe and their performance of their respective obligations under that Agreement (clause 9, exhibit 4; exhibit 11).

Conclusion

154. I agree with Mr Rowe's construction of the draft Deed. The evidence supports his submission that Mr McCann intended the draft Deed to supersede all previous agreements on its subject matter, enabling them to "walk away" from all the Claims, claims and disputes between them, when they performed their respective obligations under the draft Deed (clauses 1.1, 7.1, 8.1, 20, 21.5, exhibit 11; paragraphs 1, 4, 23, *First Cross-Defendant's written submissions*).

155. The evidence does not reveal when Mr Rowe executed the draft Deed, nor when the final instalment of the consideration, specified in its clauses 2 and 3.1 was paid. Therefore, I am unable to determine when he was released from whatever indemnity, liability or obligation he had to Mr McCann under their share sale Agreement, dated 23 April 2003. Accordingly, they should have the opportunity of addressing the Amended Cross Claim on the basis of the evidence before this Court, having regard to

my findings today (exhibits, 4, 11; paragraph 24, *First Cross-Defendant's written submissions* on Amended Cross Claim).

Orders

156. Plaintiff's amended Statement of Claim against the third Defendant, Stephen McCann, is dismissed;
157. amended Statement of Claim and Amended Cross Claim are adjourned for mention.

Clive Phillip Locke of counsel, instructed by Oliveri Lawyers, appeared for the plaintiff, Coates Hire Operations Proprietary Limited.

Laina Chan of counsel, instructed by Baron and Associates, Lawyers, appeared for the third defendant and cross claimant, Stephen McCann.

Andrew Geoffrey Martin of counsel, instructed by Paul Bard Lawyers, appeared for the cross defendant, Anthony Jerard Rowe.

*I certify that this and the
previous 36 pages are the
Reasons for Judgment of Her
Honour Judge O'Toole
J. Ridley
Associate*