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Contract law update 2024

Contents

Welcome to the 13th Allens contract law update, in which we summarise the most important contract law decisions handed down by Australian courts during 2024.

Introduction

The meaning of words is the essence of contract law, whether those words are contained in contracts or in legal principles. Does there come a point, however, where differences between disputed meanings are too subtle to be of practical relevance? Consider for example the High Court's consideration last year of 'remoteness' in contract law. In the tort of negligence, losses are too remote if they are not reasonably foreseeable. There is however no settled test for remoteness in the law of contract. The High Court referred to tests that had been suggested in earlier cases, such as: 'on the cards', 'not unlikely', 'quite likely', 'a serious possibility', 'a real danger' or even the tortious 'reasonably foreseeable'.

The court adopted the test of 'serious possibility', citing a judgment of Lord Reid, but possibly overlooking the fact that Lord Reid rejected this test as being much too wide (because, in his view, it included the chance of picking 1 specific card from a full deck of 52 cards). What are we to make of this? Has the High Court held that losses which have a probability of less than 1 in 50 are not too remote – which would seem to be a radical change in the law—or does the High Court use 'serious possibility' in a different way from Lord Reid? If so, is the High Court's 'serious possibility' equivalent to Lord Reid's 'not unlikely'?

Even if this issue is one day resolved, different judges will still apply these tests in different ways; and arguably that difference in application is more significant than any differences between legal tests.

This is not to deny the importance of legal principles. In many cases in this year's update – such as those concerning the formation of contracts, the interpretation of contracts or the doctrines of repudiation and frustration – the orthodox application of the principles of contract law was determinative of the outcome. It is those principles which lawyers need to understand, and we hope this update helps with that understanding.

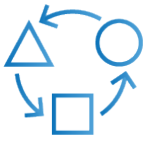
Key themes from 2024

Ambiguities around timing, formality, and signing capacity can turn informal agreements into unexpectedly enforceable contracts.

Terms introduced after formation may not be binding, while implied duties, such as the duty to co-operate, will be enforced where necessary to uphold the parties' legitimate contractual expectations.

While courts may avoid rigid or unfair readings they will not override unambiguous language, and rectification for mistakes remains available only in cases of proven mutual error.

Factual causation requires showing a substantial contribution to loss, not sole causation.



In 2024, courts reaffirmed that the doctrine of frustration only applies when a supervening event fundamentally alters contractual obligations beyond what was contemplated by the parties

Contract formation

Forming a binding settlement agreement

In 2024, the courts were faced with a number of cases where the validity of a settlement agreement was in dispute. To be enforceable, a settlement agreement must satisfy all foundational requirements for a valid contract. These include the requirements that:

- the agreement be supported by good consideration; and
- the parties, by that agreement, intended to create a legal relationship.

While it is trite that a contract must be supported by consideration, what exactly amounts to 'good' consideration? It is a long-established principle that performance of an existing duty, whether arising under a contract or statute, is not sufficient. This principle was qualified in *Wigan v Edwards* (1973) 1 ALR 497, where Justice Mason acknowledged that performance of an existing obligation can be good consideration if it is given by way of a bona fide compromise of a disputed claim. If one party believes, in good faith, that it is excused from performing a pre-existing contractual obligation, performing or promising to perform this obligation will be good consideration for a new promise by the other party. The New South Wales Court of Appeal in *Creative Academy Group Pty Ltd v White Pointer Investments Pty Ltd* [2024] NSWCA 133 considered these principles in the context of a commercial arrangement for the development of childcare centres. The decision carefully examines the need for a genuine dispute that is being compromised in order for the new agreement to be supported by consideration.

Settlement agreements are often concluded following a series of correspondence between the parties. This can give rise to the vexed issue of what point in time communications between parties form a binding contract when entry into a formal agreement was contemplated. Readers of the *Contract Law Update* (2023, 2022) will recall our discussion in previous years of the distinction between a binding contract and a mere 'agreement to agree'. The New South Wales Court of Appeal in *Radovanovic v Stekovic* [2024] NSWCA 129 considered whether acceptance of an offer made in a Calderbank letter in settlement of a dispute demonstrated an intention to be bound immediately upon acceptance, or whether the parties would only be bound upon entry into a formal deed of settlement and release.

Sinclair v Balanian [2024] NSWCA 144 also considered the parties' intention to be bound by an agreement. In this case, commercial parties sought to settle a dispute by entering into a deed of settlement, release and indemnity without legal input. While the document lacked the formalities required to be a binding deed, it was still held to be valid as a contract and, troublingly for the individuals, was found to be binding on signatories in their *personal* capacity rather than only as representatives of the commercial parties.

Creative Academy Group Pty Ltd v White Pointer Investments Pty Ltd [2024] NSWCA 133—consideration where new promise made—restitution of monies paid

The New South Wales Court of Appeal considered whether a settlement proposal between the parties was supported by good consideration. The issues before the court included whether a new promise in the context of an existing contract was good consideration, and whether restitution of monies paid by one party was available on the basis that either the contract was unenforceable, or the monies were paid under a mistaken belief.

This case considers whether a new promise can amount to 'consideration' in the context of a pre-existing contractual arrangement. It emphasises the principles expounded by Justice Mason in Wigan v Edwards (1973) 1 ALR 497 that a promise to perform an existing legal duty only amounts to consideration if it is a 'bona fide compromise of a disputed claim'; otherwise, a new promise must be more than what is promised under the existing contract.

Facts

Creative Academy Group Pty Ltd and White Pointer Investments Pty Ltd entered into an oral agreement around October 2017 for the services of Hilton Hedley, White Pointer's sole director and secretary (the ***Moncur Agreement***). Mr Hedley agreed to identify suitable childcare sites for CAG and assist it to lease the sites in return for a fee of $2000 per child placed at each childcare centre. Half of the fee would be paid upon the execution of a lease agreement and granting of development approval of a site, and the remaining half would be paid upon the opening of the relevant childcare centre.

In early 2020, and after being introduced to some sites by Mr Hedley, CAG proposed an alternate arrangement where it would pay a lesser amount per a child's place in advance, and White Pointer would be required to refund these advances if the relevant childcare centre did not open (the ***Settlement Proposal***).

White Pointer commenced proceedings against CAG for amounts it alleged were outstanding under the Moncur Agreement. In its cross-claim, CAG alleged it was entitled to restitution of all amounts paid to White Pointer because the services provided by White Pointer and Mr Hedley required that they were licensed as real estate agents in NSW and the ACT as per the *Property and Stock Agents Act 2002* (NSW) and *Agents Act 2003* (ACT). White Pointer was successful at first instance.

Judgment

Justices Adamson and White allowed the appeal in part. Justice Meagher dissented on the application of the *Agents Act 2003* (ACT) and the availability of restitution.

Settlement Proposal was not enforceable

The Court of Appeal unanimously upheld the finding that the Settlement Proposal was not binding.

Justice Adamson (Justices White and Meagher agreeing) considered the general rule articulated in *Wigan v Edwards* (1973) 1 ALR 497 at 512 that 'a promise to perform an existing duty is no consideration', as well as the qualification that such a promise can be sufficient consideration 'when it is given by way of a bona fide compromise of a disputed claim, the promisor having asserted that he is not bound to perform the obligation under the pre-existing contract or that he has a cause of action under that contract'.

Her Honour found that CAG's conduct in offering to pay part of the sum owing under the Moncur Agreement for existing sites but characterising it as an advance for a different site was an attempt to conceal 'part-performance of an existing obligation as a valuable concession'. Her Honour found that CAG's promises were no more than threats to withhold performance under the agreement to gain an unfair advantage, and did not amount to consideration. Further, there was no bona fide dispute about the terms of the Moncur Agreement that the Settlement Proposal purported to resolve. The Settlement Proposal therefore failed for lack of consideration and was unenforceable.

No restitution

The appellants alleged they were entitled to restitution of amounts they had paid to White Pointer given the terms of the NSW Act and the ACT Act. The appellants argued that the Moncur Agreement was illegal, contrary to public policy and unenforceable.

Justice Adamson found that the NSW Act did not go as far as to require White Pointer to repay monies already received under the Moncur Agreement where that choice was available to the legislature. That Act makes clear that an unlicensed agent is not entitled to bring proceedings to recover a fee for services performed without the requisite licence, but does not require those agents to pay back monies already received. Her Honour found it was not incongruent with public policy for the court to refuse to order White Pointer to return the monies already paid to it under the Moncur Agreement. Her Honour applied the same analysis with respect to the ACT Act and the payments White Pointer received for ACT sites.

The appellants also argued they were entitled to restitution of the monies paid because they were paid under the mistaken belief that White Pointer could have enforced a right to payment, and that this was the only available inference on the evidence. Her Honour found that other explanations arose on the evidence, including that the appellants had a 'strong commercial interest' in using the respondents' services and that as a new entrant to the childcare sector they would have been unlikely to secure and lease any of the sites without the respondents' connections. It could not be inferred that CAG was concerned about whether the respondents were or were required to be licensed when it only needed the benefit of the respondents' connections. Her Honour also found that the appellants had not established causation, as she did not accept that CAG would have impacted their future business by not paying White Pointer on the basis that they did not hold the requisite licences.

Radovanovic v Stekovic [2024] NSWCA 129—accepting Calderbank offer—binding settlement agreement—Calderbank offer indicating intention to be bound immediately

The parties exchanged correspondence in the course of a family dispute over the distribution of proceeds from a property sale. The appellant sent a Calderbank letter, expressed as 'without prejudice save as to costs', offering terms of a proposed settlement that were accepted by the respondents. The issue arising was whether this gave rise to a binding settlement agreement, or whether the parties intended not to be bound until a formal settlement agreement was executed.

This decision emphasises the importance of taking a commercially sensible approach when determining when parties intend to be bound by an agreement.

Facts

Goran Radovanovic was the sole registered owner of a property in Queanbeyan, NSW. In 2020, he sold the property for $675,000. Mr Radovanovic's sister and her husband (together, the ***Stekovics***) asserted an equitable interest in the property and placed a caveat on the title. They agreed to remove the caveat if the proceeds of sale were held on trust by the appellant's solicitor, BDN, while the dispute was resolved.

The sale amount was paid into BDN's account by the purchaser and remained held in trust for nearly two years. In 2022, Mr Radovanovic notified the Stekovics that he intended to have the funds paid out to himself, which prompted the Stekovics to make an offer settling the dispute. These communications were made through the parties' solicitors by email. In reply, Mr Radovanovic rejected the settlement offer and made a counteroffer that:

- Mr Radovanovic would authorise $225,000 of the net sale proceeds to be paid to the Stekovics; and
- the parties would enter a 'deed of settlement and release', which contained a term that the parties would bear their own costs and would otherwise contain 'standard provisions'.

The Stekovics accepted this counteroffer.

By August 2022, no payment had been made, and no formal deed was executed. The Stekovics commenced proceedings that resulted in the order against Mr Radovanovic to comply with the counteroffer.

Judgment

Mr Radovanovic argued on appeal that he was not bound by the counteroffer.

Justices Meagher, Gleeson and Payne found that the counteroffer was a binding settlement agreement and dismissed the appeal. The court found that an objective bystander would conclude the parties intended to be bound as soon as the Stekovics accepted the counteroffer.

The counteroffer was a Calderbank offer, expressed as being 'without prejudice save as to costs'. This type of settlement offer fixes a time for acceptance and, after that time, may be relied upon by the offeror to seek favourable costs orders in subsequent litigation. Mr Radovanovic argued that the language of 'without prejudice save as to costs' was pro forma language for a Calderbank offer and did not evince an intention to be bound. This argument was rejected.

Justice Payne (with whom Justices Meagher and Gleeson agreed) opined on the nature of Calderbank offers, and stated as a general proposition that provided the time for acceptance is reasonable and it is capable of acceptance, it will ordinarily bind the parties immediately, notwithstanding that the agreement may contain executory promises. His Honour considered that an objective bystander would have understood that the parties intended that the counteroffer, once accepted, would immediately be binding. All the circumstances, including the accompanying threat of litigation, supported the conclusion that there was an intention to be bound.

Further, the language of the counteroffer did not suggest it was the parties' intention to delay entering an agreement until the execution of a formal deed. Instead, it was held to be a term of the agreement that was to be fulfilled in the future but was nevertheless binding from the moment of acceptance.

The court rejected the argument that the counteroffer lacked key terms and was therefore incomplete and not binding. It was commercially obvious, even without an explicit term to this effect, that once the Stekovics received the $225,000, Mr Radovanovic would retain the balance. Further, the circumstances of the funds being held on trust by BDN on behalf of Mr Radovanovic (not on the Stekovics' behalf) meant there was no term needed to specify they authorised BND to release the funds.

Sinclair v Balanian [2024] NSWCA 144—contract formation—improperly executed deed

In this case, the New South Wales Court of Appeal considered whether a document described as a deed (but not executed as such) was effective as a contract that was binding on the three executing companies and the three individuals who had executed it notionally on behalf of the companies in their capacity as directors. The court unanimously held that the document was a valid and effective contract that was binding on both the companies and individuals in their capacity as individuals.

The case demonstrates that parties to an improperly executed deed may still be held to be bound by its terms in contract. Subject to the language of the document, the obligations may be held to extend to company officers executing the document in their personal capacity.

Facts

The case concerned two appeals from two proceedings heard together in the Supreme Court. The proceedings were commenced by the appellants in mid-2021 for claims relating to a digital commodity investment fund business involving the respondents.

The appellants were Fiona Sinclair (for herself and for the estate of her deceased husband, John Sinclair) and the company she owned with Mr Sinclair. The respondents were Mr Ashod Balanian and two of Mr Balanian's companies.

The appeals concerned the legal effect of a document entitled 'Deed of Release & Indemnity, Settlement of Proceedings' (the ***Deed***) that was signed at a mediation attended by the parties without their lawyers. The Deed, which was prepared by the mediator, was poorly drafted. The execution page designated signature blocks for the corporate parties but not for Mr Sinclair, Mrs Sinclair and Mr Balanian, who each signed on behalf of their respective companies but not in their individual capacities.

Following the mediation, disagreement arose over the terms of the Deed, which led to Mrs Sinclair and her company filing an interlocutory process in each of the Supreme Court proceedings, seeking a declaration that the Deed was void and unenforceable. It was not disputed that the Deed did not comply with the execution requirements under s38 of the *Conveyancing Act 1919* (NSW).

Before the primary judge, and on appeal, Mrs Sinclair argued that the Deed was only intended to take effect if and when properly executed as a deed. In this respect, the appellants placed particular emphasis on the Deed clause allowing execution by counterparts. While accepting the Deed was not effective as a deed, the respondents argued that a valid and binding contract had been formed between the parties, including the individuals in their personal capacities.

At first instance, Justice Henry upheld the respondents' arguments and made declarations that the Supreme Court proceedings had been settled in accordance with the Deed.

Judgment

The Court of Appeal unanimously dismissed both appeals.

There were four issues on appeal:

- whether the parties intended to be contractually bound by their agreement even though not completed as a deed;
- whether the parties intended that the individuals be personally bound;
- whether the Deed only took legal effect, becoming binding on the individuals, when a counterpart execution page was exchanged; and
- whether the primary judge erred by addressing conduct subsequent to the agreement being reached on the terms of the Deed.

On the first issue, the court found that, based on an objective assessment of the terms of the Deed, its subject matter (settling the two proceedings), and what was conveyed by the parties in the circumstances leading up to execution, the parties intended to be legally bound, whether or not the Deed was effective as a deed. The court noted, among other things, the following in support of the finding:

- Parties can intend that a document expressed as a deed take effect as a contract, whether or not they also intend that it operate as a deed. The Deed frequently referred to itself as an 'agreement', and these references evidenced the parties' intention to be bound by the Deed, regardless of whether it was completed as a deed.
- The parties did not need to use a deed for their settlement, and none of the operative clauses were premised on the Deed having effect as a deed.
- Consistently, at the mediation, the parties and the mediator drew no distinction between a deed and a contract.
- Leading up to execution, the parties were very eager to settle the proceedings and insisted that the Deed be finalised at the mediation, dismissing the mediator's repeated suggestion that they take the Deed to their lawyers to finalise.

On the second issue, the court found the Deed conveyed a common intention for Mrs Sinclair (and Mr Sinclair's estate) and Mr Balanian to be parties to the Deed and to be personally bound by it, despite the absence of execution blocks for them to sign in their personal capacity. The court noted, among other things:

- references to the parties in the two Supreme Court proceedings, which included Mrs Sinclair (and Mr Sinclair) and Mr Balanian;
- the absence of execution blocks for the individuals was less surprising than it might otherwise be in circumstances where the Deed was drafted in a hurry and without review by the parties' lawyers; and
- the settlement of two Supreme Court proceedings contemplated under the Deed required the participation and agreement of all parties to the litigation, including the individuals.

On the third issue, the court rejected the appellants' argument that the Deed only took legal effect when the individuals exchanged counterparts. The court defined the relevant issue as whether the individuals had agreed to be personally bound, despite only executing the Deed in their corporate capacities. The court noted this was an issue of formation, and its determination required an objective ascertainment of each individual's intention as assessed by a reasonable person in the position of the corporate parties, having regard to the Deed as a whole and the surrounding circumstances. Consequently, the court upheld the primary judge's finding that the individuals communicated an intention to immediately bind themselves personally when signing the Deed.

As to the fourth issue, the court found it unnecessary to address whether evidence of conduct post-mediation could be relevant to considering whether the Deed took effect as a contract, given it had found the Deed took effect as a contract immediately upon execution.

Contractual terms

Express and implied terms in 2024

The first step in resolving a contractual dispute will usually be to determine the terms of the contract. This can be contentious where a contract is formed by the exchange of correspondence, as shown by the decision of the New South Wales Court of Appeal in *Medical Device Technologies Pty Ltd v Health Administration Corporation* [2024] NSWCA 142. Identifying the point of contract formation is vital as communications after this point cannot retrospectively form part of the contract.

In *Medical Device Technologies*, certain proposed terms and conditions were first included via a hyperlink to a communication that, in all other respects, appeared to be communication of acceptance to a prior offer. As such, the court declined to find that the terms and conditions contained in the hyperlink were part of the agreement. The court also pointed to the purchaser failing to state expressly that the purchase would be on their terms (ie the terms and conditions set out in the hyperlink) when ruling that a reasonable businessperson would have concluded the contract was on the terms provided by the seller.

As a point of interest, in *Medical Device Technologies* the court determined at what point in the ongoing chain of communication the agreement crystalised, by considering what would make commercial sense regarding the parties' subsequent conduct. This aspect of the reasoning was later clarified by the court in *Michael Hill Jeweller (Australia) Pty Ltd v Gispac Pty Ltd* [2024] NSWCA 211 where it was stated at [216] '[t]here is good reason to maintain a tight rein on the admissibility of post-contractual conduct, even as evidence as to the formation of a contract. In most cases such evidence will constitute a direct challenge to the objective determination of the existence of a contract'.

In *Royal Pines Projects Pty Ltd v Brightman* [2024] QCA 147, the Queensland Court of Appeal explored the scope of the implied duty to co-operate. In this case, the developer sold off-the-plan units in an apartment building. The contracts required the developer to provide at least 14 days' notice of the settlement date; practically, this was to allow purchasers to arrange pre-purchase inspections for the purposes of obtaining finance approval. Following the giving of notice, the developer delayed in allowing the purchaser's valuers to access the property.

While the contract was not explicitly 'subject to finance', it did contemplate purchasers obtaining finance and the court agreed that the primary judge could take judicial notice of the fact that purchasers would require finance to complete the sale. The court also concluded that the developer, acting reasonably, must allow the purchaser the full 14 days promised to access the properties the subject of the purchase. Thus, the delay in allowing the valuers access to the property was in breach of that implied term.

In considering what acts might be required by the implied duty to co-operate, the court noted the distinction between:

- acts that are necessary for the performance of an obligation under the contract; and

- acts that are merely necessary to entitle a contracting party to a benefit under the contract.

This case fell into the latter category, and the court followed the statement of Justice Mason in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* [1979] HCA 51; (1979) 144 CLR 596 (at 607) as follows:

> *In such a case* [ie the second category]*, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction* [which would apply to the first category] *as on the intention of the parties as manifested by the contract itself.*

Medical Device Technologies Pty Ltd v Health Administration Corporation [2024] NSWCA 142—incorporation of terms contained in purchase order

The New South Wales Court of Appeal held that terms and conditions contained within a purchase order hyperlink were provided by the purchaser after the point of contract formation and were not incorporated as terms of the purchase agreement.

The case demonstrates the importance of the context surrounding the formation of the contract to findings of incorporation of contract terms.

Facts

The case concerned two agreements between Medical Device Technologies Pty Ltd (***MDT***) and the NSW Health Administration Corporation (***NSW Health***) to supply, in April 2020, 384 ventilators during the COVID-19 pandemic, at a cost of $20.79 million.

NSW Health and MDT entered into a series of negotiations to finalise the first agreement for 148 ventilators:

- MDT issued a quotation and requested a formal purchase order from NSW Health;
- NSW Health requested MDT's payment terms;
- MDT stated that payment was on the terms of the quote;
- NSW Health requested further details, including a tax invoice;
- MDT provided a tax invoice and its bank details; and
- NSW Health sent through a purchase order, which included a hyperlink to the purchase order terms and conditions at the bottom, and paid half the first invoice amount.

After the first agreement had been negotiated, MDT advised that 200 further ventilators were available:

- NSW Health requested a tax invoice, pricing and terms for these ventilators;
- MDT provided this invoice;
- NSW Health sent a purchase order number, 'to secure' the ventilators, and paid half the second invoice amount; and
- NSW Health issued the second purchase order in May.

MDT delivered the ventilators in June. The ventilators were defective, and NSW Health sought to reject the ventilators, terminate the agreements and demand a refund.

At first instance, NSW Health argued that the terms it included in the two purchase orders were incorporated into the agreements and MDT had breached these terms. It contended that the purchase orders were a counteroffer containing additional terms to MDT's invoice, and MDT accepted that offer by its conduct in delivering the ventilators.

The primary judge rejected the contention that the hyperlinked terms in the purchase order were incorporated, finding that a reasonable person in the position of the parties would not consider acceptance was caused by delivery, as NSW Health would then have no legally enforceable commitment from MDT to deliver the ventilators. NSW Health appealed this finding.

Judgment

One of the issues before the New South Wales Court of Appeal was whether the terms hyperlinked in NSW Health's purchase orders were incorporated into the agreement.

Justice Payne (Justices Stern and Harrison agreeing) upheld the primary judge's finding that the additional terms were not incorporated into the contract. The court held that in view of all the circumstances, the parties did not intend for NSW Health's purchase order terms and conditions to be incorporated. The purchase orders would objectively be understood as confirmation of the orders, rather than supplementary agreements. The court emphasised the following factors in reaching this conclusion:

- the negotiations occurred during a time of urgent need to secure ventilators in a pandemic;
- NSW Health made no suggestion that the purchase would be on its terms, asking the seller to state the payment arrangements and issue an invoice;
- NSW Health's request for terms and pricing during the second agreement negotiations would have been unnecessary if it thought the first purchase order terms and conditions governed the first agreement and, applying *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153, the primary judge was correct to find that this post-contractual conduct was admissible in determining whether a contract had been formed; and
- NSW Health's partial payments at the end of April, before the second purchase order had even been issued, were clearly made with the intent of securing an enforceable promise to deliver the ventilators.

Royal Pines Projects Pty Ltd v Brightman [2024] QCA 147—implied contractual promise to respond promptly

The Queensland Court of Appeal held that a contract between a property developer and the respondent buyers contained an implied duty to co-operate so as to give the other party the benefit of the contract. By promising at least 14 days' notice of settlement in circumstances where the respondents might need to obtain finance, the appellant impliedly promised to allow reasonable access for valuers within that 14-day period and failure to do so was a breach of this term.

This case underscores the importance of fulfilling the implied contractual promise to co-operate, including by responding promptly to requests that could impact the ability of the other party to perform.

Facts

The appellant developer sold off-the-plan units in an apartment block to the respondents under standard form contracts. The contracts required the appellant to provide at least 14 days' notice of the settlement date, and the notice was to be given at a time reasonably determined by the appellant. The contracts also contemplated that the respondents might obtain finance from a lender to complete the purchase.

After providing notice requiring settlement on 16 July 2024, the appellant delayed in allowing the respondents' valuers to access the properties. As a result, the buyers had only seven days from inspection to settlement and were unable to obtain finance in time for settlement.

The respondents commenced proceedings against the appellant in the Supreme Court of Queensland, contending that, by denying or delaying access, the respondent breached its implied obligation to co-operate, and therefore could not insist on a 16 July 2024 settlement.

The primary judge resolved matters in favour of the respondents and found that the implied duty to co-operate required the appellant to permit the respondents' valuers access to the properties within a reasonable time after request, so as to allow the respondents the full 14-day period stipulated by the contract to prepare for settlement.

Royal Pines appealed this decision.

Judgment

The issues for the Court of Appeal to consider included:

- whether the primary judge erred by implying the duty to co-operate;
- whether the primary judge erred in finding that any such implied term was breached; and
- whether the primary judge erred in concluding that there was sufficient evidence to find that any breach of contract by the appellant caused the buyers to be unable to complete by 16 July 2024.

On the first issue, the court found:

- the contract promised at least 14 days for the respondent buyers to prepare for settlement;
- the court could take judicial notice of the common practice of obtaining finance for purchasing properties;
- the appellant could not reasonably determine to give a notice that would mean the respondent buyers had less than 14 days to access the properties; and
- the primary judge did not err in finding that, by promising at least 14 days' notice of settlement in circumstances where the respondents might need to obtain finance, the appellant was impliedly promising to allow reasonable access for valuers within that 14-day period.

On the second issue, the court found that the appellant's weeklong delay in responding to requests for access was unreasonable and breached this implied term.

As to the third issue, the court agreed with the primary judge that, given the limited timeframe before settlement, the respondents' evidence of urgently seeking relief, and the steps taken by valuers to inspect properties as soon as allowed, there was a real risk that the breach would cause the respondents to be unable to obtain finance in time.

The appeal was dismissed with costs.

Interpretation

During 2024, Australia appellate courts emphasised the importance of:

(a) interpreting contracts as a whole;

(b) giving ordinary words their plain meanings; and

(c) ensuring that defined terms provide clear and precise meanings without creating unnecessary ambiguities.

These principles featured in *SkyCity Adelaide Pty Ltd v Treasurer of South Australia* [2024] HCA 37, where the High Court emphasised the need for holistic reading and straightforward interpretation unless ambiguity arises.

Courts often decline to interpret automatic termination clauses literally, as they can operate unfairly if an 'innocent' party is prejudiced by the termination. Following the High Court's judgment in 1950 in *Suttor v Gundowda*[1], these clauses are often construed as making a contract voidable, rather than void. However, the Victorian Court of Appeal in *VS Property & Holding Pty Ltd v Zurzolo* [2024] VSCA 199 held that this principle will not override the intention of the parties if the language is clear and intractable.

The determination of whether a term is essential or intermediate can be critical in deciding whether a party has a right to terminate on breach. In *Cougar Metals NL v Richore Pty Ltd* [2024] WASCA 36, the f Court of Appeal highlighted that assessing whether a term is essential involves considering the parties' common intention and the commercial context. Similarly, in *V Quattro Pty Ltd v Townsville Pharmacy No 4 Pty Ltd* [2024] QCA 34, the court preferred an interpretation that supported the existence of an enforceable contract despite non-compliance with a condition precedent, reinforcing that reasonable business intentions can prevail over strict formalities.

In *SSABR Pty Ltd v AMA Group Limited* [2024] NSWCA 175, the high threshold for rectifying contractual mistakes was reaffirmed, requiring clear proof of mutual error before altering agreed terms.

SkyCity Adelaide Pty Ltd v Treasurer of South Australia [2024] HCA 37—contractual and statutory interpretation

In this case, the High Court of Australia considered bespoke provisions of an agreement entered into between SkyCity Adelaide Pty Ltd and the Treasurer of South Australia. A dispute arose between the parties concerning the liability of SkyCity to pay duties under the *Casino Act 1997* (SA) and whether the value of certain electronic gaming credits constituted 'gross gambling revenue' subject to duty.

This case serves as an example of how the High Court is applying orthodox interpretative principles in contractual and statutory interpretation, and specifically that:

- ***contracts must be read as a whole—clauses cannot be interpreted in isolation;***
- ***if the ordinary meaning of the words results in an unambiguous or straightforward interpretation, it is unlikely further interpretation would be needed; and***
- ***definitions should not create circular references that makes understanding or applying them difficult.***

Facts

SkyCity operated a loyalty program in which customers could accumulate loyalty points, convert accumulated points into electronic gaming credits and then either redeem the converted credits for cash, or use the converted credits to bet on the machines. The converted loyalty point credits were indistinguishable from credits purchased by gamers using their own funds.

A dispute arose between SkyCity and the State of South Australia about whether the converted credits, when used to bet, constituted 'net gambling revenue' and attracted duty payable by SkyCity.

The Casino Duty Agreement between SkyCity and the Treasurer of South Australia provided that SkyCity was to pay duties in respect of 'net gambling revenue' for a financial year. This term was the subject of cascading definitions in the agreement.

At first instance (*City Adelaide Pty Ltd v Treasurer of South Australia* [2024] SASCA 14), the South Australian Court of Appeal answered the questions referred for consideration as follows:

- **Question 1**: Do 'Converted Credits' when played by customers constitute 'gross gambling revenue' under cl 1.1 of the Casino Duty Agreement being an 'amount received by [SkyCity]… for or in respect of consideration for gambling'? **Yes**.

[1] (1950) 81 CR 418.

- **Question 2:** Do loyalty points received by customers for gambling using electronic gaming machines and automated table games constitute 'monetary prizes' within the definition of 'net gambling revenue' in cl 1.1 of the Casino Duty Agreement? **No**.
- **Question 3**: If the Converted Credits issue and the Monetary Prizes issue are decided in such a way that SkyCity is liable to the Treasurer of South Australia for unpaid casino duty, then, as a matter of law, do the common law or equitable principles concerning penalty clauses apply to cl 11 of the current Casino Duty Agreement? **Yes**.

SkyCity was granted special leave to appeal the Court of Appeal's answer to Question 1 (the ***appeal***), and the state applied for special leave to cross-appeal the Court of Appeal's answer to Question 3 (the ***cross-appeal***).

Judgment

The appeal

SkyCity argued that the Court of Appeal erred by declining to take the ordinary meaning of 'revenue' in the defined term 'gross gambling revenue' into account in construing the phrase 'amount received ... for or in respect of consideration for gambling' in the definition of that expression. The error of principle alleged by SkyCity was that the Court of Appeal treated, as an inflexible rule, the orthodox principle that it is 'circular to construe the words of a definition by reference to the term defined'. Skycity argued that the natural meaning of 'revenue' connotes an incoming or receipt of money from an external source and the Converted Credits fell outside this definition.

The court unanimously dismissed the appeal, finding that the reasons for judgment of the Court of Appeal were sound and dispositive.

The court confirmed that there is no rule against construing words of a definition by reference to the term that those words define. The term must, however, be construed in the context of the substantive provision to which it applies in accordance with its natural and ordinary meaning. The court considered that the Court of Appeal did not adopt a rigid approach to this rule, but rather expressed well-founded scepticism as to whether the word 'revenue' was sufficient to convey the meaning preferred by SkyCity in the face of other factors. The Court of Appeal correctly identified that the monetary value received by SkyCity was 'in the form of a reduction in SkyCity's indebtedness to the customer in an amount represented by the monetary value of the electronic gaming credits which the customer could then have redeemed for cash yet then chose to wager'.

The cross-appeal

The court granted the state's application for special leave to cross-appeal, and allowed the cross-appeal.

The issue in the cross-appeal was whether the Court of Appeal was correct to conclude that the obligation of SkyCity under cl 11 of the Casino Duty Agreement to pay interest for late payment of casino duty at the rate of 20% per annum could be the subject of relief against enforcement if that obligation to pay interest could properly be characterised as a penalty at common law or in equity.

The court described the Court of Appeal's reasoning as involving three steps:

- first, by providing in s17(4) of the Casino Act that the Casino Duty Agreement operated as a deed, the South Australian Parliament indicated that the general law of contract would apply to the Casino Duty Agreement except to the extent modified by statute;
- second, a clear and unmistakeable manifestation of legislative intention needed to be found in the Casino Act in order to oust the common law and equitable jurisdiction of the Supreme Court to declare a provision of the Casino Duty Agreement unenforceable as a penalty; and

- third, that although such a clear and unmistakeable intention is manifested in the specific references in ss17(1)(c) and 51 of the Casino Act to 'penalties', it cannot be found in the references in those same provisions to 'interest'.

The court allowed the cross-appeal, finding that this reasoning inverted the scheme of the Casino Act. Specifically, the court found that:

- by providing that the Casino Duty Agreement operates as a deed, s17(4) of the Casino Act permits such an agreement to allow for the payment of casino duty, interest and penalties for late payment or non-payment, and any other clause in the Casino Duty Agreement that deals with a matter within s17(1)(a), (b) or (c) of the Casino Act to be enforced at common law or in equity, where it otherwise may be unenforceable;
- s17(1)(c) of the Casino Act sets out that the Casino Duty Agreement must '[deal] with interest and penalties to be paid for late payment or non-payment of casino duty'. This section distinguishes between interest and penalties in a way that allows for the Casino Duty Agreement to impose an obligation to pay interest for late payment or non-payment of casino duty without also imposing an obligation to pay penalties for late payment or non-payment of casino duty, which was effected in cl 11 of the Casino Duty Agreement; and
- the distinction between 'interest' and 'penalties' in s 17(1)(c) of the Casino Act provides no basis for limiting the rate of interest able to be agreed between the licensee and the Treasurer to a rate that cannot be characterised as penal.

VS Property & Holding Pty Ltd v Zurzolo [2024] VSCA 199—construction of automatic termination clauses

In this case, the Victorian Court of Appeal considered the construction of an automatic termination clause in the context of a contract for the sale of land in light of the well-established principle in *Suttor v Gundowda*, being that:

> …where there is a clause which is for the benefit of an innocent party, that innocent party ought not lose the benefit of the contract at the hands of the defaulting party, the consequence is that the contract ought to be treated as voidable at the innocent party's option.'

The court held that the contract terminated automatically upon the purchaser's failure to settle and that the presumption in *Suttor* had been displaced.

This case clarifies that the principle in Suttor v Gundowda is a rebuttable presumption, not an inflexible rule—it does not displace the ordinary principles of contractual interpretation, including that you start with the words used in a contract and, if they are clear, it is unlikely that further interpretation is required.

Facts

The court considered an appeal and notice of contention relating to a contract for the sale of land between the Zurzolos (the ***vendors***) and VS Property & Holding Pty Ltd (the ***purchaser***).

The parties entered into the contract of sale on 4 August 2017. However, the contract did not settle on 5 November 2020 as intended, due to a tripartite dispute between the Zurzolos, VS Property and the relevant water authority. That dispute concerned the Zurzolos' grant of an easement to the water authority, and VS Property's subsequent lodging of a caveat over the land.

As part of the resolution of that dispute, the Zurzolos and VS Property entered into a deed of settlement. Under cl 5 of that deed, the parties agreed that settlement of the property was to occur by 15 September

2022, and that if VS Property failed to settle on that date, through its own default, the contract immediately terminated, and the deposit was forfeited.

VS Property and its transferee, Deanside Land Pty Ltd, were unable to settle on 15 September 2022. The Zurzolos were not prepared to extend the settlement date and treated the contract as having ended, but did not issue a default notice to VS Property and Deanside in respect of the failure to settle.

VS Property denied that the contract had been discharged and brought a proceeding seeking specific performance.

The Zurzolos sought, by counterclaim, a declaration that the contract of sale was terminated by operation of cl 5.

There were three issues before the trial judge:

(a) whether VS Property had defaulted so that cl 5 was engaged;

(b) if cl 5 was engaged, whether the contract was voidable, and not void by application of the principles in *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 and *Gange v Sullivan* (1996) 116 CLR 418; and

(c) whether the Zurzolos could exercise termination rights without providing notice.

At first instance, Justice Quigley held that:

- VS Property and Deanside had defaulted by failing to settle on the extended settlement date;
- the effect of cl 5 was that the contract was voidable at the Zurzolos' option; and
- the Zurzolos were not required to provide notice under the contract of sale before exercising their right to terminate under cl 5.

VS Property and Deanside sought to appeal findings two and three. The Zurzolos filed a notice of contention that the effect of cl 5 was automatic and did not require any steps from them.

Judgment

In a joint judgment, Justices Niall, Walker and Kenny upheld the Zurzolos' notice of contention, and found that as a matter of ordinary construction:

- cl 5 of the settlement agreement operated to terminate the contract of sale automatically if VS Property failed to settle on 15 September 2020; and
- there was nothing in the language of cl 5, considered in light of its context and purpose, that required the Zurzolos to take any further steps to terminate the contract.

In view of these findings, the Court of Appeal needed to consider whether the principle in *Suttor* and other related cases required departure from the ordinary construction of cl 5.

The principle in *Suttor*, as summarised by Justice Quigley at first instance, provides:

> … where there is a clause which is for the benefit of an innocent party, that innocent party ought not lose the benefit of the contract at the hands of the defaulting party, the consequence is that the contract ought to be treated as voidable at the innocent party's option.

The rationale is that the law will not permit a party to take advantage of their own wrong.

In this case, if the *Suttor* principle was applied as a rule of construction, cl 5 would be construed to make the contract of sale voidable, rather than void.

The Court of Appeal observed that applying *Suttor* in this way would be wrong, reiterating that this principle does not displace the ordinary approach to the construction of a commercial contract. Rather, it is a rebuttable presumption, not an inflexible rule.

The court was satisfied that the language of cl 5 was 'clear and intractable', and the history set out in the recitals to the settlement deed fortified the conclusion that the parties intended for the contract to come to an immediate end if settlement did not occur.

J&Z Holding (Aust) Pty Ltd v Vitti Pty Ltd [2024] NSWCA 2—relevance of poor drafting to contractual interpretation

In this case, the New South Wales Court of Appeal considered whether a sum payable under a contract should be characterised as a 'conventional deposit', repayable in the event of the vendor's default and recoverable in a claim for restitution, or as an 'option fee' that became the property of the vendor and was credited against the purchase price.

The court held that the true legal character of the disputed sum was an option fee, despite it being described as 'the deposit' in various parts of the relevant agreements.

This case provides important guidance on the court's approach to the interpretation of poorly drafted contracts.

Facts

This dispute related to the sale of land in Ultimo. The appellant, J&Z Holding, was the prospective purchaser and the respondent, Vitti, was the registered proprietor.

The parties entered into a Put and Call Option Agreement under which Vitti granted J&Z Holding a call option for a period of 22 months, expiring on 17 June 2020. The Agreement required J&Z Holding to pay a Call Option Fee equivalent to 20% of the purchase price of the property in four equal instalments across the call option period.

On 17 June 2020, an Amending Deed was executed, which extended the call option period. The Deed was conditional on payment of the Call Option Fee, and stated that the Call Option Fee 'is and has been irrevocably and unconditionally forfeited and released to [Vitti]'.

The call option was not exercised by J&Z Holding. Vitti exercised the put option, thereby creating a contract for the sale and purchase of the property, and issued a Notice to Complete. J&Z Holding failed to complete the contract and Vitti subsequently purported to terminate the contract.

J&Z Holding alleged that Vitti's purported termination of the contract constituted a repudiation, and purported to terminate the contract. J&Z Holding claimed that the option fee could be characterised as a conventional deposit, and that because of Vitt's alleged repudiatory conduct, J&Z Holding was entitled to recover that sum.

Judgment

Justice Griffiths (Justices Payne and Kirk agreeing) dismissed the appeal.

The key issues on appeal were:

- Whether, upon a proper construction of the contract read with the Option Agreement and Amending Deed, the disputed sum was to be characterised as a deposit (ie an amount paid by J&Z Holding as security that it would perform the contract) or, alternatively, as an option fee that became the property of Vitti and was credited against the purchase price.
- If the disputed sum was a deposit, whether J&Z Holding was entitled to recover it in a restitution claim arising from the alleged termination of the contract or from the law governing penalties and relief against forfeiture.

Justice Griffiths acknowledged that the agreements at issue were 'badly worded' and contained 'numerous errors'. His Honour considered that such poor drafting can play a significant role in the

construction exercise, noting Justice Leeming's judgment in *S&C Nicola Pty Ltd v Peter Holmes Investment Pty Ltd* (2022) 108 NSWLR 165 (which was covered in our 2022 *Contract Law Update*). In *S&C Nicola*, Justice Leeming observed that numerous errors or 'casual' grammar and syntax in a contract can diminish the weight placed on considerations that turn on the precise form of clauses. His Honour suggested that imprecise drafting can invite a threshold question about what the literal or grammatical meaning of the words used in a contract actually is.

The court held that the true legal character of the disputed sum was an option fee (not a deposit). On a proper construction of the contract for the sale and purchase of land (which must be read in the context of the Option Agreement and Amending Deed), the disputed sum would remain the property of Vitti regardless of whether the Call Option was exercised and in circumstances where the Put Option was exercised.

In reaching this conclusion, Justice Griffiths was critical of the 'looseness in language' of the contract. His Honour considered that the expression 'released to the vendor' did not mean that the disputed sum was not the property of the vendors. Further, the Option Agreement expressed that the vendors had a right to 'keep' the amounts paid as the Call Option Fee, which strongly indicated that the disputed sum was paid in consideration for the grant of the Option Agreement, rather than as a deposit. The Amending Deed, which expressed that the Call Option Fee would be 'irrevocably and unconditionally forfeited and released to the [vendors]', reinforced this construction.

QBT Pty Ltd v Wilson [2024] NSWCA 114—contractual interpretation where literal construction would cause commercial absurdity

In this case, the New South Wales Court of Appeal considered whether the plain meaning of a contractual clause should be enforced in circumstances where it would produce a commercially absurd result.

This case highlights that though the plain meaning of a clause will usually determine how it is construed, there is scope for a court to avoid a literal interpretation where it would lead to manifest absurdity.

Facts

Wilson held all the shares in TravelEdge Pty Ltd. TravelEdge owned a 40% interest in a global student travel business, STA Travel Academic Pty Ltd. The remaining 60% interest was held by a Swiss company.

The shareholder agreement between the Swiss company and TravelEdge stated that each party had to notify the other if there was a change in their company's control. If one party failed to do so, the non-defaulting party was able to compulsorily acquire the other's shares in STA travel.

In 2019, the appellant, QBT, executed a share sale agreement with Wilson to acquire its interest in STA Travel. The purchase price for the shares comprised three amounts and included, relevantly, a deferred amount.

Clause 4.4 provided that the deferred amount was payable if:

- the Swiss company consented in writing to the change in control triggered by completion and TravelEdge retained its shareholding (the ***Consent Event***); or
- the Swiss company did not consent in writing to the change of control, and elected to purchase TravelEdge's stake (the ***Non-Consent Event***).

Soon after the share sale agreement was executed, the Swiss company went into administration and did not exercise its right to acquire TravelEdge's shareholding. This meant that neither sub-clause of the definition of the Deferred Amount had occurred.

QTB argued that because neither sub-clause had been fulfilled, on the plain construction of cl 4.4 the Deferred Amount was not payable.

At first instance, the primary judge rejected this and found that the Deferred Amount was payable even though neither sub-clause had been fulfilled. It was held that cl 4.4 was directed, in substance, not to obtaining consent but rather whether TravelEdge retained its shareholding in STA Travel. The primary judge held that the intention of the parties was that the Deferred Amount had to be paid one way or another.

QBT appealed this decision, arguing that the primary judge had erred by engaging in a 'radical rewriting' of the clause.

Judgment

Justice Leeming (Chief Justice Bell and President Ward agreeing) dismissed the appeal. His Honour held that the drafting of cl 4.4 evidently miscarried the parties' intention. Agreeing with the primary judge, it was held that cl 4.4 provided for a 'binary outcome' where one limb of cl 4.4 would inevitably be satisfied and the Deferred Amount would be paid.

Although the parties provided for only two eventualities, the court considered that it was the intention of the parties that the Deferred Amount would be paid. This intention was construed from the text and context of the agreement, including the structure of the clause and the fact that the clause was expressed as a definition.

A literal construction would lead to a commercially absurd outcome because this would mean that:

- even though cl 4.4 was expressed as a definition, it would fail to attribute any value to the Deferred Amount; and
- QBT would receive a windfall just because TravelEdge did not obtain 'consent in writing'.

Justice Leeming observed that there are limits to the court's power to resolve drafting errors by construction. It must be self-evident what the objective intention of the parties was, and it must be clear how the absurdity can be resolved. His Honour cautioned that courts should be careful in accepting submissions that a construction is absurd, because '*courts are far from being well placed to assess what is or is not commercially sensible'*. However, in this case, the literal construction of cl 4.4 was plainly opposed to reason and could be clearly resolved in a way that accorded with the parties' evident intentions.

SSABR Pty Ltd v AMA Group Limited [2024] NSWCA 175—rectification by construction—rectification in equity

In this case, the Court of Appeal of New South Wales allowed an appeal against a decision rectifying a clause of a Business Sale Agreement.

This case underscores the high threshold for the court to rectify a contractual clause.

Facts

On 3 October 2018, AMA entered into a Business Sale Agreement (the ***BSA***) to purchase two auto repair businesses from the appellants. Clause 5.1 of the BSA provided a formula for calculating the deferred consideration (the ***Earn-Out***) to be paid by AMA to the appellants within 90 days of the second anniversary of completion.

A dispute arose in November 2020 regarding the calculation of the Earn-Out: specifically, whether it should be based on Earnings Before Interest and Tax (***EBIT***) over two calendar years, as expressly stated in cl 5.1 of the BSA; or the 'average annual' EBIT for the Earn-Out Period, as the respondents contended.

The appellants commenced proceedings in the Supreme Court of New South Wales and sought declaratory relief for the proper construction of cl 5.1, while AMA sought rectification of cl 5.1 either as a matter of law by construction or in equity to specify that the Earn-Out should be based on the 'average annual' EBIT.

While the primary judge found against AMA on the construction of cl 5.1, her Honour ordered rectification on the basis that the clause did not reflect the common intention of the parties to the BSA.

Judgment

The issues for the Court of Appeal to consider included whether the primary judge erred in failing to find that, as properly construed, cl 5.1 of the BSA provided for an Earn-Out calculation based on 'average annual' EBIT over the Earn-Out period.

The Court of Appeal unanimously allowed the appeal.

As to the first issue, the court found that the primary judge erred in ordering rectification and that there was no basis for a finding that the parties' objective intention was anything other than as reflected in the words used in the relevant clause. In reaching this conclusion, the court discussed the principles in relation to rectification by construction and rectification in equity.

Rectification by construction

The court summarised the relevant principles of contractual construction set out in *Electricity Generation v Woodside Energy Ltd* (2014) 251 CLR 640, including that a commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'. The court also referred to the principles in relation to rectification by construction, highlighting that:

- the starting point is that, if the error is clear, and it is also clear what a reasonable person would have understood the parties to have meant, the mistake may be corrected as a matter of construction;
- two conditions must be satisfied before the court takes such a step: the literal meaning of the contractual words is an absurdity, and it is self-evident what the objective intention was; and
- the court must be satisfied of those matters to a high level of conviction.

The court found no error in her Honour's conclusion as to construction. Taking into account the language used by the parties, the surrounding circumstances known to them, and the commercial purpose or objectives to be secured by the contract, the relevant conditions were not satisfied.

Rectification in equity

When considering the respondents' contention in relation to rectification in equity, the court reaffirmed the standard of proof set out in *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85 that 'rectification will only be ordered in equity on the basis of clear and convincing proof of the parties' common intention'.

As to the onus of proof, the court held that 'in a claim in rectification for mutual mistake, an applicant must discharge the onus of making out its claim and must do so by reference to clear and convincing proof of the parties' common intention.'

The court rejected the respondent's contention by stating that the fact there were solicitors on both sides of the transaction was a reason for caution in making the factual findings upon which a rectification was based, as there was a 'measure of inherent unlikelihood' in each solicitor being mistaken in the same way.

V Quattro Pty Ltd v Townsville Pharmacy No 4 Pty Ltd [2024] QCA 34—whether exercise of call option where consideration not paid in time is valid—interpretation of conditions precedent

In this case, the Queensland Court of Appeal considered whether the exercise of a call option was valid where there had been a failure to pay the nominal consideration within the required time period.

The court held that the orthodox approach to contractual interpretation must apply. A reasonable businessperson in the shoes of the parties could not have intended that such payment would be a condition precedent to the formation of the contract, nor to the right to exercise the option.

This decision provides an example of the application of general principles of contractual interpretation, and the court's preference for an interpretation that supports the existence of a contract, absent any clear words to the contrary.

Facts

The court considered an appeal by V Quattro Pty Ltd of a declaration granted by the Supreme Court of Queensland that Townsville Pharmacy No 4 Pty Ltd (***Townsville Pharmacy***) had validly exercised its right under a call option agreement.

The parties entered the call option agreement in late 2020. By cl 3.2 of the agreement, Townsville Pharmacy was required to pay a premium of $10 within two business days of the date of the agreement.

The parties executed the agreement in December 2020; however, Townsville did not pay the premium within the time. It did so shortly before exercising the call option in September 2022.

Townsville Pharmacy obtained a declaration in the Queensland Supreme Court that it had validly exercised the option. V Quattro appealed, arguing that strict compliance with the requirement to pay the premium in time was essential to the valid and lawful exercise of the call option and the enforceability of the agreement.

Judgment

The Queensland Court of Appeal dismissed the appeal.

The court held, by reference to the express words of the agreement and the surrounding circumstances, that the parties could not have intended that strict compliance with cl 3.2 would be essential to the enforceability of the call option or the contract as a whole.

The relevant question was whether on proper construction, failure to pay the premium could be either:

- a breach of a condition precedent to the formation of the agreement; or
- a breach of condition precedent to the exercise of the option.

Justice Henry observed that it was necessary to interpret the contract in accordance with orthodox principles of contractual interpretation. This required determining what a reasonable businessperson in the shoes of the parties would have understood the terms to mean.

Nothing in the express words of the agreement suggested an intention not to be bound until a particular step at a later date. The nominal consideration provided for supported that intention. The court held the premium of $10 represented a promise to pay and an intention to be bound at the time the promise was made, not at the time of payment.

Further surrounding circumstances and the conduct of the parties supported those express words. Critically, the parties did not execute the agreement until after payment of the premium was due. If the parties intended the time stipulations in cl 3.2 to be strictly complied with, the agreement and right to exercise the option under the agreement would have been immediately defeasible upon execution.

Justice Henry agreed with the primary judge's observations, finding that V Quattro failed to demonstrate an essential contractual term that required payment of the $10 premium in the stipulated time. Instead, a commercial approach that treated the non-payment of the premium as a debt owing, and not a failure to comply with a requisite element of existence of an enforceable contract, was preferred.

Cougar Metals NL (Subject to DOCA) (ACN 100684 053) v Richore Pty Ltd (ACN 116 341 363) [2024] WASCA 36—contract interpretation—essential terms

In this case, the Court of Appeal of Western Australia considered, among other issues, whether a term of an option agreement to acquire mining rights that contained an obligation to pay 'statutory minimum annual expenditure commitments' and maintain the tenement 'in good standing' constituted an essential term giving rise to a right to terminate.

The Court of Appeal overturned the decision of the primary judge characterising the term as essential. Instead, the court held that the term was not an essential term of the option agreement, and the respondents were not entitled to terminate the agreement on the grounds of breach of the term.

This case considers the principles of construction of essential terms in Australia vis-à-vis the position in the UK. The assessment of whether a term is an essential term has a significant impact for commercial parties, as any breach of an essential term by one party will give rise to a right to terminate by the other.

Facts

Cougar Metals and the second respondent, Pyke Hill Resources, were parties to an option agreement under which Pyke Hill granted Cougar an option to acquire the rights to explore for and mine nickel and cobalt on a mining lease held by Pyke Hill. Cougar exercised that option but did not commence mining on the site.

Pursuant to cl 6(a)(ii) of the option agreement, Cougar was required to, among other things, 'attend to all proper administration in respect of the Tenement including … payment of rents and rates as they fall due, and otherwise maintain the Tenement in good standing including payment of all statutory minimum annual expenditure commitments in respect of the Tenement'.

Under the *Mining Act 1970* (WA), it was a term of the mining lease that a prescribed minimum expenditure occur each year in connection with mining in order to encourage prospecting and exploration for minerals within the state. In 2019–20, Cougar did not make the statutory minimum annual expenditure for the site. It later obtained a retrospective exemption relieving it of compliance with the obligation for that year.

In July 2021, the respondents purported to terminate the option agreement for breach of cl 6(a)(ii) due to Cougar's failure to make the minimum annual payment under the Mining Act within the relevant year. The respondents commenced proceedings in the Warden's Court, seeking a declaration that the option agreement had been validly terminated. The decision of the Warden was appealed to the Supreme Court of Western Australia, where the primary judge held that the clause was an essential term and had been breached, entitling the option agreement to be terminated. Cougar appealed this decision to the Court of Appeal.

Judgment

The Court of Appeal unanimously held that:

- Cougar breached cl 6(a)(ii), as the obligation on Cougar was to maintain the site in good standing by payment of statutory expenditures, and retrospective exemption from the obligation to make payment did not absolve Cougar of liability for a breach that had already occurred; however

- cl 6(a)(ii) of the option agreement was not an essential term and the respondents were not entitled to terminate the agreement as of right for breach.

When is a term an essential term?

Whether a term of a contract is an essential term, rather than an innominate or intermediate term, is a question of construction.

The court reviewed the authorities and noted that the accepted position in Australia is that:

- the determination of whether a term is essential, so that any breach will justify termination, must be assessed in light of the common intention of the parties, expressed in the language of the contract, and the commercial relationship and purpose underpinning the agreement; however
- there is a policy of 'leaning in favour' of classifying terms as intermediate (or non-essential terms) in order to promote certainty of outcome, encourage contractual performance and restrict the right to terminate to cases where breach of an agreement occasions serious prejudice.

The court also noted the decision of Lord Justice Hamblen in *Spar Shipping AS v Grand China Logistics Holding (Group) Co Ltd* [2016] 2 Lloyd's Rep 447, which characterised the position in English law as being that a term is presumed to be innominate, rather than essential, unless it is clear that it is intended to be a condition or a warranty.

Why was cl 6(a)(ii) not an essential term?

Applying the Australian position, the court held that cl 6(a)(ii) was not an essential term because:

- The option agreement did not contain any provisions allowing either party to terminate the agreement for breach, nor any provision providing that a given term was 'essential'.
- Clause 6(a)(ii) included a wide variety of obligations, many of which could be readily capable of 'trivial breaches', including breaches for which the prospect of serious consequences—eg the lease being forfeited—were remote.
- The agreement as a whole required Cougar to make substantial payments for the rights to mine the site, and it could not readily be inferred that the parties' intention was that the agreement would be terminated for any, even trivial, breach of cl 6(a)(ii). Rather, a commercial interpretation of the agreement was that the parties intended it would only be terminated in the event of serious breach.
- Damages would be an adequate remedy for most consequences of a breach of cl 6(a)(ii), and such damages would likely be capable of assessment. While damages may not have been an adequate remedy in the event that the consequence of a breach of cl 6(a)(ii) was that the lease was forfeited, this does not render the term essential, and it is in the nature of innominate terms that damages will not be an adequate remedy in some cases.

The respondents' right to terminate

The final outcomes of the case were that:

- The respondents were not entitled to terminate the agreement for breach of cl 6(a)(ii) as a right.
- The respondents' case rested entirely on the characterisation of cl 6(a)(ii) as an essential term. They did not contend that, if cl 6(a)(ii) was found to be an innominate term, Cougar's breach was significantly serious to entitle termination.

On this basis, the decision of the Warden's Court was restored, and the respondents were not entitled to a declaration that the option agreement had been effectively terminated.

Breach and repudiation

In 2024, appellate courts heard a number of cases in which they considered principles of breach of contract and repudiation.

The Western Australian Court of Appeal in *Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd* [2024] WASCA 122 considered the approach to assessing factual causation in actions for breach of contract. In the case, Lenane Holdings alleged that the failure of Summit Royal's employee to turn off the master key in a hired heavy equipment machine was a breach of contract, and that it led to a fire that caused Lenane Holdings to suffer loss and damage. The Court of Appeal stated that the issue of factual causation should start with the application of the 'but for' test, and that a breach of contract may be a cause of loss or damage if it has made a substantial contribution, rather than being the sole or exclusive cause. In this case, the court accepted that, in relation to factual causation, Lenane Holdings had established that the employee's conduct had made a substantial contribution to the loss or damage.

The Victorian Court of Appeal in *Lanshan Pty Ltd v F3 Enterprises Pty Ltd* [2024] VSCA 5 considered whether a default notice was defective because the notice did not sufficiently particularise an alleged breach of a written agreement. In this case, Lanshan had purported to terminate a licence agreement on the basis that the F3 Enterprises had not remedied their default within 14 days of receiving written notice. The Court of Appeal found that Lanshan was not entitled to rely on the default notice to terminate the agreement, because a reasonable recipient in the position of F3 Enterprises would not have understood the nature of the alleged default. This decision demonstrates the need for an objective approach to determining whether a default notice provides sufficient particulars of the alleged breach such that the notice can be relied upon to terminate the contract.

In *C H Leaman Investments Pty Ltd v Tuesday Enterprises Pty Ltd as trustee for The Steele Investment Trust* [2024] WASCA 142, the Western Australian Court of Appeal considered whether a party's written notice based on an erroneous interpretation of a contract would amount to repudiation. In that case, the various respondents' lawyers gave written notice to C H Leaman Investments of their incorrect belief that a share purchase agreement ceased to have effect because an essential condition had become incapable of being satisfied. C H Leaman Investments terminated the agreement, claiming that the notice suggested an unwillingness to perform. The court found that the respondents' letter amounted to repudiation because the wording would not have conveyed to the reasonable recipient that the respondents were open to being corrected on their incorrect interpretation.

The cases of *Lanshan* and *Leaman*, in different ways, speak to the critical nature of written communications between parties, and remind parties to be cognisant both of what the terms of the relevant agreements require, and what a reasonable person would understand those communications to mean.

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122—breach of contract—principles of causation

In this case, the Supreme Court of Western Australia Court of Appeal surveyed classic and more recent jurisprudence on causation in an action for breach of contract. The court affirmed that factual causation begins with application of a 'but for' test to determine whether the breach was a cause of the loss or damage. If factual causation is established, the question will then arise as to whether the defendant should be legally responsible for the alleged loss.

This case provides guidance on the approach to assessing causation in actions for breach of contract. It provides a comprehensive survey of authorities in respect of both remoteness and causation, and contains a caution regarding the need to plead comprehensively at first instance.

Facts

The respondent, Lenane Holdings Pty Ltd, contracted with the appellant, Summit Rural (WA) Pty Ltd, for the hire of a loader to be used by the appellant at its fertiliser plant. It was an express term of the contract that Summit Rural would 'turn off [the] master key every night'. The master key was a switch, or key, that when placed in the 'off' position, had the effect of isolating the loader's battery.##

On 4 October 2018, a Summit Rural employee left the master key of the loader in the 'on' position. The loader subsequently caught fire and was destroyed.

Lenane issued proceedings against Summit Rural, seeking damages for breach of contract and negligence.

At first instance, the court held that the appellant's failure to turn off the master key was a breach of contract and its duty of care to the respondent. Summit Rural appealed that decision.

Judgment

The key issues on appeal with respect to the breach of contract claim included :

(a) whether the breach (being the failure to leave the master key in the off position) relevantly caused the fire and ensuing loss; and

(b) whether the fire and the consequent damage to the loader was too remote a consequence of the breach.

Causation

The appellant contended that that trial judge had erred in concluding that Summit Rural's breach of contract was a cause of the fire, given that the master key was not installed for fire prevention purposes, and consequently the connection between the breach and the fire was not causal, but rather 'purely serendipitous'.

President Buss and Justice Lundberg (with Chief Justice Quinlan agreeing) comprehensively surveyed the authorities on causation and concluded that:

- It is sufficient if a plaintiff establishes that the breach of contract was *a* cause of loss or damage, in the sense that it made a causal contribution to the loss or damage. It is not necessary for it to be the sole or exclusive cause.
- An analysis of factual causation begins with application of a 'but for' test.
- If factual causation is established, the court will then consider whether the defendant should be legally responsible for the alleged loss or damage. Determination of that question involves consideration of the purpose of an action for breach of contract, the nature and scope of the defendant's obligation that was breached, the nature of the alleged loss or damage, and the relationship between the breach and the loss or damage.

The court was satisfied that the respondent had established factual causation, and that the failure to leave the master key in the 'off' position made a material causal contribution to the occurrence of the loss or damage.

With respect to legal responsibility, the court considered that the obligation to turn the master key to the 'off' position arose in the context of a contract for hire that obliged the appellant to return the loader to the respondent at the end of the hire period. Leaving the key in the 'on' position overnight gave rise to a risk that the loader would be damaged or destroyed. Consequently, the connection between the breach of contract and the occurrence of the fire could not be properly described as 'merely serendipitous or fortuitous', and the appellant was legally responsible for the loss or damage.

Remoteness

The appellant sought to raise on appeal the question of remoteness of contractual damages. This was not in issue at the trial and was not litigated between the parties.

The court did not permit the appellant to raise this new case, as an appellant is bound by the conduct of their case at trial. Except in exceptional circumstances, a party will not be permitted to raise a new argument on appeal that was not raised in the court below, whether deliberately or by inadvertence.

The Court of Appeal, nevertheless, provided a useful summary of the key principles of remoteness and a limitation on losses recoverable in a claim for breach of contract. The concept of remoteness of damage is related to the concept of causation, but is separate and distinct, and to be considered after an analysis of causation and by reference to the principles in *Hadley v Baxendale*.

Lanshan Pty Ltd v F3 Enterprises Pty Ltd [2024] VSCA 5—default notices

In this case, the Victorian Court of Appeal considered, among other things, whether a default notice was defective because it did not sufficiently particularise an alleged breach of a written agreement.

The court held that the default notice was defective and could not be relied on to terminate the underlying written agreement.

This case is significant because it demonstrates the importance of ensuring a default notice contains sufficient particulars of the alleged breach to enable the recipient to remedy the default if it wishes and is able to.

Facts

By way of a 'Licence Agreement' , Lanshan Pty Ltd granted F3 Enterprises Pty Ltd exclusive rights to use the car parking spaces located on Lanshan's property.

The Licence Agreement stipulated that 'the Licensee shall maintain a public liability insurance policy with respect to the car parking area to a sum not less than $10 million'.

On 6 September 2019, Lanshan sent F3 Enterprises a default notice alleging a number of breaches of the Licence Agreement, including that F3 Enterprises had 'during the Licence Period, failed to maintain the requisite PL Insurance'.

The default notice stated that the licensee had repudiated the Licence Agreement, and that the repudiation was accepted. Alternatively, if the Licence Agreement was not terminated, the notice stated that in order to remedy the breach, F3 Enterprises had to provide evidence of having effected and maintained the PL insurance.

Lanshan sent a further letter to the respondent on 3 October 2019, advising that, because 14 days had elapsed since receipt of the default notice without any attempt to remedy the alleged ongoing breach, the Licence Agreement was terminated as of 20 September 2019.

At first instance, the primary judge found that Lanshan could not rely on the default notice to terminate the Licence Agreement because the default notice did not contain sufficient particulars of the alleged breach. The default notice was therefore defective.

The judge held that identifying an alleged failure to maintain 'the require PL insurance' would not adequately bring the alleged default to the attention of someone in the shoes of and with the knowledge of F3 Enterprises, as it did not provide F3 Enterprises with sufficient information to remedy the default.

The judge held that Lanshan was not entitled to rely on the default notice to terminate the Licence Agreement.

Lanshan appealed this decision.

Judgment

On appeal, Lanshan submitted that:

(a) The primary judge had erred in finding that the default notice was defective, because it did provide sufficient particularity of the breach, and therefore the judge should have held that the Licence Agreement was properly terminated; and

(b) in any case, Lanshan could not possibly have provided further particulars of the breach in the default notice because F3 Enterprises had not provided Lanshan with a copy of its insurance policy within the period of the default notice.

The Court of Appeal rejected both submissions, dismissing the appeal. In respect of the first submission, the court reasoned that the evident purpose of cl 6 of the Licence Agreement—requiring Lanshan to serve a notice on F3 Enterprises identifying the default and its intention to terminate the licence unless the default was remedied within 14 days—was to provide sufficient notice such that F3 Enterprises might remedy the default if it was able and wanted to do so.

The court reasoned that the default notice did not comply with cl 6 because there were a wide range of possible defaults that might be encompassed by the assertion that F3 Enterprises had 'failed to maintain the requisite PL Insurance', including that:

- insurance was not maintained at all during the whole period;
- insurance was not maintained during part of the relevant period;
- the insurance maintained was not to a sum of $10 million or more;
- the insurance maintained was not 'public liability' insurance;
- the insurance maintained was not 'with respect to the car parking area' because it was limited to F3 Enterprise's business activities; and
- the insurance maintained did not insure the liability of Lanshan.

As such, the court agreed with the primary judge that the default notice was defective and did not provide sufficient particulars about the alleged breach, because a reasonable recipient standing in the shoes of F3 Enterprises would not have understood the nature of the alleged default.

In respect of the second submission, the court noted that the appropriate approach would have been for Lanshan to request a copy of F3 Enterprise's insurance policy prior to alleging a default entitling it to terminate.

C H Leaman investments Pty Ltd v Tuesday Enterprises Pty Ltd as trustee for The Steele Investment Trust [2024] WASCA 142—repudiation and erroneous interpretation of agreement

In this case, the Supreme Court of Western Australia Court of Appeal considered the circumstances in which assertion of an erroneous contractual interpretation will amount to a repudiation of the contract. The court also considered the appropriate measure of loss and damage for non-delivery of shares where the market value is incapable of being determined.

This case provides guidance on the principles of repudiation where one party purports to renounce an agreement based on an erroneous interpretation of the agreement. The case also provides insight into the appropriate measure of loss and damage for non-delivery of shares.

Facts

The appellant, C H Leaman Investments Pty Ltd, entered into a share purchase agreement (the ***SPA***) with parties including the respondent for the purchase of the sole share in Rexwells Corporation Pty Ltd.

The SPA contained a number of conditions precedent, including that completion of the transaction was subject to and conditional upon financial assistance being approved under s260B of the *Corporations Act*

2001 (Cth). If that condition was not fulfilled by 30 January 2019, cl 2.7 of the SPA stipulated that the SPA would cease to have effect.

On 17 January 2019, the respondent gave notice that the financial assistance condition had become incapable of being satisfied, and pursuant to cl 2.7, the SPA ceased to have effect. The appellant wrote to the respondent, asserting that this notice constituted a repudiation of the SPA. The appellant accepted the purported repudiation and terminated the SPA.

The parties were unable to agree on an alternate SPA and the appellant commenced the proceeding. The appellant did not make any payments under the SPA, and instead sought damages for loss based on the revenue stream it would have obtained had the SPA been performed.

The primary judge, Justice Hill, found that:

- the respondents were incorrect in asserting that, because the financial assistance condition had become incapable of being met, the SPA ceased to have effect on 17 January;
- there was no proper basis on which the respondents could have formed a view that they were entitled to give notice before 30 January. It was necessary to give a notice that the financial assistance condition could not be satisfied. If the issue wasn't resolved or the parties hadn't agreed to an extension, the respondents should have given notice after 30 January that the SPA ceased to have effect;
- the test of whether conduct is repudiatory is an objective one. The question is, having regard to the whole of the dealings between the parties, whether the alleged repudiator's conduct shows an intention to abandon the contract;
- the respondents repudiated the SPA, and the appellant was entitled to accept the repudiation and terminate the agreement; and
- the appellant was entitled to only nominal damages because it had not proved the market value of the Rexwells share or any alternative amount. The appellant was also ordered to pay the respondents' costs.

The appellant appealed the decision and the costs order. The respondents cross-appealed against the primary judge's adverse findings, and sought by notice of contention to uphold the result that only nominal damages be awarded.

Judgment

The issues before the Court of Appeal included, relevantly:

(a) whether, by the 17 January 2019 notice, the respondents had renounced the SPA; and

(b) whether the appropriate measure of damages was the difference between the purchase price contained in the SPA, and the market value of the share in Rexwells.

Repudiation of the SPA

In some instances, courts have determined that a party's incorrect interpretation of a contract does not constitute repudiation. However, the court (President Buss, Justices Vaughan and Lindberg) was not satisfied that this was one of those cases. The question turns on the facts, and in particular whether the conduct evinces an intention not to be bound by the contract.

The 17 January 2019 notice incorrectly claimed that because the financial assistance condition was incapable of being met, the SPA ceased to be effective from that date (whereas in fact under cl 2.7 of the SPA, it would have ceased to have effect from 30 January).The court considered the letter and the dealings between the parties, and observed:

- because cl 2.7 of the SPA was self-executing, the letter was gratuitous;

- the letter was written in peremptory and emphatic terms, stating unequivocally that the SPA had come to an end; and
- the letter ignored recent discussions and agreements between the parties regarding the completion date, and the financial assistance condition.

The court held that the letter did not objectively convey that the respondents were open to correction regarding their erroneous interpretation of the SPA, and that despite the erroneous construction of cl 2.7, the respondents did not convey a willingness to perform the SPA, recognise their mistake, or to accept an authoritative interpretation of the clause.

The court accepted the primary judge's finding that there was no tenable basis on which the respondents could have formed a view that they were entitled to rely on cl 2.7 prior to 30 January 2019. The court added that such a construction was 'so lacking in merit as to be patently hopeless'.

Appropriate measure of damages

The normal measure of damages for non-delivery on a sale of shares is the market price of the shares at the contractual time for delivery, minus the contract price.

The appellant contended that the primary judge had erred by treating the normal measure as a rigid rule when this case required a more flexible approach.

The court acknowledged that the normal measures of damages are no more than prima facie rules that provide useful guidance. They are not rigid rules of universal application, and can be displaced or modified.

The court accepted that the normal measure was inappropriate in this case because it presupposes an available market and market price whereby the market value may be ascertained. However, because the Rexwells share was a solitary share and not a fungible asset, there was no way of determining its market value.

The court determined that the appropriate measure of damages was the 'true' or 'real' value of the Rexwells share minus the purchase price, which would give the appellant the economic value of the performance of the SPA at the time that performance was promised. The 'true' or 'real' value of the share today was equal to the present value of the future cashflows expected to be provided by the asset over its life.

The court was satisfied that the expert evidence at trial was sufficient to assess the appellant's damages.

Frustration

Frustration arises where a supervening event renders the performance of a contract so different from what the parties had intended as to render the contract fundamentally or radically different from what had been agreed. In this way, it can serve as a vital reprieve in times of crisis. The leading authority on the doctrine of frustration in Australia is that of Justice Mason in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 (356–360).

Frustration does not, however, apply where a party adopted the risk of that supervening event under the contract. The rationale of this principle is that the occurrence of something contemplated under the contract cannot fundamentally alter what was agreed.

This was the critical stumbling block in *Cao v ISPT Pty Ltd* [2024] NSWCA 188, where, in the context of COVID-19 lockdowns, the court held that the lease allocated the risk of business interruption to the tenant, which barred them from the benefit of the doctrine of frustration.

Cao v ISPT Pty Ltd [2024] NSWCA 188—doctrine of frustration—allocation of risk for supervening events

In this case, the Court of Appeal of New South Wales considered whether the imposition of public health orders frustrated a lease and enabled the guarantor of the tenant's obligations to avoid liability for amounts outstanding under the lease.

The case affirms that the doctrine of frustration does not apply if the supervening event was a risk for which a party has assumed responsibility under the contract.

Facts

The appellants executed a commercial lease as guarantors for Beijing Roast Duck Sydney (the ***Tenant***) to operate a large restaurant in premises owned by the respondents, ISPT Pty Ltd and AWPF Management Pty Ltd, in a Sydney CBD shopping centre. The Tenant's restaurant closed on 23 March 2020 after COVID-19 public health orders came into effect. The restaurant never reopened, and the Tenant went into liquidation in May 2021.

The respondents made a claim against the appellants in the Supreme Court for the outstanding arrears of rent owing under the lease. The appellants argued that they did not have to pay the arrears because the lease was frustrated from 23 March 2020 onwards due to the public health orders.

Justice Nixon at first instance rejected the appellants' argument and ordered them to pay the respondents $4,231,033.06 in arrears.

On appeal, the appellants raised the following grounds of appeal:

- the primary judge erred in finding that the lease was not frustrated by the restrictions imposed by the Public Health Orders from 26 March 2020 to 2 June 2021;
- the primary judge erred in failing to find that compliance with the Public Health Orders would have demanded a 'radical transformation in the business' operated in the premises, or would have rendered the Tenant's business unviable;
- the primary judge erred in finding that the Lockdown Restrictions did not have the result that special condition 4 of the lease (which required the Tenant to open the premises for business during specified hours) was incapable of performance, or that performance would have contravened the law, and that it did not lead to the lease being frustrated.

Judgment

Justice Kirk (Justices Griffiths and Meagher agreeing) dismissed the appeal.

Justice Kirk found that the primary judge was correct to find that frustration was not made out, for the following reasons:

- The risk of the supervening event, being a disruption to the Tenant's business due to external events, was one the Tenant had explicitly assumed responsibility for under various provisions of the lease. The allocation of this risk to the Tenant in the contract prevented the court from applying the doctrine of frustration when the risk eventuated.
- The appellants did not establish that complying with the Public Health Orders would have rendered the lease a fundamentally or radically different business from what had been contemplated, nor that it would have rendered the business unviable for the remainder of the term of the lease.

Although the commercial business of the appellants was certainly disrupted by the Public Health Orders, the restrictions never prevented the restaurant from operating altogether, such as by opening for a limited number of patrons or providing takeaway services. Justice Kirk also found that in arguing that the contract

was frustrated by the governmental Public Health Orders, the appellants had failed to consider that the Tenant's business was eligible for government schemes introduced to assist businesses during the pandemic, including the JobKeeper scheme.

The court found that assessing the issue of frustration is a 'practical matter' that should not be approached in a 'one-sided fashion'. Overall, the appellants' evidence did not establish that the Public Health Orders would have rendered the Tenant's business unviable for any significant part of the lease.

Grounds 3 (Special condition 4)

Justice Kirk further found that the primary judge was correct to reject the appellants' argument that the lease was frustrated in relation to special condition 4:

- Special condition 4 of the lease required the Tenant to keep its business open during certain trading hours, regardless of any legal restrictions. The appellants argued that the imposition of the pandemic restrictions meant that they could not legally do so, and as a result the lease was frustrated.
- The court found that the appellants had not established that the Public Health Orders prevented the Tenant from opening the premises for business during the identified trading hours, as the Tenant could have engaged in takeaway sales.
- In any case, there would be no breach of special condition 4 because no reasonable businessperson would have understood the condition to require the Tenant to carry out their business unlawfully or to allow the landlord to claim liquidated damages in circumstances where the Tenant was prohibited from opening the premises by law.
- Although special condition 4 was considered to be paramount over the other terms of the lease, when read in conjunction with other provisions in the lease, the proper construction of the lease was that there was no intention to require unlawful activity. The lease was not frustrated by this special condition.

Damages

Damages are awarded to put the 'innocent' party in the same position as if the contract had not been breached. This simple principle masks a number of complicated issues that can arise when a court determines the amount of damages to be awarded. Some of those issues, as considered by Australian appellate courts in 2024, include:

- What if the defendant's breach makes it difficult or impossible to determine the position of the innocent party if the contract had been performed?
- What limits (if any) are placed on the types of losses that are taken into account in putting a party back into the same position?
- In determining the 'position' of the 'innocent' party, can regard be had to the 'position' of related parties?[2]

The first of these issues was discussed by the High Court in *Cessnock City Council*,[3] in an appeal from a decision discussed in our 2023 *Contract Law Update*. The case focused on the circumstances in which 'reliance damages' might be recovered. The High Court laid down some clear principles on this point:

- Damages are always awarded to put a party in the same position as if the contract had been performed.

[2] *Elisha v Vision Australia Limited* [2024] HCA 50.
[3] *Cessnock City Council v 123 239 932 Pty Ltd* [2024] HCA 17.

- 'Reliance damages' are not an exception to the principle that a plaintiff must prove its loss (ie proving the position it would have been in had the contract been performed).
- However, to the extent that the defendant's breach of contract makes it difficult for a plaintiff to prove its loss, a court will be more willing to infer that a plaintiff would have recovered expenses incurred in reliance on (or in anticipation of) the contract being performed.

This judgment resolves the question as to when 'reliance damages' can be recovered, but did leave open the extent to which principles of remoteness might play a role when a party seeks to recover 'reliance damages'.

The High Court did, however, address principles of remoteness in some detail in *Elisha v Vision Australia Limited*, which concerned the ability of an employee to recover damages for psychiatric injury caused by an employer breaching contractual obligations governing the conduct of disciplinary hearings. In deciding whether damages are too remote, courts usually refer to the judgment of Baron Alderson in *Hadley v Baxendale*[4]. It is apparent from the High Court's judgment, though, that the modern test for remoteness is much more generous to plaintiffs than that stated in *Hadley v Baxendale*.

The test endorsed by the High Court is that the type of damage suffered by the plaintiff needs to be a 'serious possibility' at the time the contract is entered into. This in turn requires the identification of the relevant 'type of damage': five judges of the court described it as 'psychiatric injury' and two judges described it as 'serious psychiatric injury'. Whether such damage is a 'serious possibility' is in turn a question of fact on which (as shown by this case) different judges will form different views, although a clear majority of the High Court found that the psychiatric damage was a 'serious possibility'.

It is quite common for corporate groups—particularly those with consolidated accounts—to arrange for invoices to be paid by legal entities that are different from the entities that incurred the obligation. Although this may not matter from an accounting perspective, it can have significant consequences from a legal perspective. As shown by the decision of the New South Wales Court of Appeal in *Capitalink Pty Ltd v Withnall*[5], a company may be prevented from recovering damages if the relevant costs were incurred by a different legal entity within the group.

The best means to avoid this consequence is to ensure that the payment and invoice match the legal entity that has the relevant obligation. Alternatively, damages might be recoverable if a corporate group's financial accounts record a debt from the company that has the legal obligation to the company that made the payment, but evidence of such a debt would need to be provided to the court.

Cessnock City Council v 123 259 932 Pty Ltd [2024] HCA 17—breach of contract—reliance damages—wasted expenditure

The High Court unanimously dismissed Cessnock City Council's appeal from the New South Wales Court of Appeal in respect of its decision to award the respondent substantive damages of over $3.6 million on the basis that it was entitled to recover reliance damages, even though it could not prove that it would have suffered loss had the appellant complied with the contract.

This case is significant, as it clarifies when a plaintiff can recover damages on a reliance basis for wasted expenses incurred in anticipation of the performance of a contract.

While the plaintiff bears the legal onus of proving its loss, where a defendant's breach has made it difficult for the plaintiff to prove the position it would have been in had the contract been performed, a rebuttable presumption operates such that it will be presumed or inferred that the plaintiff would have recovered reasonable expenditure incurred in 'reliance' on the contract. The

[4] (1854) 9 Ex 341.
[5] [2024] NSWCA 172.

evidentiary onus then falls to the defendant to prove that the plaintiff would have recouped that expenditure if the contract had in fact been performed.

Facts

Cessnock City Council entered into an agreement of lease with Cutty Sark, which saw Cutty Sark having the benefit of a 30-year lease of a prospective lot of Cessnock Airport, which the Council was intending to develop. Under the agreement, the Council was to take reasonable action to apply for and register a development plan for Cessnock Airport by the sunset date in the agreement. The Council was the applicant and consent authority for approving the subdivision.

In reliance on the agreement, Cutty Sark constructed an aircraft hangar on the land for the purposes of its business at a cost exceeding $3.6 million.

The Council did not apply for and register the plan of subdivision by the sunset date and the airport remained undeveloped. Cutty Sark ceased operating its business at the hangar following completion of the building, vacated the hangar, and was subsequently deregistered. The Council terminated the contract and, under its terms, paid the Australian Securities and Investments Commission $1 to acquire the hangar.

Cutty Sark brought proceedings in the Supreme Court, seeking recovery of damages based on its wasted expenditure. The trial judge found that the Council had breached its obligation to take all reasonable action to procure the registration of the plan of subdivision. The court awarded Cutty Sark $1 in nominal damages on the basis that Cutty Sark could *not* recover wasted expenditure because, among other things, the Council's breach did not make it *impossible* to assess the position Cutty Sark would have been in had the contract been performed.

Cutty Sark appealed the decision. The Court of Appeal found that Cutty Sark was entitled to the recovery of damages for wasted expenditure based on its reliance on the contract. The presumption that an innocent party could recoup its wasted expenditure was not confined to cases of impossibility of proving loss. The Court of Appeal found that the onus of proof is on the defendant to rebut the presumption that had the contract been performed, those costs would not have been recouped.

The Council was granted special leave to appeal the Court of Appeal's decision.

Judgment

The High Court unanimously dismissed the Council's appeal and upheld the Court of Appeal's decision.

The joint reasons of Justices Edelman, Steward, Gleeson and Beech-Jones outlined the following guiding principles for the assessment of contract damages and the availability of reliance damages:

- The foundational principle is that contractual damages aim to put the innocent party into the position it would have been had the contract been performed.
- Claims for 'reliance' or 'expectation' losses are not an alternative to the general rule for assessing damages between which a plaintiff can elect to claim.
- The party seeking damages bears the legal burden of proving its loss was caused by the defendant's breach.
- Where the defendant's breach has caused or increased uncertainty about the position the plaintiff would have been in had the contract been performed, the plaintiff's legal burden of proof will be facilitated by assuming or inferring that the plaintiff would have recovered any expenditure reasonably incurred in anticipation of, or reliance on, the contract's performance. The joint judgment explained that this gives the plaintiff a 'fair wind' to establish that its expenditure would have been recouped, but not a 'free ride'.

- The more difficult the defendant's breach has made it for the plaintiff to prove its position had the contract been performed, the stronger the assumption or inference will be that the plaintiff would have recovered its wasted expenditure. Accordingly, the weight of the defendant's burden of proof in rebutting the inference will depend upon the extent of the uncertainty resulting from its breach.

The idea that wasted expenditure is a separate head of damage was rejected by the plurality and Justice Gordon; however, Chief Justice Gageler disagreed, instead considering that wasted expenditure is itself a category of damage.

The plurality did not explicitly endorse the remoteness principles set out in *Hadley v Baxendale* as a limit on recovery of wasted expenditure, and on the basis that loss of potential future revenue of at least the amount of the wasted expenditure would have been in the knowledge of the parties at the time of entering into the contract. Their Honours found that remoteness may be better analysed by reference to potential revenue rather than foreseeability of wasted expenditure.

Elisha v Vision Australia Limited [2024] HCA 50—liability for breach of contract and remoteness of damage concerning psychiatric injury

In this case, the High Court considered the availability of damages for psychiatric injury suffered by an employee who was wrongfully dismissed in breach of an employer's contractual disciplinary procedures.

The court held that liability for psychiatric injury caused by an employer's breach is not beyond the scope of an employer's contractual duties concerning the manner of dismissal. Liability for psychiatric injury was not too remote in the circumstances of the case.

The court's decision is significant as it endorses a test for 'remoteness' that is arguable much more generous to plaintiffs than tests previously applied in Australia.

Facts

The appellant, Mr Elisha, was employed by the respondent, Vision Australia, as an adaptive technology consultant.

In March 2015, Mr Elisha was staying in a rural hotel in Victoria where he became involved in an incident with one of the hotel's proprietors. It was alleged that he was aggressive and intimidating to the owner in the course of making a noise complaint. The incident arose in the course of Mr Elisha's employment and was subsequently reported to Vision Australia's management.

Vision Australia issued Mr Elisha with a 'stand down letter' requiring him to attend a meeting two days later to respond to the hotel incident allegations. The letter stated that the meeting would be conducted in accordance with Vision Australia's Disciplinary Procedure, a copy of which was enclosed, and the enterprise agreement.

During the meeting, Mr Elisha denied the hotel incident allegations. In advance of the disciplinary meeting, Vision Australia's management had already formed a view preferring the evidence of the hotel owner. Vision Australia concluded that Mr Elisha's conduct was part of an established *'history of aggression and excuse making'*. Vision Australia determined that Mr Elisha presented an unacceptable risk and his employment was terminated.

Contrary to the Disciplinary Procedure, Mr Elisha was never afforded the opportunity to respond to the broader 'pattern of aggression' allegations, nor was he made aware that his termination had been informed by matters other than the allegations concerning the hotel incident.

Following the termination, Mr Elisha was diagnosed with a major depressive disorder and adjustment disorder that rendered him incapable of work.

The trial judge awarded Mr Elisha damages for breach of contract, finding that the Disciplinary Procedure was incorporated as a term in Mr Elisha's employment contract, and it had been breached. This decision was overturned by the Victorian Court of Appeal. Mr Elisha was granted special leave to appeal to the High Court.

Judgment

The High Court allowed the appeal, and reinstated the damages award at first instance.

The issues before the court included, relevantly:

- whether the Disciplinary Procedure was incorporated as a term of Mr Elisha's employment contract;
- if so, was liability for psychiatric injury caused by Vision Australia's breaches beyond the scope of its contractual obligations concerning dismissal; and
- were damages for psychiatric injury too remote in the circumstances?

Incorporation of terms

As regards the issue of incorporation, Vision Australia submitted that the reference in the 2006 employment contract to compliance with 'all other Company Policies and Procedures' undermined the contractual goal of certainty, as those policies could change over time.

The court rejected this submission, stating that the loss of some certainty is not a reason to deny the clearly expressed intention of the parties that the policies and procedures from time to time would have contractual effect.

Contract damages and psychiatric injury

Vision Australia relied upon the orthodox position enunciated by the House of Lords in *Addis v Gramophone Company Ltd* [1909] AC 488 that liability for psychiatric injury was beyond the scope of an employer's duties concerning the manner of dismissal.

The court held that *Addis* does not reflect the current state of the law in Australia, noting that it had been significantly undercut by more recent decisions in the UK and Australia, most notably *Baltic Shipping Co v Dillon* (1993) 176 CLR 344, which confirmed the availability of damages for psychiatric injury for breach of contract. The court considered there to be no principled basis to recognise a special exception for employment contracts.

In considering remoteness of the injury, the court referred to the principle in *Hadley v Baxendale* that the damage must arise according to the usual course of things or otherwise be reasonably in the contemplation of both parties as the probable result of breach. The court referred to the many different tests that had been used to determine whether damage was too remote, such as 'reasonably forseeable', 'not unlikely', quite likely', 'serious possibility', 'real danger' and 'on the cards'. The majority preferred the test of 'serious possibility', which is arguably a much more generous test than has previously been applied by courts in Australia.

The majority found that Mr Elisha suffering a psychiatric injury was not too remote, given:

- the seriousness of Vision Australia's breaches during the disciplinary process, which left him acutely bewildered as to what happened and why; and
- that the Disciplinary Procedure and its requirements for due process and the provision of support (including counselling) were intended to address risks of psychiatric injury. Vision Australia implicitly acknowledged that risk.

Capitalink Pty Ltd v Withnall [2024] NSWCA 172—orthodox principle to establish loss—evidential onus—implied promise to repay

The New South Wales Court of Appeal considered a contractual claim arising from a promise by the respondent to guarantee performance of a construction company's obligations in relation to a partially completed property development. An issue on appeal was whether the appellant had proved that it had (and in future would) suffer losses arising from the beach in circumstances where some of the rectification costs had been paid by family companies rather than the appellant.

This case reaffirms the need to sufficiently support a claim of loss, particularly in cases where the parties involved are not at arm's length. The case also demonstrates the application of common law principles concerning the establishment of loss and restitution.

Facts

The case concerned a contractual claim brought by Capitalink Pty Ltd against Marc Withnall, based on a promise by Mr Withnall to guarantee the performance of Development Delivery Construction Pty Ltd in relation to the development of partially completed townhouses in Queensland. The guarantee was contained in a Deed of Agreement between Capitalink and Development Delivery, to which Mr Withnall was also a party. It was common ground that Development Delivery had failed to complete its obligations under the Deed.

Capitalink sued Mr Withnall on the guarantee to recover damages for both past and future costs associated with the completion of the project. Although many of the invoices issued by third-party contractors in relation to past costs were addressed to Capitalink, two companies other than Capitalink, namely LBT Corp Pty Ltd and Ray White Tingalpa, paid the invoices in respect of past work, including those that had been issued to Capitalink. A large number of other invoices said to relate to past costs incurred to complete Development Delivery's obligations were addressed to First State but also paid by LBT.

The primary judge held that, while Mr Withnall's guarantee was binding, Capitalink had not established a right to substantial damages, as it had not proved that it was liable for the amounts that had been or would be paid to complete the project, as most of the costs had been paid by other companies and there was no evidence that Capitalink was obliged to reimburse them.

Capitalink appealed.

Judgment

The issues before the Court of Appeal included:

- whether the primary judge erred in finding that the future costs remaining to complete the works were not a measure of loss suffered by Capitalink;
- whether the primary judge should have found that the past costs paid by LBT and First State were paid by them at the request of Capitalink;
- whether the primary judge should have found that Capitalink was liable to reimburse LBT and First State for costs paid by them to complete the works (alternatively, for payments made by LBT and First State that discharged a liability of Capitalink); and
- whether the primary judge erred in finding that the past costs paid by Ray White from the rent account were not loss suffered by Capitalink.

On the first issue, the court found that the primary judge erred in holding that it was necessary for Capitalink to prove that it 'undertook to become liable to other entities' in respect of future costs.

The court rejected Mr Withnall's argument that Capitalink was not entitled to the future costs because they would be paid by a third party, holding that Mr Withnall's evidence of his understanding in respect of

the future costs did not supply a basis upon which the present case could be distinguished from the orthodox principle that Mr Withnall otherwise accepted.

The orthodox principle was that, to establish loss and entitlement to payment under the guarantee, all that the Capitalink needed to establish was that the development was still defective because Development Delivery admitted non-performance of its obligations, and the costs claimed for remediation were necessary and reasonable.

Accordingly, the court held that Capitalink was entitled to the future costs.

On the second and third issues, the court dismissed Capitalink's restitutionary argument that the past costs were paid by LBT and First State, two related companies, at Capitalink's request, and that Capitalink was obliged to reimburse them, thus creating a loss for which Mr Withnall was liable under the guarantee.

While the court found Capitalink's argument 'in play' at first instance and found no question of prejudice to Mr Withnall, it held that the primary judge had been correct to find that the evidentiary onus that lay on Capitalink was not discharged in relation to the past costs issue and that the material relied upon by Capitalink was insufficient to establish an implied promise to repay by Capitalink.

The court further observed that the implication of a promise to repay was less readily drawn in a family group of companies, where the payments made by LBT and First State may have been for their own benefit or interest.

As to the fourth issue, the court found that the primary judge erred in finding that expenses paid by Ray White, the managing agent of the property, had been paid indirectly by LBT as opposed to Capitalink.

Capitalink contended that those expenses were paid from a trust account in Capitalink's name and thus represented a loss suffered by Capitalink for which Mr Withnall was liable under the guarantee. The court agreed with Capitalink and held that the evidence showed that Ray White paid third-party creditors from funds held by it in Capitalink's name.

The court also rejected Mr Withnall's argument that Capitalink had not established that all of the past costs incurred were in fact referable to the non-performance of the obligations guaranteed by Mr Withnall, as an expenditure report received in evidence had categorised the expenses paid for from the trust account as past costs in respect of the development.

Accordingly, the court awarded Capitalink the sum of the payments from the trust account.

Connect with us

Our contract law team brings together a diverse group of experts from across the firm. We stay on top of the changing developments of contract law in the courts to ensure our clients have the most up-to-date and robust contractual protection. Should you have any concerns from the developments raised in this update, please contact the team below to discuss further.

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