Contract Law Update 2022: Editorial sections

Introduction

It is perhaps surprising that, in 2022, the High Court was asked to consider such basic questions as:

- how does one categorise contractual terms; and
- can a person waive a contractual right?

Even more surprisingly, and notwithstanding the fundamental nature of these questions, there was no consensus in the High Court as to their answer.

Part of the joy and frustration of the common law is that legal issues can be debated for many years without resolution. Regular readers of this *Update* will recognise many issues in this edition: when (if ever) should a duty of utmost good faith be implied into contracts; when should damages be calculated as at the date of breach; and what conduct constitutes a repudiation of a contract?

Even where the rules are agreed – and the rules of construction are (currently) largely settled in Australia – we see different judges reaching different outcomes when the same rules are applied to the same facts. Until our judges are replaced by ChatGPT and its successors, we are likely to continue to see disagreement and uncertainty both on the content of contract law and its application in different scenarios.

Which is, of course, all the more reason to read updates like this one. We hope the enjoyment of reading it outweighs the frustration of doing so.

1 Contract formation

Contract law students are very familiar with the 'battle of the forms' (where each party to a contract claims that its own terms govern the parties' contract) and the 'ticketing cases' (where a party issuing a ticket claims that the ticket incorporated certain terms in a separate document). Both of these were the subject of appellate consideration in 2022.

The decision of the Full Court of the Federal Court in the Ruby Princess class action *Carnival plc v Karpik*[1] is mainly known for upholding a class action waiver clause. It also, however, contains a very interesting discussion of the ticketing cases and the incorporation of provisions by notice in electronic contracts.

The court confirmed the following principles:[2]

1. the terms must be made available before contract formation;
2. reasonable notice must be given of the terms; and
3. in so far as a party seeks to incorporate unusual or onerous terms, the party must have done all that was reasonably necessary to bring those to the other party's attention.[3]

In relation to the second point, Justice Derrington cautioned that: *what amounts to satisfactory notice is very much fact specific, with the result that drawing guiding principles as to this issue is difficult if not impossible.*[4]

The analysis of these principles was complicated by uncertainty as to whether the travel agent was the agent of Princess Cruises or the relevant passenger (or neither). It was also complicated by an issue as to when the contract was formed (Mr Ho did not agree to the relevant terms and conditions until nearly a year after paying his deposit); with the court appearing to prefer an analysis that was not put forward by either party (that there were two separate contracts – a booking contract and a passage contract). On the issue of reasonable notice, however, Justice Derrington (with whom Chief Justice Allsop agreed) held that adequate notice was provided of the class-action waiver clause for it to be incorporated into the contract.

Forte Sydney Construction Pty Ltd v N Moit & Sons (NSW) Pty Ltd[5] was a fairly standard battle of the forms, where each party sent contracts to the other, but neither was expressly agreed before work commenced. As is often the case, the resolution of the dispute depended on a careful examination by the NSW Court of Appeal of the conduct of the parties.

Another favourite of contract law students is the decision of the High Court in *Masters v Cameron*'[6], which applies in determining whether parties intend to be bound by a preliminary agreement pending execution of a more formal written agreement. As explained by Justice Walker of the Victorian Court of Appeal in *Sully v Englisch*[7]:

These categories describe circumstances in which:

> (a) the parties intend to be bound immediately, though expressing a desire to draw up their agreement in a more formal document at a later stage;

[1] [2022] FCAFC 149.
[2] See, in particular, at [170] and [206].
[3] Denning's famous 'red hand' test from *Thornton*, cited at [192]: *an unexpectedly stringent or harsh exclusion clause would have to be presented in red writing with a red hand pointing to it for sufficient notice to be given to the customer.*
[4] At [170].
[5] [2022] NSWCA 186.
[6] [1954] HCA 72; (1954) 91 CLR 353.
[7] [2022] VSCA 184 at [62].

(b) the parties intend to be bound immediately, but may wish the operation of a particular clause or term to be delayed pending the drawing up of a more formal document; or

(c) the parties intend to postpone the creation of contractual relations until a formal contract is drawn up and executed.

Since Masters v Cameron was decided, Courts have recognised a fourth category — that being where the parties intend to be bound immediately by terms which they have agreed upon, whilst expecting to make a further contract in substitution for the first contract containing, by consent, additional terms.

Justice Walker emphasised, however, that these categories should not detract from the fundamental inquiry as to whether the parties intended to reach a binding agreement.

This case concerned the application of these principles to a settlement reached at a mediation. Although the matter was 'finely balanced', the court held that the parties intended to be bound by their oral settlement, notwithstanding their intention to record the settlement in a written agreement.

***Carnival plc v Karpik (The Ruby Princess)* [2022] FCAFC 149 – when can terms be incorporated by reference?**

In this case, the Full Federal Court considered whether a class action waiver clause was incorporated by reference into a contract. The court held that it was validly incorporated into the contract and therefore was not an unfair term.

Facts

This case concerned class action proceedings brought against Carnival plc and its subsidiary, Princess Cruise Lines Ltd, regarding loss or damage allegedly suffered by passengers and their families in relation to a Covid-19 outbreak on the *Ruby Princess* cruise ship in March 2020. The case concerned the cruise contracts signed by 695 passengers, which contained two significant clauses:

- an exclusive jurisdiction clause in favour of the US District Courts in California; and
- a clause waiving any entitlement to participate in any class action.

These passengers were known as the US subgroup members and included Mr Ho, who was identified as the representative of this subgroup.

At first instance, Justice Stewart refused Carnival's and Princess's application for a stay of proceedings, on the basis that:

- the two clauses were not incorporated into Mr Ho's contract of carriage;
- the issue of incorporation was inappropriate to determine as a common question as to the remainder of the US subgroup members; and
- the Federal Court of Australia was not a clearly inappropriate forum in which to determine the claims.

On appeal, the court considered:

- whether the exclusive jurisdiction and class action waiver clauses were incorporated into the contracts of the US subgroup members;
- whether the class action waiver clause was an unfair contract term; and
- whether the class action waiver clause was unenforceable by operation of Part IVA of the *Federal Court of Australia Act 1976* (Cth).

Judgment

Justice Derrington (with Chief Justice Allsop agreeing substantially) allowed the appeal, and ordered that the proceedings regarding the claims of Mr Ho be stayed and the matter remitted to the primary judge to determine the extent to which the decision affected the other members of the class action.

Her Honour considered the principles from contract law cases involving tickets and the incorporation of conditions by notice, to determine whether the exclusive jurisdiction and class action waiver clauses were incorporated into the contracts of the US subgroup members. Justice Derrington held that Mr Ho could have easily located the terms and conditions by following a link, and could have printed them out, read them and accepted or rejected them as he saw fit. Mr Ho was therefore provided with reasonable notice of the terms.

In particular, he was provided with adequate notice of the important terms, including the exclusive jurisdiction and class action waiver clauses. The contract was displayed in large letters on Princess's website, and was accompanied by a paragraph written in bold capitals that commenced with the words 'Important Notice to Guests' and implored Mr Ho to read the terms of the agreement.

Justice Derrington held that the class action waiver was not an unfair term within the meaning of s23 of the *Australian Consumer Law*. The class action waiver did not impede on Mr Ho's substantive right to bring proceedings against Princess, it merely required that he bring such a claim individually. This left Mr Ho's right to pursue his claim intact and capable of enforcement. Further, as an international corporation engaged in business across multiple jurisdictions, Princess had a legitimate interest in maintaining a class action waiver, as such a term would allow it to respond to claims in the same forum, utilising the same lawyers, experts and processes. Justice Derrington considered whether the class action waiver caused detriment to Mr Ho. Her Honour considered that it was not shown Mr Ho's claim was not worth pursuing outside of a class action, and even if this had been demonstrated, this factor would not demonstrate that the term was unfair. In addition, Princess had done everything necessary to bring the class action waiver to Mr Ho's attention. For these reasons, Justice Derrington concluded that the class action waiver was not an unfair term.

In relation to whether the class action waiver clause was unenforceable by operation of Part IVA of the Federal Court of Australia Act, Justice Derrington upheld the finding of the primary judge that the optional nature of participation in class actions preserves freedom of choice and it is not inconsistent with this for a person to enter an agreement not to be part of any proceedings. Further, under the Act, a group member is entitled to opt out before the date fixed by the court and before receiving the notice, and this is consistent with a person agreeing in advance to exercise that right when it becomes available.

> In dissent, Justice Rares decided that the class action waiver clause was unenforceable because it offended public policy. This was because Pt IVA of the Federal Court of Australia Act did not allow persons to contract out of being group members before the commencement of a class action. Justice Rares also held that, for this reason, as well because the Federal Court was not a clearly inappropriate forum and Mr Ho would have a clear juridical advantage in remaining as a group member, the exclusive jurisdiction clause was unenforceable.

***Forte Sydney Construction Pty Ltd v N Moit & Sons* (NSW) Pty Ltd [2022] NSWCA 186 – battle of the forms: what are the terms of a contract where neither party expressly accepts the other's terms?**

In this case, the NSW Court of Appeal considered the contractual basis on which certain excavation and construction works were completed. The central question for the court was whether the contract asserted by the appellant, Forte Sydney Construction Pty Ltd, or the respondent, N Moit & Sons (NSW) Pty Ltd, governed the works, where neither party had expressly accepted the draft contracts.

This case is an important discussion of what constitutes acceptance of a contract, where the parties have not expressly accepted any specific draft contract.

Facts

Forte and Moits both worked in the business of construction and had worked on other developments together previous to this dispute. They shared the following exchange in regard to excavation, anchor and shotcrete work at a site in Ryde, NSW (***the works***):

- 17 April 2018 – Forte sought a fee proposal from Moits for the works.
- 23 April 2018, 7 May 2018, 10 May 2018, 11 May 2018, 17 May 2018, 18 May 2018 – Moits sent various iterations of tender submissions to Forte, quoting for the works.
- 21 May 2018:
    - 9.50am – Forte rejected Moits's most recent tender submission, providing a 'Letter of Engagement' and subcontract document with different terms from Moits's tender submission ('Forte Subcontract');
    - 12.15pm – Moits provided its 'Final Tender Submission' to Forte; and
    - 6.00pm – Forte provided a revised 'Forte Subcontract' for execution to Moits.
- 25 May 2018 to November 2018 – Moits commenced and carried out the works as a subcontractor to Forte.

There were a number of material differences between Forte's subcontract and Moits's final tender submission. The final tender submission provided that the disposal of contaminated material would be on rates per tonne additional to the lump sum quoted, whereas the Forte subcontract provided that Moits could not charge at all for the disposal of such material. Further, the Forte subcontract 'Letter of Engagement' stated that 'If, for any reason, this document is not signed and returned, [Forte] will assume acceptance by the Sub-contractor, of all the terms and conditions as set out in the Contract and Scope of Works'. The parties disagreed as to whether the Forte subcontract or final tender submission governed the works. The contracts had differing consequences for the parties' entitlements to payment.

The primary judge held that Moits's final tender submission was the contractual basis for the works. His Honour characterised Forte's subcontract sent at 9.50am and Moits's final tender submission sent at 12.15pm on 21 May 2018 as offers, and found that Moits did not accept the Forte subcontract because it did not sign or return the 'Letter of Engagement' sent at 9.50am.

The primary judge considered that in providing the revised subcontract at 6pm, Forte attempted to unilaterally impose upon Moits the obligation to provide all of its services that were part of its final tender submission, but ignore the extra over rates for the disposal of contaminated material, and other exclusions and conditions. The judge found it fanciful to suggest that Moits would have accepted a contract that defied commercial common sense. His Honour concluded by finding that Forte, in requesting and permitting Moits to commence the works on 25 May 2018, engaged Moits on the terms of its final tender submission, and entered judgment for Moits.

Judgment

Did the 'Final Tender Submission' or 'Forte Subcontract' govern the works?

The crux of the appeal was Forte (***the appellant***) challenging the primary judge's decision that Moits's (***the respondent***) inal tender submission governed the works. The court unanimously upheld the appeal, finding that the Forte subcontract was the only contract standing between the parties when the respondent commenced the works on 25 May 2018, and that the respondent's conduct in starting the works, even without formally signing and returning the letter of engagement, constituted acceptance of the Forte subcontract's terms.

Silence and conduct as acceptance

Citing *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523, the court found that while an offeror may not stipulate that silence will be taken as acceptance of the offer, acceptance may be tacit, or implied by conduct, as opposed to being express, and that the silence of an offeree in conjunction with other circumstances of the case may indicate that they have accepted the offer. Further, their Honours held that an offeree who has omitted to accept an offer but has nonetheless taken the benefit of that offer will be bound by the contract. The court continued, citing *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32, that the conduct of the parties may indicate that although their negotiations did not proceed in the manner contemplated to the point of contract formation, they did intend to contract in the circumstances. At [92], the court held:

> where an offer is neither expressly accepted nor expressly rejected, the subsequent conduct of the offeree in performing in accordance with the terms of the contract which was contemplated in the offer will generally indicate to a reasonable person in the position of the offeror an intention to accept the offer.

The court construed the appellant's provision of the Forte subcontract to the respondent as a rejection of the final tender submission, because it contained inconsistent terms, and characterised all of the parties' communications from that point as negotiations on the terms of the Forte subcontract (thereby rejecting the primary judge's finding that Forte had unilaterally imposed terms). From that basis, and in the absence of signed acceptance of the Forte subcontract, the court held that a reasonable person in the position of the appellant must have understood the conduct of the respondent in commencing the works on 25 May 2018, to be done in acceptance of the offer embodied in the Forte subcontract. Finally, even though the appellant had accepted variation claims made by the respondent (which the respondent claimed were based on the final tender submission), the court held this was not an admission the contractual arrangements were based on that final tender submission. The court entered judgment for the appellant.

***Sully v Englisch* [2022] VSCA 184 – whether a binding agreement to settle made at mediation – oral agreement on key terms – intention of parties to be immediately bound when contemplating future, detailed written agreement**

In this case, on appeal, the Supreme Court of Victoria considered whether the parties had reached a binding settlement agreement at mediation.

The court allowed the appeal and held that the objective intention of the parties was that the agreement reached at mediation was binding.

This case sets out the relevant legal principles to be applied in determining whether parties have agreed to be immediately bound by an agreement they have reached. It highlights the importance at a mediation of signing written terms that expressly state whether they are intended to be immediately binding.

facts

The applicant in this matter brought proceedings in the Victorian Civil and Administrative Tribunal (***VCAT***) against the respondent for misleading and deceptive conduct.

- In March 2020, VCAT made an order in favour of the applicant.
- On 20 April 2020, the respondent filed a notice of appeal.
- In June 2020, the parties were ordered to attend a judicial mediation.
- On 3 September 2020, the mediation took place and was facilitated by Judicial Registrar Keith.
- At the mediation, the parties reached an agreement to settle, but did not prepare any written terms of settlement on the day of the mediation.

- The parties agreed that the respondent's solicitor would draw up various documents, including terms of settlement, an amended notice of appeal, consent orders allowing an appeal, and a joint memorandum to the Court of Appeal.
- The mediation was left 'open' by the Judicial Registrar at its conclusion and the proceeding was listed for a directions hearing in September.
- In correspondence following the mediation, the parties disagreed on the terms that had been settled at it.

Judgment

Justice Walker stated that there was no dispute between the parties about the relevant legal principles to be applied in determining whether parties have agreed to be immediately bound by an agreement they have reached. Her Honour adopted the trial judge's articulation of the relevant principles:

- 'The ultimate question to be answered is what each party, by its words or conduct, would have led a reasonable person in the position of the other party to believe';
- it is to be determined objectively;
- it is to be fact based, with regard to all surrounding circumstances, including from the parties' correspondence and commercial context;
- parties' subjective intention is not determinative, though it may be relevant; and
- regard may be had to the subsequent conduct of the parties, in some circumstances.

Justice Walker considered, in this case, that regard could be had to the subsequent conduct of the parties, as they agreed they would prepare a written document setting out the terms of the agreement. Her Honour referred to the case of *Masters v Cameron* and discussed the three categories of contract set out in this case, noting that the courts have subsequently recognised a fourth category. However, it was stated that these categories are 'taxonomic and should not distract from the fundamental inquiry with which the Court is engaged'.

Justice Walker allowed the appeal, concluding that the applicant had discharged their onus of providing that the parties intended to be immediately bound by the agreement they reached on the day of the mediation.

2 Implied terms, inferred terms and good faith

The distinction between implied and inferred terms was covered in our 2018 and 2021 *Updates*.[8] Put simply:

- an inferred term is a term that a court infers was agreed between the parties, even if it was not expressly agreed in writing or in words (the inference is usually drawn from the parties' conduct); and
- an implied term is one a court decides would have been agreed by the parties, had they turned their minds to it (eg because it was necessary to give business efficacy to the contract).

It is unclear whether this distinction has survived the judgment of the High Court in *Realestate.com.au Pty Ltd v Hardingham*[9]. That case was heard by five judges, two of whom (Justices Edelman and Steward) proposed a very different method for categorising terms of a contract. Their judgment divided contracts into:

- express terms, which they limited to terms that were expressly agreed by words or in writing; and
- implied terms, to be determined in accordance with the test in *BP Refinery*, albeit not rigidly applied.

This categorisation would appear to leave no room for terms that might be inferred from conduct, but do not satisfy the criteria in *BP Refinery.*[10] Their application of *BP Refinery* to 'informal' contracts was also arguably inconsistent with earlier High Court authority, although in substance there may be no difference if *BP Refinery* is not applied rigidly.

Adopting this approach, Justices Edelman and Steward determined the appeal by deciding what term should be implied into a licence agreement.

The other joint judgment, of Chief Justice Kiefel and Justice Gageler, in some respects adopted a more traditional approach. They inferred the terms of a licence agreement from the conduct of the parties and the surrounding circumstances, and held that there was therefore no need to consider whether a term should be implied (and therefore did not consider the test in *BP Refinery*). There are some passages, however, which appear to question the utility of focusing on whether terms were inferred or implied.[11]

Justice Gordon J delivered a separate judgment, which disagreed with the analysis of contract terms proposed by Justices Edelman and Steward. Like Chief Justice Kiefel and Justice Gageler, she held that the terms of the licence agreement could be inferred from the words and conduct of the parties, in light of what they knew. She may, however, also have had some reservations about the utility of the distinction between inferred and implied terms.[12]

[8] Implied terms (allens.com.au) and contdispmar19.pdf (allens.com.au).
[9] [2022] HCA 39.
[10] *(1) [the implication] must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that 'it goes without saying'; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract.*
[11] See [21] – [22].
[12] At [50], although this passage in her judgment may have been primarily intended to deal with the classification proposed by Justices Edelman and Steward.

In conclusion, the High Court has narrowly confirmed the ability to infer terms of a contract from the parties' conduct and surrounding circumstances, but has created some uncertainty about the utility of the distinction between implied and inferred terms, and as to how and when the test in *BP Refinery* should be applied.

An example of the distinction between inferred and implied terms is the decision of the Victorian Court of Appeal in *Bai v Lightspeed Finance Pty Ltd*[13], in which a court inferred an agreement to terminate a deed of loan following the entry by related parties into a new funder agreement. Although the court in this case did use the language of an 'implied agreement' to terminate, it was inferring such an agreement, rather than purporting to imply terms in accordance with *BP Refinery*.

The test in *BP Refinery* applies to the implication of terms in fact, rather than in law. The long debate in Australia as to whether there should be an implied contractual obligation of good faith (and whether such an implication should be in law or in fact) shows no signs of being resolved. The issue was considered by the Queensland Court of Appeal in *QNI Resources Pty Ltd & Anor v North Queensland Pipeline No 1 Pty Ltd & Anor*[14]. The judgment of Justice Kelly (with whom the other two judges agreed) contains a useful overview of the authorities on good faith, and on the distinction between terms implied in fact and in law. The court declined to imply a duty of good faith on either basis.

An example of a term implied in law is an implied term that contractual powers be exercised within a reasonable time. As Justice Dixon stated in *Reid v Moreland Timber Co Pty Ltd*[15]:

> an implication of a reasonable time when none is expressly limited is, in general, to be made unless there are indications to the contrary

This passage was cited by the Western Australian Court of Appeal in *City of Wanneroo v Tah Land Pty Ltd*[16], in finding in favour of such an implied term limiting the power of the city to require Tah Land to perform certain work.

An example of a potentially more 'flexible' approach to implying terms into informal contracts is the NSW Court of Appeal judgment in *Woodhouse v Woodhouse*[17]. The case concerned an oral loan agreement. The court noted the possibility of implying a term that a loan was not repayable without notice (which was significant for determining when the limitation period commenced), on the basis that it was arguably *'necessary for business efficacy*'. This might suggest support for the abbreviated test for implying terms into oral contracts, rather than applying all of the *BP Refinery* criteria although perhaps not too much weight should be given to these comments, as they were obiter.

Conversely, the decision of the NSW Court of Appeal in *Hobhouse v Macarthur-Onslow*[18] is an example of a court applying *BP Refinery* in declining to imply a term. The court found – contrary to the trial judge – that the term should not be implied because it was not 'necessary', not 'so obvious that it goes without saying' and would be inconsistent with an express term.

***Bai v Lightspeed Finance Pty Ltd* [2022] VSCA 242 – formation of contract – effect of subsequent agreements on initial agreement – implied termination**

In this case, the court considered whether an initial loan agreement between a lender and borrower was superseded by a subsequent funder agreement to which the lender was not a party.

[13] [2022] VSCA 242.
[14] [2022] QCA 169.
[15] (1946) 73 CLR 1 at 13.
[16] [2022] WASCA 53.
[17] [2022] NSWCA 240.
[18] [2022] NSWCA 158.

The court held that although the funder agreement did not terminate the initial loan agreement, it was a relevant part of the factual matrix in which the question of implied termination was to be considered. Ultimately, the inconsistency between the two agreements, taken alongside the conduct of the party, established an implied agreement to terminate the initial loan agreement.

The case is significant, as it demonstrates how subsequent agreements can impact an initial agreement, even where the subsequent agreement involves parties who are not parties to the initial agreement.

Facts

Under a deed of loan, Mr Junping Bai lent $1,500,000 to Lightspeed Finance Pty Ltd. According to the deed of loan, the funds were advanced for the express purpose of being on-let to 462 Victoria Parade Pty Ltd.

Eventually, both Mr Bai and Lightspeed Finance sought to depart from the terms of the deed of loan. Mr Bai wished to alter the arrangement so that his company, Haide Holdings Ltd, was the lender. Lightspeed wished to ensure that it was no longer the borrower but was, rather, a 'mortgage manager' that would act as an intermediary to procure and manage loans made by Haide to third parties. Accordingly, Haide and Lightspeed entered into a separate 'Funder Agreement' to reflect those changes – Haide was listed as the lender, and Lightspeed was listed as the loan facilitator and manager.

While the funder agreement substantially related to future loans, in a schedule to the agreement it also referred to 'Settled Loans', including reference to the funds advanced to Victoria Parade under the original deed of loan. Victoria Parade eventually defaulted on its repayment obligations, and Mr Lai brought proceedings against Lightspeed to recover the principal sum lent under the deed of loan and any outstanding interest repayments. The question that arose in the proceedings was whether, following entry into the funder agreement, the deed of loan had been impliedly terminated such that Lightspeed was no longer liable as a borrower under that deed.

The primary judge ruled in Lightspeed's favour, holding that the funder agreement superseded the deed of loan, and that the deed of loan had been impliedly terminated. The Victorian Court of Appeal unanimously upheld that decision.

Judgment

The court began by noting that, in resolving the issue on appeal, it was not concerned with the subjective intentions of the parties. Rather, it was necessary to consider the 'outward manifestations of those intentions'. What was 'critical' was what each party, by its words or conduct, would have led a reasonable person in the position of the other party to believe.

The court noted that the funder agreement itself could not have any direct effect on the deed of loan. Haide and Lightspeed could not contract with each other to terminate an agreement that was between Lightspeed and Mr Bai. Nonetheless, the inconsistency between the funder agreement and the deed of loan was relevant to the extent that it formed part of the 'factual matrix' relevant to the question of whether Mr Bai and Lightspeed had separately agreed to terminate the deed of loan.

So far as inconsistency between the funder agreement and the deed of loan was concerned, the court focused on the fact that the funder agreement sought to regulate 'Settled Loans'. It found that the definition of 'Settled Loans' in the funder agreement embraced the original loan on-lent to Victoria Parade under the deed of loan. It followed that both the funder agreement and the deed of loan regulated that loan. However, they did so in an inconsistent manner. Notably, the interest rate payable by Victoria Parade under the funder agreement was 15% per annum, rather than the rate of 24% imposed by the deed of loan on Lightspeed. In the court's view, the objective bystander would not consider the interest remitted to Lightspeed by Victoria Parade could be 15% per annum while Lightspeed retained a

concurrent obligation to pay interest at 24% under the deed of loan. Such an arrangement would not make commercial sense.

Importantly, the court noted that this inconsistency alone did not mean the deed of loan was unenforceable. Instead, it was necessary to demonstrate that Mr Bai also agreed to the termination of the deed of loan. However, the court ultimately found that his conduct evinced an agreement to the termination of the deed of loan. In reaching that conclusion, the court noted that Mr Bai was aware of the terms of the funder agreement, and the material inconsistencies between the funder agreement and the deed of loan. Additionally, various exchanges between the parties demonstrated an intention between them for the funder agreement to ensure that Lightspeed would no longer be a borrower. In those circumstances, it was evident that Mr Bai, through his conduct, had agreed to the termination of the deed of loan and thus the appeal was dismissed.

***City of Wanneroo v Tah Land Pty Ltd* [2022] WASCA 53 – implied terms regarding time for performance of contracts**

In this case, the Western Australian Court of Appeal (Justices Quinlan, Buss and Beech) considered, among other issues, whether there existed an implied term that limited the ability to call upon performance of an obligation under a contract within a reasonable time frame.

The court held that, on the basis of the parties' conduct and the objective unlikelihood of agreeing to an unlimited time frame, there existed an implied term regarding the reasonable time frame.

This case is significant in affirming the principles the court will look to when deciding whether to imply a term limiting the period in which performance of a contractual obligation can be required.

Facts

In 1992, the City of Wanneroo and Tah Land Pty Ltd entered into a deed relating to the proposed development of an area of land, which Tah Land owned, on Wanneroo Road, Landsdale, for a variety of commercial purposes. Two relevant terms of the deed were that Tah Land would take steps to have the land rezoned and subdivided, and would transfer to the council the title to 1.5 hectares, to be used as a Community Purposes Site, before the commencement of trading of any business on the land.

In 1996, the City and Tah Land exchanged correspondence, which later became the basis of ground 2(a) of the appeal in this case. The City sent a letter to Tah Land, which included the following words:

> The legal agreement should therefore be modified to achieve the following:
>
> 1. A time extension for the identification, zoning, subdivision and transfer of the community purposes site on the basis that the City is able to require these matters to be carried out at any time in the future if it requires.

In response, Tah Land replied that it would modify the existing deed to incorporate those points 'on proper and reasonable terms and conditions consistent with the original Legal Agreement'. Later that year, Tah Land sent the City a draft deed that proposed performance could be called for within 12 months, to which the City provided no response.

The agreed effect between the parties of that correspondence was that Tah Land would be permitted to commence trading, even though it had not subdivided the Community Purposes Site and transferred it to the City.

In 2019, the City required Tah Land to perform its obligations, and prepare a plan of subdivision and transfer of the Community Purposes Site. Tah Land refused to perform its obligations.

The City submitted that the correspondence exchanged between the parties in 1996 created a complete and binding agreement, to the effect that the deed was varied so that the City had indefinite power to call for subdivision and transfer of the Community Purpose Site. The trial judge ruled that the power was not

indefinite but, rather, that there was an implied term that the City could only call for performance within a reasonable time frame (of which 2019 was not).

Judgment

The court upheld the trial judge's finding that the words and conduct of the parties did not reveal an objective agreement between the parties that the City could call upon Tah Land to perform its obligations at any time in the future.

It held that a reasonable person in the position of both the City and Tah Land would not conclude that the parties had to a right to call upon performance for an indefinite duration. The court placed particular emphasis on the below factors:

- the subject matter of the obligation was the transfer of an area of land, for which courts are reluctant to construe obligations giving rise to indefinite rights of transfer;
- the initial obligations in the deed (before they were varied) were limited by time, and were essential terms of the deed;
- it was the City that was requesting Tah Land defer performance of that obligation, rather than Tah Land itself requesting delay of its obligations of performance; and
- Tah Land's agreement to that deferral was expressed to be 'on proper and reasonable terms and conditions consistent with' the deed.

Due to the above factors, the court found that there was an implied term the City could only call upon performance within a reasonable time frame. As such, ground 2(a) of the appeal was rejected.

***Hobhouse v Macarthur-Onslow* [2022] NSWCA 158 – implied terms: application of the *BP Refinery* test**

In this case, the Court of Appeal of NSW considered whether an implied term should be read into a deed that contained an option to purchase property.

The court held that the five conditions for implying terms in *BP Refinery* were not met, especially because the term implied at first instance by the Supreme Court would have contradicted an express term of the deed. Thus, the appeal was allowed.

This case is significant because it confirmed that terms will not be implied in contracts where existing provisions are capable of operation without implication, even if those provisions are not operable in every circumstance.

Facts

Under a deed, Mr Macarthur-Onslow had a first call option to purchase an apartment at the 'midpoint market value' price determined in accordance with the procedure in cl 8.1(d) of the deed. This option would expire 60 days after the deed was executed. If Macarthur-Onslow failed to exercise his option before it expired, Ms Hobhouse had a second call option to purchase the apartment.

Clause 8.1(d) authorised Mr Rogers, an accountant, to obtain two current market valuations of the apartment and, subsequently, to determine a midpoint valuation. Clause 12.2(d) provided that any option was to be exercised by serving a written notice of exercise of option, two signed contracts for sale, and a cheque for the deposit.

After the deed was executed, Rogers sought valuations of the apartment from two valuers to determine the 'midpoint valuation'. However, only one valuer returned a valuation of the apartment, at $4,250,000-$4,500,000, within 60 days of the deed being made and Macarthur-Onslow's option expired. Nonetheless, Macarthur-Onslow purported to exercise the option by submitting a notice of exercise, two signed

contracts, and a cheque for $437,500 before the end of the 60th day of the deed. This amount constituted 10% of the midpoint of the range given by the one valuer.

At first instance, Justice Kunc considered that the test in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 for implying a contractual term was satisfied. His Honour implied the words 'and if the price has been determined in accordance with this Deed' into the relevant clause:

> Any such option…is to be exercised by service of written notice of exercise of option…signed by the Grantee, *and if the price has been determined in accordance with this Deed*, together with two copies of the Contract for the purchase of such property duly executed by the Grantee and cheque for the deposit payable…

The effect of the implied text was that if the midpoint market value had not been determined in accordance with the deed, then Macarthur-Onslow would only need to submit a notice, and not a cheque for the deposit or two signed contracts . Accordingly, Justice Kunc held that Macarthur-Onslow had validly exercised his option.

Judgment

Justice Macfarlan (Justices Ward and White agreeing) did not consider that the test in *BP Refinery* for implying a term was satisfied. The test for implying a term in that case was summarised as such:

1. The term must be reasonable and equitable;
2. The term must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it;
3. The term must be so obvious that 'it goes without saying';
4. The term must be capable of clear expression; and
5. The term must not contradict any express term of the contract.

The court regarded the deed in this case to be detailed and comprehensive. Its provisions relating to Macarthur-Onslow's option 'were not so unworkable such that it was necessary to imply a term to give them business efficacy'. Rogers' task to obtain the midpoint of two valuations of the apartment was 'by no means impossible' and there were plenty of options open to him to ensure that two valuations were obtained in time. For instance, Rogers could have chosen any valuer, and the valuations did not need to take a form that would have delayed valuation. If a valuer were delayed, Rogers could have approached another within the 60-day period.

While the option was not workable in the particular circumstances of this case, there were many instances in which it would *not* be unworkable. Justice Macfarlan considered it unnecessary that the option be able to be exercised in every circumstance. Rather, it was sufficient that the option 'was capable of being exercised in many foreseeable circumstances'. Therefore, it was not necessary to imply a term to give business efficacy to the deed (condition 2 of *BP Refinery*). In the present case, the implication in essence was only necessary to ensure the contract operated in Macarthur-Onslow's favour.

Further, Justice Macfarlan considered that the term implied by Justice Kunc was not so obvious that 'it [went] without saying' (condition 3 of *BP Refinery*), and that a reasonable bystander might have implied a different term. His Honour also found that the implied term was inconsistent with the contract's express terms (condition 5 of *BP Refinery*), as it changed the manner in which the option could be exercised by altering the circumstances in which a deposit was required.

The court also dealt briefly with the question of relief against forfeiture, which Macarthur-Onslow raised in the alternative. Justice Macfarlan found that this was not a case in which equity would relieve against Hobhouse's reliance on the deed because Hobhouse did not act unconscionably, nor was Macarthur-Onslow's inability to exercise his option an 'accident'.

In this case, the Queensland Court of Appeal considered whether:

1. the participants in a joint venture could be found liable to pay certain charges under a contract executed by the joint venture manager;
2. those charges could be construed as unenforceable penalty clauses; and
3. an obligation to act in good faith could be implied into the contract.

The court held that the joint venture participants were directly liable to pay the charges under the contract. Those charges legitimately protected the interests of the promisee under the contract, and therefore could not be construed as unenforceable penalties. Additionally, in the absence of High Court authority, the court refused to recognise a universally applicable implied obligation of good faith in commercial contracts. The court also refused to imply an obligation to act in good faith in fact or law, in light of the circumstances of this case.

The decision reinforces the absence of a universally implied obligation of good faith into commercial contracts in all Australian jurisdictions. If parties wish to rely on an obligation of good faith, they may need to demonstrate why such an implied obligation is necessary to the operation of the contract. Additionally, the decision reinforces recent case law concerning penalty clauses and the high threshold for a clause to be construed as a penalty.

Facts

North Queensland Pipeline No 1 Pty Ltd and North Queensland Pipeline No 2 Pty Ltd (the ***pipeliners***) formed an unincorporated joint venture to design, construct, operate and maintain gas pipeline. On 12 May 2005, the pipeliners executed a contract for the transportation of gas on the pipeline with Queensland Nickel Pty Ltd, in its capacity as the manager of (and as an agent on behalf of) the participants in another joint venture – QNI Resources Pty Ltd (***QNR***) and QNI Metals Pty Ltd (***QNM***). The Queensland Nickel Joint venture required gas to operate its nickel refinery in Yabulu.

On 22 April 2016, Queensland Nickel went into liquidation. Subsequently, on 10 March 2016, it nominated that zero gas be received under the contract, as the nickel refinery it operated had been shut down. The dispute between the parties concerned invoices to QNR and QNM (the ***appellants***) to pay a 'Firm Forward Shortfall Charge' and 'Imbalance Charge' under the contract.

The firm forward shortfall charge was a payment to the pipeliners for satisfying their obligation to transport the gas under the contract. The pipeliners were required to receive a nominated quantity of gas on any day up to the 'Maximum Daily Quantity' (the ***MDQ***) specified in the contract. If the pipeliners delivered between 90 to 100% of the MDQ, they would be paid a firm forward charge that was calculated by reference to the actual quantity of gas supplied. However, if the pipeliners delivered less than 90% of the MDQ, they would be paid both a firm forward charge and a firm forward shortfall charge. The firm forward shortfall charge would be calculated by reference to the amount by which the delivery fell short of 90% of the MDQ. In substance, its effect was to ensure that the pipeliners received a minimum payment as if they had delivered 90% of the MDQ.

The imbalance charge arose where more or less gas was delivered to a delivery point by the pipeliners than was received by a pipeline at a receipt point. As pipelines require a base quantity of gas to guarantee necessary for the gas to flow along the pipeline, the balance of gas in pipeline is an important consideration. Under the contract, if there was an imbalance of gas, the pipeliners were entitled to charge an amount that was the product of a pre-determined formula.

At first instance, the appellants were held to be liable to pay both the firm forward shortfall charge and the imbalance charge. On appeal, the appellants sought to argue the following:

1. the contract did not directly impose liability onto them to pay the charges to the pipeliners;
2. the imbalance charges were unenforceable penalty clauses; and

3. in claiming the imbalance charges from the appellants, the pipeliners had breached an implied obligation to act in good faith.

Judgment

The court unanimously dismissed the appeal, with Justice Kelly delivering the reasons for judgment. On the first ground of appeal, his Honour noted that the contract imposed various obligations on 'QNI'. QNI was defined in the contract as referring to Queensland Nickel, QNR and QNM. Additionally, the contract included a clause that specifically stated all liability to pay an amount of money under the contract (including liability to pay for a failure to perform an integral 'QNI obligation') was to be borne severally by the appellants in specified proportions. His Honour also noted that the contract imposed obligations on the appellants to remain creditworthy at all times, and that the pipeliners were granted a right under the contract to terminate if the appellants failed to pay on a due date. Read together, the effect of these provisions was to directly impose obligations on the appellants to pay certain amounts of money under the contract.

On the second ground of appeal, Justice Kelly found that the imbalance charges were not penalties. His Honour noted that a penalty clause is a collateral stipulation that acts to secure a primary stipulation. Such a clause would be construed as a penalty if it required the payment of an amount that is 'out of all proportion' to the interests said to be protected under the primary stipulation.

In arguing that the clause entitling the pipeliners to an imbalance charge was a penalty, the appellants focused on the fact that an imbalance charge could be incurred even if there was a positive imbalance of gas in the pipeline. However, the unchallenged finding of the primary judge was that a positive imbalance could reduce or eliminate the pipeline's capacity to store gas in the pipeline. That in turn could impact the Pipeliners' ability to serve additional users of the pipeline. The appellants submitted that such a loss was entirely theoretical because at the time of contracting there was no evidence of any anticipated additional users of the pipeline. However, Justice Kelly rejected this submission, reasoning that any prospective loss under a contract at the time of contracting was necessarily theoretical or hypothetical. Contrary to the appellant's submissions, there was no evidence that the risk posed by a positive imbalance was unlikely to materialise at the time of the contracting. Therefore, no finding could be made the imbalance charge was out of all proportion to the Pipeliners' interest in avoiding a positive imbalance. Additionally, expert evidence accepted by the court suggested that gas imbalances could lead to the loss of customers and reputational issues for the operators of pipelines. Such losses were difficult to estimate in advance, and his Honour stated that, in such circumstances, the penalty rule had no application. Instead, his Honour found that, properly construed, the imbalance charges were the product of the parties settling for themselves the contractual allocation of burdens and benefits regarding gas imbalances.

On the third ground of appeal, the appellants submitted that the contract included an implied obligation on the pipeliners to act in good faith to eliminate or correct the imbalance before enforcing the imbalance charge. This proposed wording of the obligation flowed from the fact that the contract empowered the pipeliners to choose to correct an imbalance before charging an imbalance charge.

The appellants contended that the primary judge should have recognised a generally applicable implied obligation of good faith in commercial contracts as a matter of law. However, in the absence of High Court authority in favour of a universal implied obligation of good faith in commercial contracts, Justice Kelly held that the Queensland Court of Appeal should proceed on the basis that such a term is not to be universally implied into all commercial contracts.

Despite the foregoing finding, his Honour noted that the appellants could still argue that an obligation of good faith could be implied within the particular circumstances of this case either in fact or law. An implication in law relied on the imputed intention of the parties, while an implication in fact required assessing the parties' actual intentions.

For such an implication to be drawn at law, Justice Kelly noted that the appellants needed to demonstrate that without an obligation of good faith the contract would be seriously undermined or deprived of its substance. However, in his Honour's view, the proposed implied obligation disturbed the proper functioning of the imbalance clause in the contract. In effect, it modified the pipeliners' discretionary power to either seek to correct the imbalance or impose the imbalance charge, by rending that power a power for the benefit of all parties. The proposed obligation of good faith would in substance subordinate the Pipeliners' interests in being able to charge for imbalances to the appellants' interest in not being liable to pay. His Honour noted that the usual content of implied good faith obligations was not to subordinate the interests of one party to the other's.

Finally, his Honour considered whether the obligation of good faith could be implied as a matter of fact. He noted that for an implication of fact to be drawn, the proposed term must be reasonable and equitable, necessary to give business efficacy to the contract, and so obvious that it 'goes without saying'. For similar reasons to those explained above, his Honour found that a good faith obligation was not necessary to give business efficacy to the contract. The power to correct imbalances was framed in expressly discretionary terms, and a good faith obligation would transform this discretionary power such that the word 'may' would be read as 'must'. Accordingly, the actual intention of the parties could not have been to constrain the Pipeliners' powers by an obligation of good faith.

Therefore, all three grounds of the appeal failed and the court dismissed the appeal with costs.

***REA Pty Ltd v Hardingham* [2022] HCA 39 – categorisation of contractual terms – inferred and implied terms**

In this case, the High Court considered what terms might be inferred or implied into an informal contract.

The court held that the applicants did not infringe the licence granted by a real estate photographer, by continuing to use the works uploaded to their websites after the relevant properties were sold or leased, in circumstances where the photographer knew his works would be uploaded by the original licensees to another website.

The majority of the High Court was willing to infer terms into an informal contract, but different approaches were taken to the inference or implication of terms.

Facts

The following background facts were not in dispute:

- The copyright in the works (which were photographs and floor plans) was held by the respondents, a real estate photographer, Mr Hardingham, and his company Real Estate Marketing Australia Pty Ltd (referred to collectively as ***Hardingham***).
- Hardingham was commissioned by real estate agencies to provide the works to assist the agencies in selling and leasing properties.
- Hardingham did not have written contracts with their clients.
- Hardingham knew that their clients would upload their works to REA in order to advertise the properties for sale or lease.
- RP Data had an agreement with REA by which it used works published on REA.
- REA and RP Data continued to reproduce the copyrighted works on their websites after the sale or lease of the properties.

The real estate agencies had entered into a subscription agreement with REA, by which they agreed to the following express licence:

> 5. Your acknowledgements
>
> You acknowledged and agree that at all times during the Term of this Agreement:

> (a) in consideration for us granting you a right to upload listings to the Platform and other services we provide, you grant us an irrevocable, perpetual, world-wide, royalty free licence to publish, copy, licence to other persons, use, adapt for any purpose related to our business any content you provide to us during the Term, and this licence survives termination of this Agreement by you or us;

The question was whether REA and RP Data's use of the works was within the licence granted by Hardingham to the real estate agents who commissioned the works for their use in selling the properties, including on REA. Hardingham claimed that, although they did not have formal contracts with the real estate agents, the licence they granted was limited and came to an end once the relevant property was sold – ie it was not a licence in perpetuity.

At first instance, the primary judge found that Hardingham permitted (ie licensed) the real estate agencies to use their works on REA, and knew or assumed that the website was permitted to use the works after the relevant advertising campaigns had ended. The sub-licence to RP Data did not go beyond the licence that could be inferred from Hardingham's conduct and implied into the contracts with the agents.

On appeal, the majority of the Full Court of the Federal Court concluded that the informal contracts contained an express term that a licence to use the works and sub-licence was limited to the campaign to sell or lease the properties. The court made orders restraining the websites from using the works.

Judgment

The High Court confirmed that when construing the terms of a contract, it is an objective view of what a reasonable person would conclude based on the words and conduct (or lack thereof) of the parties. A reasonable person would conclude that the purpose of the real estate agencies commissioning the works was in part so that they could be uploaded to REA, which required the agencies to provide it with a licence to use those uploaded works. By their conduct, Hardingham permitted the use of their works by the websites after the marketing campaigns had finished.

Justice Gordon explicitly criticised the approach of the Full Court in taking the following steps:

- referring to the actual intention of the parties, when the terms of a contract must be identified objectively;
- applying a 'rigid taxonomy' of express, implied and inferred terms, when the first task is to identify what a reasonable person would conclude were the terms of the bargain based on the parties' conduct and context; and
- conflating inferred and implied terms

In their joint judgment, Chief Justice Kiefel and Justice Gageler noted that Hardingham's failure to object led the real estate agencies to the view that they knew and accepted the commercial reality they would need to advertise on REA and accept the terms of the website. Justice Gordon's view was that the contract included a term that the real estate agencies could sub-lisence the use of the works to other parties even after the properties had been sold or leased.

Justices Edelman and Steward took a different approach, and decided the case on the basis of implied, rather than inferred, terms. They found that it was natural and obvious the real estate agencies were going to use the services of REA and were going to accept its terms and conditions, and implied a term accordingly.

The High Court took slightly differing views on the application of the principles.

Differentiation between 'inferred' and 'implied' terms

Chief Justice Kiefel and Justice Gageler drew a distinction between what can be inferred from the circumstances and what may be implied. In this case, they noted that Hardingham did not raise any objections to the commercial reality that the real estate agencies would accept REA's terms. An agreement and the terms of the agreement could be inferred from their acts and conduct (or their

absence). In these circumstances, it is not necessary to consider whether to imply a term into the sub-licence to REA limiting their use of the copyrighted works.

Justice Gordon stated that the definitional delineation between inferred and implied terms is not easy to draw, and potentially unproductive if it would distract attention from the proper inquiry as to the terms of the bargain between the parties.

Justices Edelman and Steward asserted that there is no third category of 'inferred terms', as contract terms are either express or implied, although they noted that there is a fine line between an implication in an express term and an implied term. Although there is no category of 'inferred terms', inferences can be made in the process of discerning the existence of express terms or the identification of implied terms. A term 'implied' by a court already exists in a contract (although not expressly), which can be understood by drawing inferences.

Application of principles to informal and formal contracts

Justices Edelman and Steward took the view that, while noting context will affect the application of contractual rules, there is no such thing as a category of 'informal' contracts that have different rules from those governing all other contracts. Justice Gordon, on the other hand, noted that there are separate authorities distinguishing between the implication of terms in formal and informal contracts, and that courts' approaches will differ when considering an informal contract.

While Chief Justice Kiefel and Justice Gageler did not refer to 'informal' contracts, their reasons noted that where the terms of an agreement have not been articulated, they must be ascertained by reference to the parties' words and conduct.

***Woodhouse v Woodhouse* [2022] NSWCA 240 – are loans without a fixed term repayable without notice?**

In this case, the NSW Court of Appeal considered whether an oral loan agreement between a mother and son was within the limitation period for enforcing the loan.

The court held that the loan was for a fixed term that placed the action for its recovery well within the limitation period. However, the appellant had submitted in the alternative that the loan was payable on demand, to which the court commented it was arguable that, had the fixed term of the loan not existed, it would be necessary for business efficacy to imply a term that the cause of action to recover the loan would not accrue until some sort of reasonable notice was given to the debtor.

The commentary is significant because it suggests a potential widening of the circumstances where the court will imply a term that requires notice to be given to a debtor before a cause of action to recover the debt accrues. This is important both to the proper construction of loan agreements and to calculating the limitation periods of such loans.

Facts

In dividing a family estate, a mother transferred land and other assets to her adult son for him to continue running the family farming business. As part of this transfer, the son agreed to 'take on' the overdraft liability of the farming business's trading trust. To cover the liability, the mother loaned $267,237 to the son, which she alleged was to be repaid after five years at 8% annual interest.

Eventually, the mother brought proceedings seeking recovery of the principal and interest on the loan. At first instance, the Supreme Court dismissed the claim because, on balance, it was not persuaded that the loan had been entered into on the terms alleged by the mother – particularly, it had not been established that the loan was repayable after five years. As a consequence, the mother's claim was outside the limitation period and was statute barred.

The mother appealed to the Court of Appeal, asserting that, on a correct construction, the loan had a fixed term of five years, but that, alternatively, the loan was payable on demand (and therefore the limitation period under the *Limitation Act 1969* (NSW) had been extended because partial repayments had been made).

Judgment

The Court of Appeal found for the mother, affirming that the obligation to repay the loan arose after five years and that, accordingly, the debt was still within the limitation period and was enforceable (per Justice Meagher; Chief Justice Bell and Justice Mitchelmore agreeing).

However, there was significant *obiter* from the court that, had the loan not been for a fixed term, it did not follow that it was payable on demand.

The general common law position is that a simple loan contract that does not provide for the time of repayment is understood to create an obligation to repay immediately – ie on demand. Parties who wish to avoid this obligation arising must contract out of it: *Ogilvie v Adams* [1981] VR 1041,1043.

In this case, the court considered it 'certainly an arguable position' that it could be necessary for business efficacy to imply a term that the mother's loan was not repayable without notice, given its circumstances and purpose . Had such a term been implied, the limitation period on the mother's claim would not have commenced until a demand for the debt was made.

The court was supported in this dictum by the Supreme Court of Victoria's decision *VL Finance Pty Ltd v Legudi* [2003] VSC 57, which found that, in certain circumstances, implying a term that a loan would not be repayable without notice to the debtor accords with the principle established in *Ogilvie*.

The court's comments in this case suggest a widening of circumstances where it may rely on business efficacy to imply a notice requirement for a loan (with no due date) to be payable. This widening is suggested because material differences exist between the scenarios contemplated in *VL Finance* (being a written loan agreement clearly implying the loan would not be payable, and a dispute where shareholders deposited surplus capital funds into a company) and the facts of the present case.

3 Construction of contracts

The construction of contracts usually turns on the particular language chosen by the parties, sometimes informed by surrounding circumstances, and assisted by various rules or principles. When written contracts contain apparently contradictory clauses and various drafting errors, what rules will a court apply to determine the parties' (objectively ascertained) intention?

S&C Nicola Pty Ltd v Peter Holmes Investment Pty Ltd[19] concerned an agreement that Justice Leeming described as *'poorly expressed … replete with syntactical or typographical errors'*. He observed that this *'lack of care and precision and apparent lack of understanding of legal concepts … informs the task of construction in a number of ways'.*[20] These include:

- a court should not place great weight on the precise wording used by the parties;
- it may be that less weight should be given to the principle that operative provisions prevail over inconsistent recitals (although Justice Leeming didn't decide this point, which he noted would be contrary to some authorities); and

[19] [2022] NSWCA 72.
[20] At [29].

- there may be threshold questions about the literal meaning of words actually used (and that may not bear their ordinary meaning).

Even with these guiding principles, different judges can interpret a contract in different ways: in this case, two of the three appellate judges preferred a different interpretation from the trial judge and the third appeal judge.

Sometimes the inconsistency within a contract is more commercial than literal. In those circumstances, it is difficult for a court to depart from the language used by the parties. An example of these difficulties is the decision of the Western Australian Court of Appeal in *NTC Contracting Pty Ltd v Morton*[21], in which it declined to confine an insurance clause (which obliged one party to obtain insurance covering both parties) to circumstances covered by a separate indemnity clause. The appellant in that case relied on the decision of the NSW Court of Appeal in *Erect Safe Scaffolding (Australia) Pty Ltd v Sutton*[22], where the court did confine the scope of an insurance clause by reference to the scope of an indemnity. The authority of *Erect Safe* is quite doubtful, however, given later judgments of the NSW Court of Appeal.[23]

***S&C Nicola Pty Ltd v Peter Holmes Investment Pty Ltd* [2022] NSWCA 72 – construction of partnership agreement with inconsistency between agreement's recitals and operative provisions, and how any such inconsistency is to be resolved**

In this case, the NSW Court of Appeal considered whether interest on funds provided to a partnership by one partner is to be treated as a partnership expense or as an independent debt to be paid by the other partner.

The court held that the interest entitlement due to the respondent is to be treated as an expense of the partnership, which is to be paid from the partnership assets before the division of profits and not from the appellant's share of the partnership profits.

This decision provides important guidance on the application of the rules of interpretation to poorly drafted contracts, particularly where there is no extrinsic contextual material.

Facts

The appellant, S&C Nicola Pty Ltd, and its related company, Manotik Pty Limited, acted in partnership with the respondent, Peter Holmes Investments Pty Ltd (***PHI***), in the acquisition and development of residential properties. Their practice was for PHI to fund the acquisition and development, S&C Nicola to find the property and coordinate the construction, and Manotik to carry out the building work.

PHI sought the taking of accounts in the Equity Division of the NSW Supreme Court regarding two of the partnership properties.

The appeal judgment concerned the construction of the partnership agreement between S&C Nicola and PHI, which the court variously described as 'poorly', 'casually' and 'carelessly' drafted.

Relevantly, Recitals D and E stated:

> D. In consideration of [PHI] entering into this Partnership [S&C Nicola] will [enter] into the Partnership agreement, support [PHI] in the Partnership and indemnify [PHI] from half of the costs of the development, plus pay [PHI] 5% interest per annum on all monies spent on the project by [PHI].
>
> E. After completion of the Development Project the units will be sold and the proceeds will be paid first towards return of the capital invested by [PHI], then toward 5% interest calculated per annum on a monthly basis on that Capital and finally distributed equally between the Partnership parties.

[21] [2022] WASCA 160.
[22] [2008] NSWCA 114; (2008) 72 NSWLR 1.
[23] Such as *GIO General Limited v Centennial Newstan Pty Ltd* [2014] NSWCA 13 and *CSR Limited v Adecco (Australia) Pty Ltd* [2017] NSWCA 121.

Clause 6(a)-(c) stated:

> (a) The parties must contribute the capital required to complete the project in the following proportions and will share in the profits and losses of the venture in the same proportions.
>
> (i) Party 1 50%
>
> (ii) Party 2 50%
>
> (b) If a Partner pays money on behalf of the Partnership, the other Partners must make a contribution as soon as practicable after being informed of the payment, to restore equality of contribution between them.
>
> (c) Despite (a) and (b) above Party 2 has agreed to fund the whole capital of the project on behalf of the parties until completion of the Partnership project and in consideration therefor Party 2 is entitled to be the sole owner of the properties and entitled to 5% interest on … all capital expenditure *to be repaid before any profits are distributed*. (emphasis added)

The issue for determination was whether, on the proper construction of the partnership agreement, the interest of 5% per annum on funds provided to the partnership was to be treated as a partnership expense (and borne equally by the partners), or was to be paid by S&C Nicola as a debt separate from the partnership expenses (in which case, S&C Nicola would be liable to pay the full 5%).

Judgment

Justices Macfarlan and Leeming determined that the interest payment was to be treated as a partnership expense. Justice White took the view that the partnership agreement treated the interest separately from other development costs and that S&C Nicola was obliged to pay it.

Justice Macfarlan had specific regard to the textual context in which the references to the interest payment are made. In each of Recital E and clause 6(c), the reference to the interest payment is 'wedged between' references to the return of PHI's capital contribution and division of the profits. His Honour considered that the placement of these references suggests, in the absence of any clear contractual indication otherwise, that the interest payment is intended to have a similar character to the repayment of capital, and is to be treated as a partnership expense to be deducted from the partnership assets before division of the partnership profits. His Honour did not consider that there was any inconsistency between the agreement's recitals and operative provisions to be resolved.

Justice Leeming agreed that the interest payment is to be treated as a partnership expense. His Honour noted the parties' decisions not to rely on any extrinsic material. The court was to 'give legal effect to the parties' words', which 'turns on an objective intention to be imputed to the parties, by reference to the contractual text construed in light of its context and purpose' (citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35]).

Justice Leeming identified three ways in which the 'lack of care and precision and apparent lack of understanding of legal concepts in the document informs the task of construction':

- Where there are numerous errors and the drafter's approach to grammar and syntax is casual, it would be wrong to place great weight on the precise form of the clauses. In other words, legal meaning should not turn on 'semantic exactitude' where the parties have recorded their agreement in loose and ungrammatical language (citing *Norton Property Group Pty Ltd v Ozzy States Pty Ltd (in liq) [2020] NSWCA 23* at [49]; *Down Town Visuals Pty Ltd v Panorama Investments Pty Ltd* [2018] VSC 427 at [94]).
- Where an operative clause in a contract is clear and unambiguous, it cannot be controlled, qualified or modified by the recitals (citing Lord Halsbury's speech in *Mackenzie v The Duke of Devonshire* [1896] AC 400 at 405-406). Importantly, his Honour did not indicate a willingness to stray from the authorities on this principle, despite some caselaw that does (see *Tom Elvin Pty Ltd v Knell* [2003] ACTSC 36 at [19]; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603; [2009] NSWCA 407 at [381]). His Honour was also disinclined to accept (though did not offer

a concluded view) S&C Nicola's submission that little weight should be given to the rule that where a recital and operative clause are in conflict, the latter prevails, despite the apparent unsophistication of the agreement, which may be cause to question whether the parties should be taken to know of the difference between a recital and operative provision. In any event, his Honour considered that neither Recital D or E is sufficient to diminish the effect of clause 6(c), given the direct inconsistency between them.

- Sometimes the imprecision and ignorance of a drafter may lead to a threshold question about what the literal or grammatical meaning of the words used actually is.

Justice Leeming also considered the textual context within which the interest payment is referred to. His Honour observed that clause 6(c) treats the repayment of capital and the payment of interest in a 'rolled up way', which suggests the interest entitlement is a partnership expense that needs to be taken into account before the profit is determined. Further, if the liability to pay interest was a personal liability of S&C Nicola, there would be no need for the entitlement to be paid before profits are distributed.

Justice Leeming also referred to Recital E, which 'unequivocally speaks of the interest being paid from the same source as the return of capital' – each of the capital, interest and profits are to be paid from the proceeds of sale. This finding supports the view that the interest is a partnership expense.

Justice White reached a different conclusion from Justices Macfarlan and White, due to a stricter reading of the text of the agreement and a finding that the operative provisions are ambiguous. In particular, his Honour:

- applied more weight to the wording of Recital D, which provides that S&C Nicola is to '*pay* 5% interest per annum on all monies spent on the project by [PHI] [emphasis added]'. His Honour considered this to be expressed as a personal obligation;
- contrary to Justice Leeming's view, considered that the source of the funds from which the interest is to be paid (as stipulated in Recital E) is not inconsistent with S&C Nicola having a personal obligation to pay it'
- considered that the operative provisions in clause 6(a)–(c) were ambiguous and their interpretation was therefore able to be controlled by the recitals; and
- contrary to the views of Justice Macfarlan and White, considered that the agreement treated the interest payment separately from the development costs, so the prima facie position that the interest would be borne equally by the partners (in accordance with s24 of the *Partnership Act 1892* (NSW)) did not apply.

NTC Contracting Pty Ltd v Morton [2022] WASCA 160 – whether the scope of an indemnity clause confined the scope of an insurance clause

In this case, the Supreme Court of Western Australia considered whether the scope of an indemnity clause in a building subcontract confined the scope of the insurance clause in that same contract.

The court held that the insurance clause in the subcontract was not confined by the separate indemnity clause in that contract. On that construction of the contract, NTC, as subcontractor, was obliged to procure public liability insurance for the principal (Bechtel) and the main contractor (ACTO) for any third party liability incurred.

This case highlights the importance of ensuring that different clauses in a contract operate together harmoniously

Facts

The case was an appeal from the District Court of Western Australia in relation to proceedings brought by Mr Morton, who had sued in negligence and for breach of statutory duty when he allegedly fell into a trench while working on a construction camp in the Pilbara.

Mr Morton's claims against Bechtel and ATCO were settled; however, third-party proceedings continued where Bechtel and ATCO argued that NTC was in breach of a term in the subcontract between NTC and ATCO, for failing to procure, for their benefit, an insurance policy covering Mr Morton's claim against them. The relevant clauses of the subcontract had the following effect:

Clause 15 – Indemnity clause: required NTC to indemnify ATCO and its respective employees and agents against any damage, liability and costs arising out of a direct negligent act or omission caused by NTC in carrying out the works.

Clause 17 – Insurance clause: required NTC to effect and maintain a public liability policy in the joint names of Bechtel, ATCO and NTC to cover the insured parties' rights and interests, as well as liabilities to third parties.

NTC argued that the obligation to insure was to be read in the context of, and was limited by, the indemnity clause. The judge at first instance found in favour of Bechtel and ATCO, and NTC appealed the decision.

Judgment

The court dismissed the appeal and NTC's argument that clause 17 should be read subject to the indemnity in clause 15.

The court held that, on its ordinary meaning, clause 17 did not convey a limitation as submitted by NTC. In addition, the 'architecture' of the subcontract did not support the argument that there was some link between the clauses – eg the clauses were not adjacent to each other, nor were the insurance and indemnity obligations combined into one provision.

The court also observed that it is not uncommon for a building contract to provide that one of the parties will take out an insurance policy indemnifying all of the parties involved in the work. In this case, the court found that clause 17 was 'of considerable elaboration and detail', which was consistent with the construction of that clause not being confined by the indemnity clause.

4 Repudiation and termination

In our *Contract Law Update* for 2021, we referred to the '*considerable uncertainty in practice*' that can arise in deciding whether a breach of contract gives the 'innocent' party a right to terminate. Such a breach is often called a 'repudiation of a contract'. Another form of repudiation can arise where, although there has not been a breach of contract, a party indicates that they are not going to comply with the contract or that they will only comply in a manner substantially inconsistent with their obligations. This form of repudiation is sometimes described as 'anticipatory breach'.

This form of repudiation can also generate uncertainty as to whether the proposed method of performance is 'substantially inconsistent' with the party's obligations. In particular, what happens if a party's proposed non-compliant performance of the contract is based on an incorrect interpretation of the contract? This was considered by the Queensland Court of Appeal in *Babstock Pty Ltd Anor v Laurel Star Pty Ltd Anor.*[24] That case ultimately turned on the proper interpretation of a particular provision in the contract. However, the court, in its judgment,

[24] [2022] QCA 63.

confirmed the applicable principles when considering whether an 'anticipatory breach' constitutes a repudiation of a contract. In particular:

(a) The court confirmed that the test for repudiation by anticipatory breach is an objective test. That is, in deciding whether a party has an intention no longer to be bound by the contract, or only to fulfil it in a manner substantially inconsistent with its obligations, that intention is determined objectively, rather than by reference to the actual, subjective intention of the party.[25]

(b) The court referred to some High Court judgments to the effect that '*The Court will not readily infer from a party's insistence on a wrong construction of a contract that [the party] is unwilling to perform it according to its true construction*'.'[26]

There will, however, be cases where the incorrect interpretation of a contract does lead to a repudiation. The circumstances in which maintaining an incorrect interpretation of a contract does, or does not, repudiate the contract is currently not clear and will need to be developed in future cases. On the current state of the law, a party that 'accepts' a repudiation, based on the other party's incorrect interpretation of the contract, therefore runs the risk of itself repudiating the contract.

Some of the High Court cases relied upon by the Queensland Court of Appeal in *Babstock* were also referred to by the NSW Court of Appeal in *Hong v Gui.*[27] In that case, a party was alleged to have repudiated an agreement by purporting to terminate when the other party had failed to supply a land tax certificate (as required by the contract). The court referred to:

- *DTR Nominees*[28]*,* that a party insisting on an incorrect interpretation of the contract does not necessarily evince an intention not to perform the contract according to its terms; and
- the warning of Justice Wilson in *Shevill*[29] that '*repudiation of a contract is a serious matter and is not to be lightly found or inferred*'.

The NSW Court of Appeal also confirmed that the test for determining whether a party evinces an intention not to comply with the contract is an objective, rather than a subjective, test. In either case, the court held that it was clear on the facts that the vendor did intend to comply with the contract and had not repudiated it.

The risks in terminating a contract by 'accepting' a repudiation were, once again, exemplified by a decision of the NSW Court of Appeal, in *Aslan v Stepanoski.*[30] That case concerned a dispute as to whether a builder, in submitting a payment claim, and in light of alleged deficiencies in previous building work, repudiated the contract. The trial judge held that the builder did repudiate the contract but the NSW Court of Appeal took a different view. There have been many cases in previous *Contract Law Updates* where appellate courts have taken a different view from trial judges of allegedly repudiatory conduct .

Although a contract is usually terminated by the deliberate act of one party, it is also possible for contracts to be terminated by 'abandonment'. The NSW Court of Appeal in *Woolworths v Gazcorp*[31], following its decision in *Tecnidcas Reunidas SA v Andrew*[32], confirmed that abandonment should be understood as an inferred agreement to terminate. It is therefore a

[25] At [18].
[26] At [34], citing Justice Mason in *Green v Sommerville* (1979) 141 CLR 594 at 611.
[27] 2022 NSWCA 245.
[28] (1978) 138 CLR 423 at 432.
[29] *Shevill v Builders Licensing Board* (1982) 149 CLR 620.
[30] [2022] NSWCA 24.
[31] [2022] NSWCA 19.
[32] [2018] NSWCA 192, cited at [93] and summarised in our 2018 *Contract Law Update*: contdispmar19.pdf (allens.com.au)

question of fact to be inferred from an objective assessment of the conduct of the parties.[33] In that case, the objective assessment led to a conclusion that the contract had been abandoned.

***Babstock Pty Ltd & Anor v Laurel Star Pty Ltd & Anor* [2022] QCA 63 – relevance of genuine (but mistaken) interpretation of contract in determining whether contract repudiated – adopting a commercial construction having regard to legislative context**

In this case, the Queensland Court of Appeal considered an appeal from a District Court decision that the appellant, Babstock Pty Ltd, had repudiated an essential term of a contract for the sale of part of a business through an anticipatory breach.

The court held that the behaviour of the parties ahead of the sale reflected a 'cooperative approach' that did not amount to repudiation of the contract by Babstock. The court also held that, alternatively, the construction of the relevant term adopted by Babstock was correct.

This case illustrates that, even where parties have conflicting views about contractual obligations, the broader context of the parties' dealings and legal obligations will inform whether anticipatory breach occurs

Facts

Babstock agreed to sell its property letting business, which managed 148 properties, to Laurel Star Pty Ltd. As part of the sale, Babstock agreed to sell its appointments as rental agent for properties under its management to Laurel Star in a contract dated 1 December 2017.

Clause 10.1.4 of the contract appeared to require that Babstock provide Laurel Star with assignments of appointments 'duly executed by the relevant transferred Property Owner' on the settlement date. This requirement was included in the contract even though the assignment could occur under the *Property Occupations Act 2014* (Qld) (the ***Act***) without the property owner's acknowledgment.

The first settlement date was 11 May 2018. Laurel Star sent Babstock a letter on 10 May 2018, purporting to terminate the contract for breach of contract, among other reasons.

Importantly, Babstock did not intend to provide Laurel Star with assignments that had been executed by property owners. In the months before settlement, Laurel Star had been sent drafts of the notices of assignment that Babstock sent to owners that did not request their execution.

Nevertheless, evidence showed that Babstock was in a position to provide Laurel Star with at least two appointments executed by owners. The contract did not specify the number of appointments to be assigned to Laurel Star.

The primary judge held that Laurel Star had validly terminated the contract for repudiation by Babstock. Babstock was found to have anticipatorily breached clause 10.1.4 when Laurel Star terminated the contract, because it had no intention to provide Laurel Star with assignments executed by property owners on the settlement date.

Judgment

Repudiation resulting from anticipatory breach

On appeal, Justice Fraser (writing for the court) reversed the primary judge's decision that Babstock was in anticipatory breach of clause 10.1.4 and had repudiated the contract. The appeal decision on anticipatory breach was independently supported on two grounds:

- Babstock's insistence upon an allegedly incorrect construction of clause 10.1.4 did not amount to anticipatory breach; and

[33] See [95].

- even if Babstock was obliged to provide assignments executed by owners, it was still able to do so in a way that would meet its obligations under clause 10.1.4.

By sending draft notices of assignment to Laurel Star, Babstock made clear that it did not intend to request that owners execute the documents. After Laurel Star received those draft notices, the parties continued to cooperate in preparing correspondence with owners and otherwise taking the steps necessary to effect settlement.

Babstock's behaviour did not amount to 'persisting in its interpretation willy nilly in the face of a clear enunciation of the true agreement' because Laurel Star never insisted upon the purported requirement that owners execute the assignments. This meant there was no anticipatory breach.

Furthermore, even if Babstock was obliged to provide assignments executed by owners, Laurel Star could not show that Babstock was 'wholly and finally disabled from performing its contractual obligations' on the settlement date.

Clause 10.1.4 did not specify the number of properties that needed to be transferred to Laurel Star by the first settlement date. At that date, Babstock was still able to provide two assignments executed in this manner. In the absence of a contractual requirement to transfer a particular number of properties, this was sufficient to satisfy its obligations under clause 10.1.4.

Construction of contractual terms

Justice Fraser separately held that the proper construction of clause 10.1.4 did not require execution of the notices of assignment by property owners. This was unnecessary under the Act. In context, the requirement for due execution by owners should be read as applying to the appointment of the rental agent, not the assignment of that appointment to Laurel Star.

This construction was bolstered by the uncommercial effect of requiring execution of the notices of assignment by property owners. Requiring owners' execution of the assignments generated no commercial benefit for either Babstock or Laurel Star. Instead, the legally unnecessary requirement risked reducing the number of appointments that could be assigned to Laurel Star at settlement.

Together, the legal incoherence and uncommercial effect of the most literal construction of clause 10.1.4 justified its rejection in favour of a construction that did not require owners' execution of assignments.

***Aslan v Stepanoski* [2022] NSWCA 24 – whether builder's demand for progress payment and consequent suspension of work was repudiatory**

In this case, the NSW Court of Appeal considered an appeal by a builder from a finding that he had engaged in repudiatory conduct by refusing to continue to perform work under a lump sum contract due to non-payment of a progress claim, in circumstances where the builder had already been paid significantly more than the value of the work that had been completed.

The court unanimously allowed the appeal, finding that the respondents had failed to discharge their burden of proving that the builder had engaged in repudiatory conduct. The court identified error in the trial judge's analysis of the conduct, which it found was not determinative. It also rejected a restitutionary claim for mistaken overpayment on the same basis.

The decision demonstrates that a claim of repudiatory conduct involving issues of non-payment and suspension of works must be based on evidence that demonstrates conduct inconsistent with the specific terms of the contract, rather than general evidence that compares the value of work completed with amounts paid

Facts

The appellant (the ***builder***) and the respondents (the ***owners***) executed a lump sum contract for the construction of two residences on the owner's land in October 2014. The contract price was $1,080,000 and there was provision for this price to be paid through a series of progress claims upon the builder's completion of certain stages of the construction work.

The builder commenced works in November 2014 and continued through to September 2015, during which time he submitted progress claims and the owners paid a total of $1,067,094.28. In mid-September 2015, a number of events transpired over the course of a few days:

- The owners made numerous complaints to the babout his management of the progress of works, poor execution of works, failure to follow approved plans and unauthorised modifications to the development consents.
- The builder submitted his fourth progress claim for $214,000.
- Two days later, the owners proceeded to change the locks at the site, which prevented the builder from accessing it.
- Five days after the builder's access was removed, he emailed a 'Notice of Ceasing Building Works' to the owners, on the grounds that he no longer had access to the site and the fourth progress claim remained unpaid.

No work was done by the builder after he issued the notice. In May 2016, the owners purported to terminate the contract, on the basis that the builder's refusal to continue the works amounted to a repudiation of the contract, which the owners accepted. The owners then commenced proceedings against the builder, claiming damages for losses arising from the repudiation.

At trial, expert evidence established that the value of the work completed by the builder was $564,426.48. The trial judge found that the builder's conduct in stopping work, and failing to resume work, evinced an intention not to perform the contract in circumstances where the builder had been paid 98.8% of the contract price ($1,067,094.28) but had only completed work to the value of 52.56% of the price. It followed that the builder had no contractual entitlement to the outstanding amounts he claimed under the fourth progress claim, such that his refusal to continue work (absent payment) amounted to repudiation.

Judgment

The court considered the central issue to be whether the trial judge had adopted an appropriate analysis in reaching the finding that the builder had repudiated the contract and, similarly, whether the owners had discharged their onus of proving the builder's repudiation.

The court held that the trial judge's comparison of an expert valuation of the value of the work performed with the amount of money paid to the builder for that work, was an inappropriate way to determine whether he had a contractual entitlement to the fourth progress claim. This was because:

- the builder's contractual entitlement did not necessarily accord with the value of the work he agreed to perform; and
- nor did it necessarily accord with the value of the work he had in fact performed.

For those reasons, the trial judge's analysis failed to account for the possibility that the owners had agreed under the contract to pay more for the work than the actual value of the work, conceivably on the basis that:

- the contract was simply a bad bargain from the owners' point of view; or
- the value of the various progress claims stipulated under the contract were not directly equivalent to the value of the work performed at each stage: ie the parties may have decided to 'front-end' the payments to make earlier progress claims disproportionately high.

In order to determine whether the builder was entitled to the fourth progress claim, the court said that it would have been necessary to consider whether the provisions of the contract that governed the payment of progress claims had been complied with – in particular, whether the builder had in fact completed the stage of works specified under the contract as entitling him to make the fourth progress claim. On the basis that no attempt was made (beyond a bare comparison of amounts paid to the builder and value of work performed) to demonstrate that the builder was not contractually entitled to the fourth progress claim, the court held that the owners had failed to establish that the builder's conduct, in asserting an entitlement to payment, was repudiatory.

The owners had also succeeded at trial on a restitutionary claim, for mistaken overpayment under the contract, that was based on the same comparative analysis between value of work performed and amounts paid. The court allowed the builder's appeal of this finding for the same reasons; particularly, a restitutionary claim to remedy a mistaken overpayment could not succeed without an examination of the progress payments by direct reference to the contractual provisions that provided for those progress payments. The owners were required to establish that the payments were in disconformity with the provisions of the contract and failed to do so.

For these reasons, the court allowed the builder's appeal, set aside the orders of the trial judge and entered judgment for the builder on the owners' claims against him.

Hong v Gui [2022] NSWCA 245 – is the subjective intention of a party, to comply with the contract, relevant to whether it has repudiated the contract?

In this case, the New South Wales Court of Appeal considered whether the wrongful service of a termination notice by a vendor was a repudiation of the contract for the sale of land.

The court held that, as the contract provided for such a course in the event of breach by the purchaser, the notice was not unequivocal as to an intention to repudiate. The court further held that, in all the circumstances, it was clear that the vendor was seeking to perform the contract despite not in fact being entitled to serve the notice on the purchaser. The purchaser's appeal was dismissed.

The case is significant because it reaffirms the law relating to repudiation of a contract for the sale of land. Whether a party has repudiated the contract must be determined in all the circumstances and while having regard to the totality of a party's conduct.

Facts

The parties entered into a contract for the sale of two strata properties on 26 September 2019. The date for completion was extended on several occasions, following requests by the purchaser. Before the settlement date, the vendor's solicitors wrote to the purchaser's solicitors to arrange settlement. There was no response to these communications. The purchaser missed the date for settlement. A second date for settlement was set by the vendor. The purchaser again did not complete. Having still received no response from the purchaser's solicitors, the vendor served a notice to complete. A third settlement date was fixed. When the purchaser did not complete, the vendor's solicitors served a notice to terminate.

The purchaser responded with her own notice to terminate, claiming that, as no land tax certificate had been provided, the notice to complete was invalid and that therefore the service of the notice to terminate by the vendor was a repudiation of the contract.

Judgment

The court held that:

- it is necessary to look at a party's conduct as a whole to determine whether they have repudiated the contract. As such, the vendor's notice to terminate could not be viewed in isolation from the surrounding circumstances known to the recipient of the notice;

- while the vendor made a factual error in not supplying the land tax certificate, in circumstances where the purchaser took no steps to identify the omission, and the vendor repeatedly sought to complete, the vendor's notice was not a repudiation; and
- there was nothing in the vendor's conduct that suggested to the purchaser the vendor sought to walk away from the contract; rather, it was clear the vendor was relying on it.

***Woolworths v Gazcorp* [2022] NSWCA 19 – whether contract terms were varied by correspondence between the parties – whether a contract was terminated for frustration or abandoned**

In this case, the NSW Court of Appeal considered (a) when a contract may be varied by communications between the parties and (b) when a contract may be treated as abandoned.

The court held that the correspondence between the parties had varied the meaning of 'Landlord's Works' under their contract. Accordingly, upon the refusal of a development application for those varied 'Landlord's Works', the contract had become frustrated. In the alternative, the court held that the contract had been abandoned, as neither party had performed nor sought performance of the contract for a substantial period of time, notwithstanding their continued dealings.

The decision is an important reminder that parties should be cautious regarding the legal effect of correspondence. Even where correspondence refers to the preparation of formal documentation to reflect an agreement, the court may treat the correspondence itself as having an immediate legal effect. Additionally, parties should be aware that continued dealings between them will not necessarily foreclose the possibility of their initial agreement being taken to be abandoned.

Facts

On 20 February 2008, Woolworths Group Limited and Gazcorp Pty Ltd entered into an agreement for lease (the ***AFL***). Under the AFL, Gazcorp would build on a site in Green Square, which would include a supermarket to be leased by Woolworths. At the time the AFL was formed, a development consent for the works had been obtained.

In late 2007 and 2008, Woolworths and Gazcorp discussed the prospect of including a Big W store at the Green Square site. A fresh development application was lodged on 2 July 2008, to reflect the inclusion of the Big W store. As a result of the discussions, the construction program was delayed. On 23 July 2008, Gazcorp sent a letter to Woolworths, requesting an extension to the date for practical completion under the AFL. On 11 September 2008, Woolworths replied to Gazcorp, agreeing to the extension, subject to Gazcorp agreeing to further variations. One of these variations was to include the revised building plans in the definition of 'Landlord's Works' under the AFL. In response, Gazcorp sought an extension to the date by which all approvals relating to the development were to be obtained. Woolworths replied the following day with a letter in identical terms to the 11 September letter, except with the approval date amended as requested by Gazcorp.

In the interim period, the development application for the revised building plans was rejected (with Gazcorp's subsequent appeal to the Land and Environment Court also being dismissed). The parties subsequently discussed alternative plans, culminating in a development application, lodged on 6 July 2012, for a development significantly different from that contemplated by the initial AFL. The development application was approved on 30 November 2012, and the parties continued to discuss proposals for the Green Square site. However, from April 2012 to 3 February 2016, no reference was made to the AFL in the correspondence between the parties.

In early 2016, the parties discussed entering into a new AFL. During these discussions, a dispute arose as to whether the initial AFL remained on foot. Gazcorp asserted that the AFL had been abandoned, while Woolworths maintained that the initial AFL remained in force. Further negotiations to revive the

project proved unsuccessful and, on 15 October 2018, Gazcorp initiated proceedings in the NSW Supreme Court, seeking a declaration that the AFL had been terminated or was otherwise no longer on foot. The primary judge made that declaration, holding:

1. that the AFL had been varied by the 12 September letter, and was subsequently discharged by frustration following the refusal of the 2008 development application: and
2. in the alternative, the AFL was terminated by mutual abandonment no later than the beginning of 2014.

On appeal, Woolworths sought to challenge both of those findings.

Judgment

The court unanimously dismissed Woolworths' appeal. On the first ground, President Bell (with Chief Justice Bathurst and Justice Meagher agreeing) held that questions of contractual variation need not be resolved by a stringent application of the concepts of offer and acceptance. Except for one alteration, the 12 September letter was identical to the 11 September letter. Accordingly, President Bell was of the view that the 11 September letter could be treated as the counteroffer, which Gazcorp sought to modify in only one respect. His Honour noted that a representative of Woolworths communicated that this modification was accepted, with a formal letter reflecting that acceptance to follow. This communication undermined Woolworths' claim that acceptance was to be effected through the preparation of formal documentation, rather than the 12 September letter. Additionally, President Bell noted that, in the course of its pleadings, Woolworths had accepted that the 12 September letter had varied the approval dates of the AFL. Given Woolworths had accepted that the 12 September letter was capable of varying some terms of the AFL, it could not assert that formal documentation was condition precedent to the 12 September letter having a legally binding effect. Accepting Woolworths' argument would require attributing conflicting practical effects to the proposed drafting of formal documentation (ie that its execution was necessary to give effect to the variation of some terms of the AFL but not others). In its submissions, Woolworths had accepted that if the contract had been found to be varied by the contract **?**, it was frustrated by the aforementioned refusal of the development application.

On the alternative possibility of abandonment, President Bell began by observing that abandonment will be found where it is plain from the parties' conduct that neither intends for the contract to be further performed. His Honour noted that abandonment is a matter of fact to be inferred from an objective assessment of the conduct of the parties. The relevant question is whether the conduct of the parties, viewed objectively, manifests an intention to discharge the contract. In the case before the court, President Bell held that the following factors evinced an intention by the parties to abandon the contract:

- despite Gazcorp's failure to carry out the Landlord's Works as required under the AFL, Woolworths made no attempt to enforce the AFL or perform its obligations thereunder;
- years passed without the parties making any reference to the AFL; and
- the parties pursued a development consent that was inconsistent with the terms of the AFL.

Therefore, the contract was held to have been abandoned and, with both its grounds failing, the appeal was dismissed.

5 Damages

A party in breach of contract is obliged to pay damages so as to put the 'innocent' party in the same position as if the contract had been performed. This test is simple to state but can be complex to apply where it is not factually possible to put a party in exactly the same

position. In *Renown Corporation Pty Ltd v SEMF Pty Ltd*[34], SEMF had to replace a defective software package that it purchased from the appellant. The issues considered by the court included:

- the date at which damages should be assessed;
- whether an allowance should be made for 'betterment', in so far as the replacement software package was superior to the promised software package; and
- whether the cost of employees' time could be recovered.

The first issue arose because the courts have often stated that there is a 'usual principle' that damages are assessed as at the date of breach. In this case, SEMF sought to recover its actual costs of purchasing replacement software (some time after the breach), and put on no evidence as to the loss at the date of breach.

As noted in our 2019 *Contract Law Update*,[35] the rule that damages should be assessed as at the date of breach has so many exceptions that it is doubtful whether it should be called a rule at all. In the present case, the court drew an analogy with construction contracts, where it is well accepted that the quantum of damages can be measured by the actual (or anticipated) rectification costs, rather than eg the difference, at the date of breach, between the value of the work actually performed and the work that should have been performed. Applying that analogy, the court upheld the right of SEMF to recover costs of purchasing a replacement software system as the most reliable means for rectifying the defects.

The second issue considered by the court was whether an allowance should be made for 'betterment' in so far as the replacement software system was superior to that contractually promised.

The court applied earlier decisions, to note that an allowance for betterment should be made where:

- a plaintiff chooses to acquire a 'better' product to replace that contractually promised; or
- if there is no alternative but to acquire a better replacement, an allowance should still be made if the benefit is not too remote and is able to be quantified.

On the facts, neither applied in this case.

The third issue considered by the court – and, again, one that commonly arises – was whether the plaintiff could recover the costs of employees' time that resulted from the breach of contract. Although generally the costs of employees' time is not recoverable, the court upheld an allowance for the costs of a casual employee whose work solely related to the problems caused by the breach of contract.

Another common issue considered by the NSW Court of Appeal during 2022 was the circumstances in which a plaintiff can recover mitigation costs. In *Edwin Davey Pty Ltd v Boulos Holdings Pty Ltd*[36], the court followed a recent decision of the High Court[37] to the effect that:

- mitigation costs can be recovered in accordance with the usual principles of causation; and
- the defendant bears the onus of proving that steps taken to reduce a loss were incurred unreasonably (and therefore not caused by the defendant's breach).

[34] [2022] NSWCA 233.
[35] Contract law update 2019: Damages (allens.com.au).
[36] [2022] NSWCA 65.
[37] *Arsalan v Rixon* [2021] HCA 40.

In this case, the court held, applying the test in *March v Stramare*[38], that the mitigation costs (paying out the vendor's mortgagee) were *'as a matter of ordinary common sense and experience'* caused by the (cross-)defendant's breach. As they were also incurred reasonably, they were recoverable as mitigation costs.

If a party to a contract fails to pay a fixed sum of money, does the intended recipient have an action in debt, for breach of contract, or both? This issue was considered by the Victorian Court of Appeal in *Tran v Hoang*[39], which involved the added complications of the payment being a gift in a deed (although the court confirmed that the same principles of interpretation apply to contracts and deeds). Somewhat encouragingly, the court stated that, due to the ability to bring a contractual claim: *the question whether the promise to pay the money amounted to a debt is largely of academic interest only*.[40] Nevertheless, the safer course will often be to plead both causes of action.

***Edwin Davey Pty Ltd v Boulos Holdings Pty Ltd* [2022] NSWCA 65 – availability of mitigation damages – relationship between causation and mitigation of loss**

In this case, the NSW Court of Appeal considered whether the appellant could recover damages for the cost of action taken to mitigate loss. The court held that it was reasonable for a purchaser of property to mitigate its potential losses by incurring a fixed contingent liability to the outgoing mortgagee, in exchange for the discharge of a mortgage over the property. It also held that it was reasonable to incur that contingent liability to mitigate potentially greater losses.

This case demonstrates that mitigation cannot be analysed separately from causation in breach of contract cases, and that the reasonableness of action taken in mitigation will depend on a close analysis of the potential outcomes of a breach, assessed at the time of breach

Facts

The plaintiff, Boulos Holdings Pty Ltd, sold a property in Pyrmont to Edwin Davey Pty Ltd for $10.8 million. The contract of sale provided for Edwin Davey to pay a deposit of $2.8 million to Boulos by 31 December 2010. On 6 January 2011, the completion date was extended to 23 August 2012. On 7 January 2011, Edwin Davey paid an additional $1 million of the purchase price. Boulos failed to complete by the fixed date and had not obtained a discharge of mortgage from Perpetual. Receivers were appointed to Boulos in June 2012, triggering an event of default on the mortgage. In August 2012, Boulos failed to repay the Perpetual loan, triggering a further event of default.

On 18 September 2012, Edwin Davey entered a payment deed to pay $500,000 to Perpetual to discharge the mortgage over the purchase property, if there were a shortfall on the sale of the two properties. The sale completed on 18 September 2012. After the sale, and the sale of the second secured property, it eventuated that there was a total shortfall of $1,536,630.79 on Boulos's debt to Perpetual.

Boulos brought proceedings against Edwin Davey in the NSW Supreme Court under a special condition of the contract and was awarded $954,864.11, which was not appealed. Edwin Davey cross-claimed for damages for breach of contract and, in the alternative, unjust enrichment based on the payment of $500,000 to discharge the Perpetual mortgage. The NSW Supreme Court dismissed Edwin Davey's cross-claim, holding that its steps to mitigate were not reasonable, as it had not exhausted other avenues to recover debts under the loan facility. The primary judge also found that Edwin Davey's voluntary payment to Perpetual to discharge the mortgage did not naturally flow from Boulos's failure to complete. The Court of Appeal overturned the primary judgment and awarded Edwin Davey $500,000.

[38] (1991) 171 CLR 506 at 522; [1991] HCA 12 at [406].
[39] [2022] VSCA 194.
[40] At [74].

Judgment

The two contested issues for the court to determine were whether:

- damages were limited to compensation for Boulos's delay in completion; and
- in the alternative that Boulos's breach was a persisting failure and inability to convey clear title of the property, Edwin Davey's payment of the contingent liability to Perpetual was reasonable in mitigation.

Causation and mitigation

Justice Gleeson delivered the court's judgment. His Honour found at [53] that a 'loss occasioned by a breach which is attributable to a failure to mitigate can be regarded as an aspect of causation'. The court overturned the primary judge's finding that a voluntary payment broke the chain of causation between Boulos's breach and Edwin Davey's loss. Justice Gleeson noted that, because it is in the nature of mitigating action that costs are incurred voluntarily, voluntary payment could not break the chain of causation.

Edwin Davey adduced evidence that if it had not incurred the contingent liability of $500,000 to Perpetual, the greater loss it would have suffered was the loss of the property and the $3.8 million deposit it had paid to Boulos.

On appeal, Boulos argued that this loss was uncertain at the time Edwin Davey took steps in mitigation and that it should have taken a 'wait and see' approach before making arrangements with Perpetual to discharge the mortgage. Justice Gleeson rejected this argument for four reasons:

- Boulos had failed to obtain Perpetual's consent to the contract of sale and failed to pass on Edwin Davey's $3.8 million deposit to Perpetual as required by its mortgage**;**
- Boulos was in receivership from August 2012 and could not pay Perpetual more than the balance of the purchase price under the contract, which fell significantly below the total sum secured by the property**;**
- Perpetual informed Edwin Davey it would not discharge the mortgage without an undertaking that it would pay up to $500,000 for the shortfall; and
- without the payment of $500,000, Perpetual would not have allowed the settlement to go ahead.

Justice Gleeson found that Boulos's failure to complete the contract gave rise to the prospect that Edwin Davey would lose both the property and the total of $3.8 million paid as a deposit, which his Honour found to constitute a clear causative link. Because of the alternative loss to Edwin Davey that would have eventuated but for its payment in in mitigation of $500,000, the chain of causation between Boulos's delay and Edwin Davey's loss was not broken.

Availability of mitigation loss – reasonableness of action in mitigation

Relying on the recent decision of the High Court in *Arsalan v Rixon* (2021) 395 ALR 390, Justice Gleeson considered that the applicable principles of mitigation of loss in Australia are:

- where a plaintiff acts to attempt to reduce a loss, the onus of proof shifts to the defendant to show that steps in mitigation were unreasonable; and
- unless shown to be unreasonable, costs incurred in mitigation caused by the defendant's wrongdoing are recoverable as a head of damage.

Justice Gleeson found at [89] that the reasonableness of Edwin Davey's actions was 'to be assessed in the light of the circumstances at the time the mitigating action was taken'. Boulos argued that it was unreasonable for Edwin Davey not to take title of the property subject to the Perpetual mortgage. However, Justice Gleeson identified that this course of action could have resulted in a greater liability for Edwin Davey than the $500,000 it paid and that this was in the contemplation of the parties at the time action in mitigation was taken.

His Honour further considered that two factors in Edwin Davey's payment deed to Perpetual indicated reasonableness:

- the liability was contingent, in that Edwin Davey would not need to pay anything to Perpetual if Perpetual successfully recovered Boulos's debt from the sale of the two properties; and
- the liability was capped at $500,000, substantially below Edwin Davey's potential total liability.

Justice Gleeson found that Boulos failed to discharge its onus to show that the payment deed was not a reasonable step in mitigation, and that Edwin Davey's loss was not so remote that it could not be recovered.

As a result, the court awarded Edwin Davey $500,000 and pre-judgment interest.

***Renown Corporation Pty Ltd v SEMF Pty Ltd* [2022] NSWCA 233 – damages for contract for supply and installation of a software system – whether damages are assessed at the date of trial or date of breach – whether there was betterment arising from the replacement of the software system – whether damages includes the calculation of a staff engaged substantially to resolve the issues arising from the software system**

In this case, the NSW Court of Appeal considered:

1. whether damages should be assessed at the date of breach or at the date of trial, with regard to the breach of a contract for the supply and installation of a software system;
2. whether replacement of the software system was the 'efficient and cost-effective' way to remedy the injured party, and damages should be awarded for the cost;
3. when betterment should be considered in the assessment of damages; and
4. whether employee costs form a component of damages.

The court held that the time for which damages is payable is dependent on the facts of the case. In this case, it awarded damages that were actually incurred by the respondent at the date of the trial. The appellant had been granted an extended period of time by the respondent to rectify the issue and concluded that it could not rectify the issue. The court found that the most practical, cost-effective and efficient solution was for the appellant to replace the relevant software. It did not take into account betterment, as the respondent did not seek a more valuable asset than the one being replaced and would have received the same newer system if the appellant fulfilled the original contract. In addition, the appellant was required to pay the cost of the staff member engaged to fix the defective software system, as the employee was hired on a casual basis solely to fix the issue.

The decision is important in taking the same approach in awarding damages for defective software as taken when awarding damages for defective building work, which is to allow damages to be determined as at the date of the trial (often after rectification work has been performed), rather than the date of the breach. Additionally, this case reinforces that damages may be recovered if employees are specifically engaged to respond to a contractual breach.

Facts

SEMF Pty Ltd (***SEMF***) (an engineering and project management consultancy) contracted with Renown Corporation Pty Ltd (***Renown***) to supply and install a software package (the ***Renown system***). Once installed, the Renown system was defective, as it did not provide the functionality promised.

SEMF sued for damages, claiming:

- costs of replacing the Renown System;
- costs incurred in endeavouring to remediate the effects; and
- costs for time wasted by employees in dealing with the effects.

At first instance, Justice Ball awarded damages to SEMF in the sum of $662,344, which comprised :

1. $631,894 for the cost of installing the new system (minus the $52,218 for maintenance payable to Microsoft);

2. $84,744 paid to SEMF for a staff member engaged on working on the problems with the Renown system;
3. $49,239 for additional licences and services that are no longer in dispute
4. less $51,315 in favour of Renown for unpaid invoices.

On appeal, the appellant, Renown, argued that its first ground of appeal with regard to point 1 above was that:

- damages should be assessed at the date of the breach;
- there was no evidence adducing the cost of rectifying the system at the date of the breach; and
- SEMF had failed to prove that it had suffered loss so as to be entitled to recover any damages;
- alternatively, a substantial discount should be provided for the betterment of the current system.

On its second ground of appeal, the appellant argued in response to point 2 above, the relevant staff member was not specifically engaged to work on solutions for the Renown system's defect.

Judgment

The court unanimously dismissed the appeal, with Justice Brereton delivering the reasons for the judgment.

On the first ground of appeal, the court provided that the relevant principle to calculate damages is the 'reasonable cost of rectification'. The relevant calculation according to the court is:

- if costs have been incurred by the date of the trial, then the reasonable cost of rectification is when costs were actually incurred, so long as they are not unreasonable; or
- if costs have not been incurred, then the reasonable cost of rectification is what is proved at trial, unless it is established that by not conducting rectification works earlier, the plaintiff (or, in this case, the respondent) failed to mitigate its loss.

Justice Brereton asserted that SEMF did not unreasonably fail to mitigate its damages. In fact, it was Renown that ultimately concluded it could not fix the problems, despite being granted an extended period of time by SEMF to fix the Renown System's issues.

Since there was no unreasonable delay on the part of SEMF to rectify the issues associated with the Renown system, his Honour asserted that the reasonable cost of rectification was at the time of the trial. In addition, his Honour agreed with Justice Ball and stated that the only practical solution to rectify the issue was to replace the Renown system. Evidence was provided by experts that it would be more efficient to replace the existing system.

In the alternative submission to its first ground of appeal, his Honour agreed with Justice Ball that no betterment occurred. The Court of Appeal held that the primary judge correctly applied the principle from *Tyco Australia Pty Ltd v Optus Networks Pty Ltd & Ors* [2004] NSWCA 333, which identifies that there are two circumstances where an allowance for betterment would be made:

1. when a plaintiff chooses to acquire a more valuable asset than the one being replaced; or
2. where there is no alternative available to the plaintiff other than to acquire a more valuable asset, there is a benefit to the plaintiff that is not remote in time or speculative, and can be quantified.

However, in this case, his Honour provided that the above categories did not apply. SEMF did not choose a more valuable asset, and, subject to the payment of maintenance fees prescribed under the original contract, SEMF would have been entitled to the new system upgrade

On the second ground of appeal, the court found that, although the employee was initially hired for other projects, he was subsequently engaged on a casual basis to resolve the Renown system's issues. During the time of his casual employment, the employee solely focused on rectifying the Renown system's issues. In addition, his Honour stated that, as a casual employee, he did not fall in the same category as

others who may have merely diverted their work and were not specifically engaged to work on solutions relating to the Renown system.

***Tran v Hoang* [2022] VSCA 194 – whether claim to recover money can be brought in debt, for breach of contract or both**

In this case, the Victorian Court of Appeal considered a deed that contained a term stating that a father 'shall expressly and irrevocably gift' $300,000 to his son. The father did not make any payment to his son under the deed and subsequently died. The son brought an action for recovery of the money. The question for the court was whether the deed created an actionable debt, a promise to make a gift at a future time, or a promise to pay money that was immediately binding and therefore recoverable under a claim for breach of contract.

The court unanimously held that the deed imposed an immediately binding obligation on the father to pay his son the specified $300,0000, subject only to the allowance within the deed for the payment to be made by 28 July 2017. Therefore, the sum was recovered as damages for breach of contract.

This case is important commentary on the fact that claims to recover certain sums of money that would have historically been brought as an action in debt are also recoverable as claims for breach of contract.

Facts

This case deals with a son's claim for recovery of $300,000 against the executor of his late father's estate. Kheim Tran (the ***father***) had three sons: Tony, Anthony and John. The father had been ill with leukaemia from 2007, and was in and out of hospital from 2016. Tony provided emotional and financial support to his younger brothers. Tony and Anthony appeared to be on good terms, though both were under the impression that they were 'owed' by the father.

In January 2017, Tony and his father had a significant falling-out, purportedly in relation to what Tony understood to be his interest in a house owned by the father, which Anthony was living in (the ***property***). Separately, the father failed in a proceeding in the Victorian Civil and Administrative Tribunal to have Anthony vacate the property. Anthony had also demanded payment from the father to have him vacate the property. Tony and his father made peace after their disagreement, resulting in the father offering to give him $300,000.

On 6 June 2017, the father entered into a tripartite deed with Tony and Anthony. The deed imposed the following obligations:

- the father was to pay his son Tony $300,000;
- Anthony was to vacate the property once Tony received the $300,000; and
- Tony was to repay the $300,000 to the father if Anthony did not vacate the property.

Anthony vacated the house, but the father died about a year after making the deed, without paying Tony the $300,000. Tony brought an action against the father's executor for recovery of the money, which failed at first instance, and he was ordered to pay costs 'on a trustee basis'.

Deed

> *1. Transfer of Monies*
>
> *(a) The [father] shall expressly and irrevocably gift [Tony] ... an amount of $300,000 (Payment) by ~~Wednesday, 26~~ [Friday 28] July 2017.*
>
> *(b) Tony must immediately provide a written receipt to the [father] and [Anthony] once the Payment has been received and cleared in his bank account.*

(c) [Anthony], upon notification of receipt of Payment from Tony must do all acts and things necessary to vacate the [Property] by ~~Monday, 31~~ [Friday 28] July 2017.

(d) The [father] agrees [Anthony] may reside at the [Property] indefinitely if the Payment is not received by Tony by Wednesday, 26 July 2017.

(e) Tony must return the Payment to the [father] should [Anthony] not vacate the [Property] by Monday, 31 July 2017.

(f) The [father] and [Anthony] agree the Payment is an irrevocable gift to Tony for use at his discretion.

(g) The [father] and [Anthony] agree to [sic] that Tony shall not be liable for any costs or damages arising from non-performance of obligations by the [father] or [Anthony] under this Deed.

Judgment

The court unanimously upheld Tony's appeal, finding that the deed created a promise to pay money that was immediately binding on the father, making the $300,000 recoverable as damages for breach of contract. The court awarded $300,000 with interest and costs.

Before addressing the case on appeal, it is useful to understand the trial judge's reasons for rejecting Tony's application to recover the $300,000 at first instance. The trial judge characterised the purpose of the deed as resolving two issues: first, the father's dispute with Tony, by providing a gift for him; and, second, addressing Anthony's occupation of the property.

The trial judge held:

- there was no implied term that Tony should use reasonable endeavours to cause Anthony to vacate the property as consideration for the father's payment of $300,000. Her Honour considered the characterisation of clause 1(a) of the deed as a covenant for the father to gift Tony $300,000 to be more in line with the contextual purpose of the deed;
- that because the father didn't immediately attempt to gift the $300,000 to Tony, his promise to gift was not immediately dispositive but, rather, a promise of future action. Therefore, the gift could not be specifically enforced at equity unless supported by consideration. Rejecting Tony's argument that he had provided consideration through Anthony's vacating of the property, the judge held that '[Tony] is considered a volunteer at equity';
- that Tony's 'common law rights' remained, as the deed did not contain any clear words excluding those rights to pursue damages for breach of contract. However, as Tony had made no submissions as to how damages should be assessed, the judge declined to award any damages;
- that Tony did not detrimentally rely on an assumption that the gift would be binding, and was therefore unable to access promissory estoppel;
- the trial judge accepted that Tony had not taken unconscientious advantage of his father's ill health in procuring the deed; and
- took the view that the text of the deed precluded any finding that Tony was to hold any money paid by his father on trust for Anthony.

Appeal

Tony's substantive grounds of appeal can be summarised as:

- first, that the trial judge erred by implicitly treating the deed as effecting an incomplete gift at common law and that Tony required the intervention of equity; and
- second, that the trial judge failed to analyse and determine the claim as a common law claim for a debt.

Tony submitted that his father's promise to pay $300,000 with the deed created an enforceable debt for $300,000; or alternatively a binding contractual promise to pay that amount, the breach of which would result in damages for the sum of $300,000. The respondent accepted that Tony did not require the equitable remedy of specific performance of the contract, but denied that the deed created a debt or contained a promise to pay money. Instead, the respondent argued, the deed contained a covenant to make a gift of money at a future date, breach of which could be remedied by damages at common law; however, no damages were sought, proven or assessed.

Clause 1(a) – immediate and binding obligation, or promise to make a future gift?

The court rejected the trial judge's construction of clause 1(a) as a statement of intention or promise to make a future gift of $300,000, finding it at odds with the text, context, purpose and object of the deed. The court held that, viewed objectively, the text of the deed created an immediate and binding obligation on the father to give Tony $300,000 by 28 July 2017. The court found this interpretation was consistent with the contextual facts known to the parties, and the objects and purposes of the deed. Noting the deed's tripartite nature, the court found that although payment of the $300,000 was not consideration for Anthony to leave the house, it was intended to operate as an incentive or motivation to do so, as one of the purposes of the deed was procuring that departure.

The respondent conceded that if the proper construction of clause 1(a) was as a simple promise to pay Tony $300,000, the sum would be recoverable by an action for debt. The court's finding on the construction of clause 1(a), together with the trial judge's finding that Tony's common law rights remained, effectively resolved the appeal in favour of the applicant, as there was no impediment to giving judgment in favour of Tony for the $300,000.

Debt?

The court left open the question of whether a promise to pay money (by deed) without executed consideration creates a 'debt' or only a simple contract to pay a fixed sum of money. The court noted that, in this case, the outcome was the same if the covenant for the father to pay Tony $300,000 was construed as creating a debt enforceable independently of breach of contract, or as creating only an executory promise enforceable by an award of damages for breach of contract.

Citing *Young v Queensland Trustees Ltd* (1956) 99 CLR 560, the court acknowledged that indebtedness in a sum for an executed consideration was never conceived as breach of contract but, rather, as an action for debt. Nonetheless, the court noted that the development of the law appeared to have moved from the recovery of stipulated amounts by action of debt (whether simple or contained in a covenant) through to action for damages for breach of simple contract (neither debt or covenant) to pay a sum certain. In this case, the court elected to assume, for the sake of argument, that the deed did not create a debt but instead formed a contractual promise to pay Tony $300,000 by 28 July 2017.

Damages for breach of contract?

Tony had an available claim for damages for breach of contract, because the court construed clause 1(a) as creating an immediately binding promise on the father to pay him $300,000 by 28 July 2017. The father's failure to pay the sum on or before that date was in breach of that promise, and as Anthony vacated the property, no countervailing obligation arose on Tony to return the $300,000. Tony was entitled to damages for the father's breach of contract by not performing the promise.

The court held that the trial judge erred in finding that Tony's lack of pleadings or submissions in regard to damages for breach were an obstacle to awarding damages. Instead, having found that Tony's common law rights were engaged, the judge implicitly accepted there had been a breach of a simple contract, raising the question of nominal damages. Once a consideration of nominal damages had arisen, the court found it incumbent on the judge to consider whether, on the evidence, there was a loss for which assessable damages should have been awarded. For the purpose of assessing damages, in this case, where there was a simple promise to pay a fixed sum by a due date, the court held there could not have

been any additional facts necessary to establish the loss. Proof of loss required nothing more than proof that a promise had been made to pay a fixed, ascertainable sum of money by a stipulated date, the date had passed, and the payment had not been made. Therefore, the damages required to place Tony in the position he would have been in had the promise been performed was $300,000.

Costs

The court found there was no occasion to award costs against Tony on a trustee basis, because his claim was against the estate for a personal liability incurred by the father while alive.

6 Illegality

Can a person bring a restitutionary claim to recover money paid under an illegal contract? To quote the High Court: *'There is no one-size-fits-all answer to the question of recoverability',* but the '*central policy consideration at stake … is the coherence of the law*'.[41] This passage was cited by the NSW Court of Appeal in *Li v Liu*[42]*,* in which the court identified the relevant factors to include:

- the policy behind any legislation making the contract unlawful and, in particular, whether it was designed to protect a class of persons;
- whether it would be unjust for the recipient to retain their benefit; and
- whether the statutory scheme would be 'stultified' if restitution were allowed.

There is sufficient flexibility in these factors to enable courts to achieve the outcome they consider most just. In this case, prohibitions in the *Migration Act 1958* (Cth) on certain agreements were, at least to an extent, designed to protect people who offered benefits (as distinct from those who received them). A restitutionary award therefore would *'not stultify the purpose of the statutory scheme but instead uphold it'.*[43]

***Li v Liu* [2022] NSWCA 67 – illegal contracts: recovery of money through restitution or under statute**

In this case, the NSW Court of Appeal considered whether, in relation to a contract rendered unenforceable due to illegality, a monetary amount paid in the form of consideration could be recovered on a restitutionary basis and/or under the *Australian Consumer Law* (the ***ACL***) .

The court relevantly held that:

- the primary judge did not err in finding that monies paid were recoverable on a restitutionary basis (as this would not result in incoherence in the law or stultify the purpose of the relevant statutory scheme); and
- had there been a representation that the appellants would obtain the result of the services rendered, recovery would not have been precluded under the ACL.

This case is an instructive example of how courts decide a party can recover amounts paid under an illegal contract.

Facts

[41] *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498; [2012] HCA 7 at [34].
[42] [2022] NSWCA 67.
[43] At [[43].

The first appellant (Kun Li) entered into various agreements with T & S Investment Group Pty Ltd. The primary judge found that these agreements constituted a 'Main Contract' to obtain visas for Ms Li and her parents (with the second appellant, Zhi Hong, being the mother of Kun Li)

In April 2017, the first and second appellants transferred A$500,000 into the bank account of the first respondent, Yang Liu. Liu was a director of, and held 99% of the shares in, T & S Investment Group Pty Ltd. The other director (and managing director) of T & S Investment Group Pty Ltd was the second respondent, Junyi Wang (Mr Wang).

One of the arrangements under the main contract was the 'investment' of $1,000,000 with T & S Investment Group Pty Ltd by or on behalf of Ms Li, and the employment of Ms Li by T & S Investment Group Pty Ltd.

Upon failing to obtain a visa, Li and Hong launched proceedings against the appellants and T & S Investment Group Pty Ltd in the District Court of NSW in order to recover the amounts paid. It was held that the arrangements breached provisions of the *Migration Act 1958* (Cth) that prevented the offering or receiving of a benefit in exchange for a 'sponsorship-related event', including 'employing or engaging … a person to work in an occupation or position in relation to which a sponsored visa has been granted, has been applied for or is to be applied for' and a 'grant of a sponsored visa'.

Accordingly, the District Court held that Ms Li and Ms Hong were entitled through restitution to recover the amounts paid from T & S Investment Group Pty Ltd, but not Ms Liu and Mr Wang.

The issues on appeal were:

- if the primary judge found that the representation was made, whether her Honour erred in doing so;
- if the representation was made, whether the primary judge erred in denying recovery against Mr Wang under ss 18 and 236 of the ACL for his alleged knowing involvement in a false and misleading representation that the appellants would obtain visas;
- whether the primary judge erred in concluding that the monies paid were recoverable on a restitutionary basis by the appellants, even though the main contract and collateral agreements were rendered illegal and unenforceable by ss 245R and 245S of the Migration Act;
- whether the primary judge erred in refusing to allow recovery from Ms Liu on a restitutionary basis in circumstances where she did not expressly plead that she had paid the monies over to T & S Investment Group Pty Ltd without notice of any illegality; and
- whether the primary judge erred in refusing to allow recovery from Ms Liu on a restitutionary basis in circumstances where her Honour did not expressly find that Ms Liu paid the funds over to T & S Investment Group Pty Ltd without notice of any illegality.

Judgment

The Court of Appeal held that:

- it was not shown that the representation was made;
- if the representation were made, the primary judge erred in concluding that the illegality of the main contract precluded recovery under the ACL or meant that the representation was not made in trade or commerce. It was held that the making of representations about the prospects of obtaining visas is not illegal by virtue of the Migration Act, and that the recovery of the investments was not based on any illegal action;
- the primary judge did not err in concluding that monies paid under the main contract and the various collateral contracts were recoverable on a restitutionary basis; and

- the primary judge did not err in refusing to allow recovery from Ms Liu on a restitutionary basis. The court held it is not sufficient to establish that an agent has knowledge of the facts that give rise to the illegality. In such cases where illegality is a vitiating factor, only actual knowledge of the illegality will suffice, given the wide range of circumstances giving rise to illegality. It was held that Ms Liu believed T & S Investment Group Pty was entitled to the funds under the various arrangements with the appellants.

Importantly, as to recovery under the ACL, the Court of Appeal held that '[w]hether some form of illegality affecting the relevant conduct inhibits or precludes recovery under s 18 of the ACL turns upon the form of illegality in question and its relationship to the action brought by the affected party'. The court held that 'the consequences of illegality for a claim under the ACL are resolved by considering and, to the extent necessary, reconciling the ACL and the statutory provisions that create the illegality in the same or similar way that occurs with illegal contracts'.

In regards to the restitutionary basis for recovery, the court held that allowing recovery in these circumstances would not result in incoherence in the law or stultify the purpose of the statutory schema. In this case, the 'integrity of the migration system' was the objective of the statutory scheme and that restitution would uphold, rather than stultify, the purpose of the statutory scheme. This is because '[t]he differential treatment of those who offer a benefit in return for the occurrence of a sponsorship-related event compared with those who receive the benefit suggests that, at least to some extent, the former are sought to be protected by the statutory scheme'.

7 Waiver

Can a party waive a contractual right and, if so, how?

The answer to this apparently simple question has, for some time, been quite uncertain. It has, however, now largely been answered by the High Court in *Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788*[44].

It is well accepted that a party can forgo a contractual right in various ways, including:

- by contractual agreement, which will generally require consideration;
- by estoppel, if another party detrimentally relies upon a representation that the right will not be exercised; or
- by election, if a party exercises an inconsistent right.

Is there a further category that applies if a party intentionally abandons a right? This is usually understood as 'waiver', although it can also be understood as an election not to exercise a right (as distinct from an election between two inconsistent rights). The Federal Court held that there was such a further category. In the High Court, Justice Gageler was the only judge to agree.

According to the analysis of the majority:[45]

> … the legal position is that although a waiver does have legal effect in that 'the waiver is binding on the waiving party, unless the waiver is effectively retracted', the waiver can generally be revoked at any time with reasonable notice.

The court similarly rejected an argument that the doctrine of election applied when a person made a choice between two inconsistent courses of action (rather than between two inconsistent rights). This judgment has therefore restored some certainty to this area of the law.

***Allianz Australia Insurance Limited v Delor Vue Apartments CTS 39788* [2022] HCA 38**

[44] [2022] HCA 38.
[45] At [29].

Can a party waive a contractual or statutory right?

This case considered whether an insurer could resile from an earlier offer of indemnity, made to an insured, where the insured had failed to comply with its disclosure obligations. The High Court held that Allianz had not waived its ability to rely on s28 of the *Insurance Contracts Act 1984* (Cth) (the ***ICA***).

The decision provides clear guidance on the very limited circumstances where a party can be found to have 'waived' a right

Facts

Allianz insured Delor Vue, a body corporate for a number of apartment buildings in North Queensland, under a composite policy of insurance. Several of those buildings were damaged by Tropical Cyclone Debbie on 28 March 2017.

The cyclone exposed the existence of pre-existing defects in the apartment buildings, which Delor had not disclosed when taking out the policy. That non-disclosure entitled Allianz to avoid liability under the insurance contract, under ICA s28(3). Section 28(3) provides a statutory defence that allows an insurer to reduce its liability to pay claims where there has been non-disclosure or misrepresentation by the insured. Delor made a claim for cyclone damage. Allianz, through its agent, made a gratuitous offer by email to honour the claim and provide indemnity over certain categories of damage, '[d]espite the non-disclosure issue'. However, the scope of the damage for which Allianz had undertaken to arrange repairs was unclear.

Over the course of the next year, after more pre-existing defects in the construction of the building became apparent, a dispute arose as to the repairs. In the course of that dispute, Allianz proposed an offer of 'settlement', open for 21 days, under which:

- Allianz would pay for certain repairs arising from the cyclone damage, and some other limited damage arising from the pre-existing defects (notwithstanding Delor's non-disclosure); but
- if Delor did not agree to Allianz's terms within 21 days (later extended to more than three months), Allianz would rely on its defence under s28(3) to reduce Delor's insurance claim to nil, and therefore not pay anything, due to Delor's non-disclosure.

Delor did not accept the terms. After Allianz asserted that its liability had been reduced to nil, Delor brought proceedings in the Federal Court, attempting to prevent Allianz from retracting its earlier offer.

At trial, Delor argued that the insurer was bound by its earlier representation that it would grant indemnity. There were four main arguments:

- **Waiver**: Had Allianz waived its right to rely on the s28(3) defence by making its gratuitous offer to provide indemnity notwithstanding the non-disclosure?
- **Election**: Had Allianz irrevocably elected not to exercise its power to rely on the defence?
- **Estoppel**: Was Allianz estopped from resiling from its representation that it would provide indemnity?
- **Good faith**: Had Allianz failed to comply with its duty to act with utmost good faith?

Delor was successful at first instance before Chief Justice Allsop on the waiver, estoppel and good faith issues. Delor was successful again on appeal to the Full Court of the Federal Court of Appeal, with a majority (Justices McKerracher and Colvin; Justice Derrington dissenting) finding for Delor on all four issues. Allianz appealed to the High Court.

Judgment

The High Court upheld Allianz's appeal. The majority (Chief Justice Kiefel, Justices Edelman, Steward and Gleeson; Justice Gageler dissenting) found for Allianz on all four issues, with the effect that Allianz

could rely on s28(3) to deny indemnity. The majority's reasoning, which generally rejected more expansive legal conceptions of the four issues, provides useful guidance on each point:

- **Waiver**. A waiver of a right, such as Allianz's right under s28(3), is 'rarely irrevocable'. With some exceptions, there are only 'exceptional' circumstances in which a waiver cannot be revoked, which did not apply to the present case. Assuming that Allianz had waived its defence under s28(3) in making its initial offer to provide indemnity, it revoked its waiver to the extent that it subsequently made that waiver (and therefore its offer to indemnify Delor) conditional on Delor's acceptance of the settlement terms.
- **Election**. The common law doctrine of election did not apply to Allianz's decision to waive reliance on the s28(3) defence and offer indemnity. There was no 'election' by Allianz between alternative and inconsistent sets of rights: with or without the waiver, the insurance contract remained on foot, and reliance on the s28(3) defence would not be immediately inconsistent with any of the parties' rights under the contract.
- **Estoppel**. Promissory estoppel also did not apply, as Delor did not suffer any detriment from relying on Allianz's promise to indemnify the property defects. Delor failed to show that it would either have obtained a more favourable settlement than Allianz's settlement offer, or that it would otherwise have taken steps to carry out repair work itself – meaning that Allianz was not estopped from revoking its offer. Insurers should be aware that they still may be estopped from resiling from offers to grant indemnity if doing so will cause detriment to the insured – such as by preventing the insured from resolving the conflict, or from taking steps to resolve the issue itself.
- **Good faith**. In providing useful commentary on the nature of the duty of utmost good faith (a centuries-old common law duty now embodied in ICA s13(1)), the majority found that this duty did not extend so far as to prevent Allianz from departing from its earlier offer to indemnify Delor. The court found that there is no 'free-standing obligation' on insurers to act in a manner that is 'decent and fair'. The content of the duty of utmost good faith (which applies to both insurers and insureds) is for rights and powers to be exercised and duties to be performed consistently with commercial standards of decency and fairness. While that has particular recognised aspects in insurance contracts (such as establishing a duty of full disclosure), it does not extend so far as a duty for insurers and insureds never to depart from representations made to each other.
- The majority also rejected a further argument that Allianz's unilateral waiver of the s28(3) defence had become irrevocable and that the defence was thus 'extinguished', finding that this argument (which had been accepted by the approach of the majority of the Full Court) would have amounted to a 'vast expansion' of the doctrine of extinguishment.

In dissent, Justice Gageler agreed with the majority judgment from the Full Court, and would have found for Delor on each issue. His Honour's judgment preferred a broader approach to the concept of election, which would have held that Allianz had waived its right to rely on the s28(3) defence; found that Delor had in fact relied on Allianz's promise of repair to the detriment of its ability to pursue opportunities to repair the properties; and found that Allianz was bound by the requirement of utmost good faith not to depart from its original offer – saying that Allianz was 'not entitled to blow hot and cold'. His Honour's comments that Allianz had acted in an 'oppressive and unbusinesslike' way by doing so (and reasserting its right to rely on the s28(3) defence) are particularly noteworthy and likely to attract further comment. Justice Gageler dissent still serves as a cautionary tale for insurers. Noting his Honour's comments that Allianz would be acting in an 'oppressive' and 'unbusinesslike' fashion by going back on its earlier offer after a year had passed, insurers and their agents should consider expressly reserving their rights to avoid an insurance claim under ICA s28(3) when making gratuitous offers to indemnify insureds notwithstanding any non-disclosure.

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