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Contract law update 2023

Introduction

Every year, the Allens contract law update contains many cases where judges reach different conclusions on the same evidence and (often) applying the same legal principles. This uncertainty in outcomes is one of the few certainties of contract law.

Few areas better illustrate this uncertainty than the willingness or otherwise of courts to stretch contractual language to adopt a more commercial interpretation. In 2023 we again saw different approaches to this fundamental issue. As it is usually a question of degree whether a commercial interpretation is open on the language used by the parties (and what is in fact a commercial outcome), one can rarely say that an outcome is right or wrong; the uncertainty is just a reflection of the (necessary) flexibility of the common law.

The flexibility of the common law also means that there is usually quite a close alignment between legal principles and commercial morality. *Willis v AMP*, discussed later in this update, might however strike some readers as a case where the principles of contract law lead to an outcome that is contrary to commercial morality. If it is such an example, a challenge is then to determine how the common law might develop to avoid such outcomes (without creating new areas of potential injustice).

This constant evolution of legal principle to accord with our (changing) commercial morality is one of the great strengths of the common law, and this update will continue to monitor that evolution as today's judges address old problems in innovative ways.

Key Takeaways:

Parties formalising a commercial agreement should be explicit as to when they will regard themselves as legally bound by their agreement.

Parties drafting options need to be aware of the minefields identified in the Willis/AMP litigation.

We continue to see courts showing varying degrees of willingness to 'be commercial' when interpreting contracts.

Subject to what the High Court may say later this year, plaintiffs might increasingly seek to recover 'reliance damages' rather than 'expectation damages'.

There are various ways in which expert evidence may be used as an aid in understanding the technical meaning of a term.

1 Contract formation

1.1 Duress and affirmation

If you agree to terminate a contract because someone has drawn a gun on you, are you bound by that termination? The simple answer, of course, is that you are not. Under the doctrine of duress, an agreement (or termination of an agreement) is voidable if illegitimate pressure compelled a person to enter into (or terminate) the agreement. Under this doctrine:

(a) The person asserting duress has the onus of proving that illegitimate pressure was brought to bear on them.

(b) If that onus is met, the party imposing pressure has the burden of proving that the pressure did not cause the person to enter into (or terminate) the agreement.

These principles were confirmed by the New South Wales Court of Appeal in *Elite Realty Development Pty Ltd v Sadek*[1]. That case illustrated the significance of a contract being void*able* (that is, terminable at the election of one party) rather than void. Because an agreement entered into under duress is voidable, the 'victim' will be bound by the contract if they subsequently affirm it, provided the duress has ended at the time of affirmation. That is what happened in this case. The court held that the victim 'affirmed' the termination by:

(a) accepting a payment under the termination agreement; and

(b) signing certain documents without complaint.

1.2 Masters v Cameron (again)

A commonly litigated issue is whether communications between parties, which result in a commercial agreement but contemplate the execution of a more formal document, give rise to a binding contract. The critical question is whether the parties intend to be legally bound before the execution of a formal agreement – which is often resolved by applying the '3 classes' from the decision of the High Court in *Masters v Cameron*[2].

The difficulty in ascertaining whether such an intention exists was exemplified by the conflicting judgments of the Queensland Court of Appeal in *Al-Freah v Thompson*[3]. The case ultimately turned on a detailed analysis of the communications between the parties. Although the majority of the court found that a binding agreement came into existence, that agreement was able to terminated due to the failure of a condition precedent (which was not the fault of either party).

This case illustrates the importance of being explicit in such correspondence as to whether a party intends to be legally bound pending execution of a more formal agreement.

Cases:

***Elite Realty Development Pty Ltd v Sadek* [2023] NSWCA 165 – Contract formation**

In this case, the New South Wales Court of Appeal considered, among other issues, whether a joint venture participant could rescind a termination contract executed under duress.

This case is significant because it demonstrates that a contract formed under duress cannot be rescinded if it has been affirmed by the party when they were no longer operating under duress. A contractual party may no longer be acting under duress even if they continue to suffer a psychiatric illness related to it.

[1] [2023] NSWCA 165.
[2] (1954) 91 CLR 353. Those classes were explained in our *Contract Law Update* 2022[2] in discussing the decision of the Victorian Court of Appeal in *Sully v Enzlisch*[2].
[3] [2022] QCA 175.

facts

The court considered two appeals relating to separate property developments, conducted on behalf of Mr Hazem Afyouni and Mr Omar Sadek.

The first proceeding related to a property development in Maroubra. In early 2016, Mr Afyouni and Mr Sadek became parties to a joint venture agreement to develop the Maroubra property. Mr Afyouni and Mr Sadek incorporated two companies as part of the joint venture: Maroubra Road Development Pty Ltd (***MDR***), which owned the property; Elite Realty Development Pty Ltd (***Elite***), the builder of the development. Mr Afyouni and Mr Sadek were directors of both companies, and owned 50% of the shares in each.

Their relationship broke down as a result of a disagreement relating to a separate joint venture.

1. On 8 May 2018, Mr Afyouni changed the access settings on Elite's bank account so that money could only be withdrawn if both he and Mr Sadek were signatories.
2. On 20 May 2018, a labourer employed by Mr Sadek threatened Mr Afyouni with a gun, demanded that he unblock the Elite bank account and said that if he were not paid, he would return the next day.

Following the gun attack:

1. On 23 May 2018, Mr Afyouni unblocked the Elite bank account.
2. On 25 May 2018, Mr Afyouni and Mr Sadek orally agreed to terminate the Maroubra joint venture agreement, on the basis that Mr Afyouni would be paid $700,000 and relinquish his ownership and directorship of MDR.
3. On 26 June 2018, Mr Afyouni withdrew $200,000 from Elite's bank account, on the basis that it was the first instalment of the $700,000 termination payment.
4. In January and February 2019, Mr Afyouni sought and received payment of the remainder of the termination payment, and signed documents transferring his ownership in MDC and resigning his directorship. He raised no complaint at that time.
5. In May 2019, Mr Afyouni first claimed that he entered into the termination agreement under duress.

The second proceeding related to the termination of a joint venture agreement for the development of a property at Avoca Beach. In March 2019, while a director of Elite, Mr Sadek executed a deed (not in his capacity as a director of Elite and to which Elite was not a party) that included a recital stating that the Avoca Beach joint venture agreement had been terminated in 2017. Elite claimed that Mr Sadek breached his directors' duties to Elite by terminating the Avoca Beach joint venture, and sought compensation.

At first instance, the primary judge found that:

1. In relation to the first proceeding:
    a. Mr Sadek acted in common design with the perpetrator of the gun attack to intimidate Mr Afyouni.
    b. The duress brought to bear on Mr Afyouni by the gun attack was at least one of the reasons he entered into the termination agreement, and Mr Sadek failed to prove the duress was not an operative reason.
    c. Any duress on Mr Afyouni ended from October 2018.

d. Mr Afyouni subsequently affirmed the termination agreement by actively seeking, and accepting, payment of the remainder of the termination payment, and signing documents to relinquish his interest in and directorship of MRD.

e. Mr Afyouni was not entitled to rescind the termination agreement.

2. In relation to the second proceeding, Mr Sadek did not breach his duties to Elite because the Avoca Beach joint venture had not been terminated at law. Elite was not entitled to compensation.

judgment

Justice Payne (Justices Mitchelmore and Stern agreeing) dismissed both appeals.

In the appeal in the first proceeding:

1. There was no challenge to the principles applied by the primary judge in determining whether the termination agreement was entered under duress.

   a. There are two elements to duress: i) pressure amounting to compulsion of the will of, in this case, Mr Afyouni; and ii) the illegitimacy of the pressure exerted. It was not necessary for Mr Afyouni's will to be overborne, merely that it was deflected.

   b. The test is objective: that is, was it reasonable for Mr Afyouni to believe that the person engaging in the wrongful conduct would take the action foreshadowed?

2. There was also no challenge to the legal test applied by the primary judge to the question of affirmation. Affirmation disentitles the party who originally entered a contract under duress from rescinding the agreement. A party can affirm or ratify an agreement entered under duress only once the duress has ended.

3. The court held that:

   a. the finding at first instance that Mr Afyouni had ongoing post-traumatic stress disorder arising from the gun attack was not inconsistent with the finding that he was no longer acting under duress in performing the agreement after October 2018. That is because a person can suffer from a psychiatric illness while having the ability to autonomously make decisions.

   b. There was no error in the primary judge's conclusion that Mr Afyouni had escaped the effect of duress by October 2018 and subsequently affirmed the agreement.

In the appeal in the second proceeding, the court upheld the primary judge's findings that the recital in the March 2019 deed, which stated that the Avoca Beach joint venture agreement had been terminated in 2017, did not effect a termination of that agreement at law. There were no operative terms in the March 2019 deed effecting a termination and Elite was not a party to the March 2019 deed. Mr Sadek did not breach his directors' duties and Elite was not entitled to compensation (nor had it suffered any loss).

In both proceedings, the court also found against the appellants on other grounds of appeal, which did not concern contract law issues.

***Al-Freah & Anor v Thompson & Anor* [2023] QCA 175 - formation of contract where parties agree to execute further formal document - operation of conditions subsequent**

The majority of the Queensland Court of Appeal held that the exchange of four emails amounted to an immediately binding contract, with the terms of the agreement to be restated in a more precise form, but that the non-fulfilment of conditions subsequent allowed one party to terminate that contract.

This case discusses the principles of contractual formation laid down in* Masters v Cameron, *the relevance of subsequent conduct to determining whether a binding agreement has been made, and the parties' rights of termination upon non-fulfilment of conditions subsequent.

facts

Four doctors, including Drs Al-Freah and Thompson, were each ultimate shareholders in and directors of two companies, through which they operated their practices. In November 2021, one of the other shareholders in the companies commenced oppression proceedings against Dr Thompson. The fourth doctor also alleged oppression by Dr Thompson, and Dr Al-Freah alleged that he had been induced by fraudulent misrepresentations by Dr Thompson to purchase shares in the company. At mediation, all of the doctors, except Dr Al-Freah, agreed that the companies should be wound up. Dr Al-Freah instead sought the return of his initial $1.5 million investment.

Dr Thompson attempted to resolve Dr Al-Freah's claim separately, ahead of resolving the oppression proceedings. To this end, on 17 February 2022, Dr Thompson's solicitors and Dr Al-Freah's counsel exchanged the following emails:

1. Dr Thompson sent an 'offer' to Dr Al-Freah. The terms of the offer were that:
    a. Dr Thompson would pay $1,500,000 to Dr Al-Freah by a specified date.
    b. Dr Al-Freah would transfer his shares to Dr Thompson.
    c. A 'deed of settlement' would document terms (a) and (b), among others.
    d. Dr Al-Freah would 'also enter another deed of settlement' releasing Dr Thompson and the other directors and shareholders from all claims.
    e. Dr Al-Freah would be released from restraints on his employment 'subject only' to the other directors' agreement, which Dr Thompson would 'seek'.
2. Dr Al-Freah accepted the offer, subject to some provisos, and asked that they 'go aheads and draw the deed' [sic].
3. Dr Thompson confirmed his agreement with the provisos and his solicitors stated that they would 'forward a deed to you as soon as possible to cover the terms of the confidential settlement agreement reached between our clients'.
4. Dr Al-Freah responded with a final email, confirming an additional request regarding the transfer of his shares.

Dr Thompson then sent a letter to the other directors, requesting that they agree to release Dr Al-Freah from any restraints on his employment. The other directors did not agree.

Dr Al-Freah commenced proceedings against Dr Thompson for specific performance, claiming that the four emails constituted an immediately binding contract.

judgment

The key issues to be resolved on appeal were:

1. whether Drs Thompson and Al-Freah intended to enter an agreement that bound them independently of the other directors and the resolution of the oppression proceedings;
2. assuming that they did, whether they intended their agreement to be immediately binding notwithstanding they contemplated subsequently entering into two settlement deeds; and
3. if the contract were intended to be immediately binding, whether Dr Thompson lawfully terminated the contract following the non-fulfilment of certain conditions subsequent.

Justice Dalton (with Justice Morrison agreeing) found that, considering the language of the emails and the commercial context known to both Dr Thompson and Dr Al-Freah, the four relevant emails were an independent agreement between those two parties and not conditional upon the resolution of the wider oppression proceedings.

Her Honour turned to consider *Masters v Cameron* (1954) 91 CLR 353, which concerns the circumstances where parties agree commercial terms, but also agree that the terms will be documented in a formal contract. There are three categories of case identified by *Masters v Cameron*:

1. The parties have reached finality in the terms and intend to be immediately bound, but propose to restate the terms in a form that is fuller or more precise but not different in effect.
2. The parties have completely agreed upon the terms of their bargain and intend no departure from or addition to that which their agreed terms express or imply, but have made performance of one or more of the terms conditional upon execution of a formal document.
3. The intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract.

To which of these categories a particular case belongs is determined by objectively ascertaining the intention of the parties. Here, the majority held that this case fell into the first category. That was because:

1. The words of the four emails were indicative of an immediately binding agreement.
2. There was no language indicating that the parties did not intend to be bound until a further deed was entered into.
3. The emails contained all of the details necessary for the agreement to be binding.
4. The parties' subsequent conduct was consistent with there being an immediately binding agreement – the court being able to have regard to that subsequent conduct for the purpose of determining whether or not a binding agreement had been reached (as distinct from construing the terms of any agreement).

Justice Bond dissented, finding that the four emails did not disclose an intention to be immediately bound and that the parties' subsequent conduct demonstrated they did not consider that they had settled a binding agreement.

Having found that the parties' agreement was immediately binding, Justice Dalton turned to consider whether Dr Thompson had lawfully terminated that contract. A condition subsequent of the agreement was that the other directors would release Dr Al-Freah from his employment restraints. Dr Thompson was obliged to, and did, use reasonable endeavours to obtain those releases. As fulfilment of the condition subsequent was within Dr Thompson's power to influence but not to control, the failure to obtain the releases did not render the contract void, but voidable at the instance of a non-defaulting party. As Dr Thompson's failure to obtain the releases was due to no fault of his own, he had the right to terminate the contract (and did). Dr Al-Freah's appeal was dismissed.

2 Contract interpretation

2.1 Having regard to surrounding circumstances

When a court may have regard to surrounding circumstances when interpreting a contract has been a constant theme in our *Contract law updates*. It is well accepted, at least in New South Wales, that a court should have regard to the surrounding circumstances when interpreting a commercial contract, and there is no need first to show an ambiguity in the contract. The orthodox principle, as stated (for example) by the New South Wales Court of Appeal in *Ulladulla Creative*

Images Pty Limited v Tibbles[4], is that a court may have regard to objective surrounding circumstances known to the parties at the time of entering into the contract, but will not have regard to the parties' statements as to their actual intentions and expectations.

The decision of the New South Wales Court of Appeal in *Altius Pty Ltd v Abignano Nominees Pty Ltd*[5] is an example of the court having regard to surrounding circumstances in interpreting a contract in a manner different from the most obvious, literal interpretation. In considering competing interpretations, the court examined the financial consequences of the parties' respective interpretations. The leading judgment of Justice Adamson stated [at 111]:

> *These calculations indicate that the construction for which the Abignano entities contended is highly uncommercial, viewed from the point of view of both parties in the context of the circumstances which applied at the time, because it delivered an unwarranted windfall to the Abignano entities and imposes an unwarranted penalty on the Peterkin entities. A construction which 'makes commercial nonsense or is shown to be commercially inconvenient' is to be avoided …*

The court arguably extended the traditional limitations on the use of surrounding circumstances by having regard to the parties' stated intentions in pre-contractual correspondence. It may be, however, that not too much should be read into this, as no point appears to have been taken that such correspondence should only be admissible in so far as it evidences objective matters known to both parties.

The New South Wales Court of Appeal adopted a more orthodox approach to the use of surrounding circumstances in *The J&P Marlow (No 2) Pty Ltd v Joseph Hayes & Andrew McCabe in their capacity as joint and several liquidators of* [various entities][6]. In that case, the court noted that:

- *ordinarily, the process of contractual construction is possible by reference to the terms of the contract alone* [at 75]*;*
- *a commercial purpose or object to be secured by the contract … is to be discerned objectively, with the contract itself supplying the best source for the ascertainment of that objective and determined purpose* [at 75]*;*
- *one must also be cautious in attributing a particular commercial intent or understanding of commercial common sense to parties to a commercial agreement* [at 76]*;*
- *attributing commercial purpose will not be used by a Court to give to the words of a contract a meaning that they cannot reasonably bear* [at 79]*;*
- *whilst the construction urged by the respondent and adopted by the primary judge may not reflect the subjective intention of the parties, it cannot be said to be absurd or so inconsistent to the parties' objectively determined intention that words should be read into the critical definition* [at 112].

2.2 The use of expert evidence to construe a contract

There are occasions when a court will look beyond both the terms of a contract and the circumstances known to the parties for the purpose of construing the contract. For example, expert evidence may be allowed, to show that a particular word or phrase has a well-established meaning by 'custom and usage'. In *Quasar Resources Pty Ltd v APG Aus No 3 Pty Ltd*[7], the Western Australian Court of Appeal held that expert evidence might be used to assist in the construction of contracts even if a particular 'custom or usage' had not been established. The

[4] [2021] NSWCA 289: as summarised in our 2021 *Contract Law Update.*
[5] [2023] NSWCA 177.
[6] [2023] NSWCA 117.
[7] [2023] WASCA 171.

court referred to cases where such evidence had been admitted, although noting that '*it must be acknowledged that it is not always easy to identify the principles being applied in a particular case by a Court in having regard to evidence of this kind*'[8]. The court referred to a suggestion by Professor Carter that evidence of technical or other instances of words used within a particular industry may be led as contextual evidence, independently of the rules on 'custom and usage'[9], and, apparently on that basis, admitted the expert evidence.

2.3 The obligation to carry on business in business sale agreements

Our 2021 *Contract law update* considered a decision of the New South Wales Court of Appeal on whether a hotel vendor complied with an obligation to *carry on the Business in the usual and ordinary course …* '. The issue arose because the hotel's usual operations were affected by Covid regulations. The High Court heard an appeal from that judgment in *Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited*[10]. The court, disagreeing with the majority in the New South Wales Court of Appeal, held that the vendor was not in default of this obligation, in so far as its usual operations were restricted by Covid regulations. The High Court held that an obligation to carry on a business in the ordinary course '*incorporated an inherent requirement to do so in accordance with law*' [at 28].

Cases

Altius Pty Ltd v Abignano Nominees Pty Ltd [2023] NSWCA 177 - precontractual negotiations - parol evidence rule

In this case, the New South Wales Court of Appeal took a broad approach to construing an ambiguous clause within a contract. Usually when a contract is in writing, the court cannot take into account pre-contractual statements. However, the court found that the clause was sufficiently ambiguous that it was necessary to consider pre-contractual negotiations when construing it.

This case shows that the court will go beyond the written contract when necessary. It may take into account context, purpose and negotiations where contracts are sufficiently ambiguous. The case also serves as a reminder of the importance of clear contractual drafting.

facts

The case concerned a joint venture between two property developers, Mr Peterkin and Mr Abignano, to develop a property on Pittwater Road. For that purpose, they created a unit trust (which had Altius Pty Ltd as the trustee). Both developers had various legal entities associated with them and that were involved in the joint venture.

After development approval for the Pittwater Road property was refused, Mr Abignano sold his units in the unit trust to Mr Peterkin.

A dispute arose about whether that sale discharged loans made to Altius by Mr Abignano during the joint venture.

The broader context of that sale included:

1. discussions in October 2015, where the solicitor for Mr Peterkin made an offer of $2.3 million for Mr Abignano's units in the unit trust;
2. discussions between Mr Peterkin and Mr Abignano in November 2015, where they had agreed the purchase price for the units would be $2.6 million; and

[8] [at 50].
[9] [at 59].
[10] [2023] HCA 6.

3. a buy-out agreement signed on 17 November 2015 that provided for a purchase price of $2.6 million and agreed that it would be adjusted for 'holding costs.'

Eventually, the parties signed an option agreement on 14 March 2016 (the ***option agreement***), which contained a clause that said the price of $2.6 million would be adjusted for the 'holding cost contribution'. The 'holding cost contribution' was defined as 'the sum of all liabilities for outstanding contributions payable in respect of holding costs of the Property … by any or all of [the Abignano entities] pursuant to any or all of the Joint Venture Agreement' (the ***disputed clause***).

On 13 May 2016, Mr Abignano sent a letter of demand to Altius for repayment of a loan. After Altius failed to repay, he sued it for repayment. Altius said in its defence that the loans, including one made by NAB, were discharged by Mr Abignano's sale of his units.

At first instance, the primary judge held that none of the loans fell within the definition of 'holding costs contribution' in the disputed clause because none of them was made 'pursuant to' the joint venture agreement. This meant Altius was liable to repay the loans.

judgment

Whether or not Altius was liable depended on whether the loans were a 'holding costs contribution' within the meaning of the disputed clause. The appeal court construed the disputed clause so that the loans were a holding costs contribution. As a result, Altius was not liable for repayment.

When construing the clause, the court went beyond the words of the option agreement. When construing the clause, it considered the commercial relationship between the parties, pre-contractual negotiations and the context of the option agreement.

Justice Adamson (Justices Leeming and Stern agreeing) reasoned that:

- The loans were made 'pursuant to' the joint venture agreement under the disputed clause. The words 'pursuant to' meant 'consequent on' or 'in conformity with', and included the loans because of both the natural meaning of the words and the broader context of the option agreement. This included that the sole purpose of the joint venture was to develop the property, and the loans were the only way the joint venture was to be funded. The October 2015 pre-contractual negotiations indicated 'a common intention that the Abignano entities' share of Altius' liabilities' would be discharged and this context indicated that 'contributions' included loans. A collateral agreement was formed between the parties in these negotiations, which was consideration for and consistent with the option agreement.
- Not including the loans as a holding cost contribution would lead to a wholly uncommercial construction of the option agreement, where the Abignano entities would benefit significantly more than the Peterkin entities. This was 'commercial nonsense'.
- The purpose of the option agreement was to end the relationship between Mr Peterkin and Mr Abignano (and associated entities) as to the property. It was not consistent with that purpose for Altius to remain liable to the Abignano entities for the loans.

Usually, a court cannot go beyond the written agreement between the parties (in accordance with the parol evidence rule, that a written document is intended to be the entire agreement between them). However, Justice Adamson considered an inference could be drawn that the parties did not intend the agreements to be their entire agreement. Her Honour reasoned that there were several collateral contracts in addition to the main agreement, which allowed the court to take the other agreements into account when construing the disputed clause.

In a separate judgment, Justice Leeming reached the same conclusion that the loans were a holding costs contribution. His Honour emphasised that while the result might involve 'some straining of the

language' of the agreement, this was needed because of the ambiguity of the contract – it was necessary to have regard to textual, contextual and purposive considerations.

***The J & P Marlow (No 2) Pty Ltd v Joseph Hayes & Andrew McCabe in their capacity as joint and several liquidators of Peak Invest Pty Ltd (in liq), Five Islands Invest Pty Ltd (in liq), Surry Hills Pub Invest Pty Ltd (in liquidation) and Four By Four Investments Pty Ltd (in liq)* [2023] NSWCA 117 - proper construction of 'sale price of the Property' in hotel management agreements; use of surrounding circumstances to interpret contract**

In this case, the New South Wales Court of Appeal considered the proper construction of the words 'sale price of the Property' in four materially identical hotel management agreements. The court held that, on a literal and contextual construction of the hotel management agreements, the 'sale price of the Property' did not encompass the price of the hotel business being operated on the land or the gaming machine entitlements sold together with the land.

This case outlines the relevant legal principles to be applied in construing the meaning of the words of a contract. It highlights the importance of considering the meaning in light of the text, context and purpose sought by the parties.

facts

The case concerned the construction of four materially identical hotel management agreements (***the agreements***). The four hotels were located on land owned by four separate companies, being the second to fifth respondents (***the landowners***). The landowners held (as trustees of unit trusts) the land on which the hotel was situated and the gaming machine entitlements (***GMEs***) used at the hotel. The hotels were operated by four separate companies (***the operating entities***), under leases with the landowners. All four hotels were managed by the first and second appellants (***the Marlow group***).

In 2022, the land on which each of the hotels was located was sold, together with the respective hotel businesses being operated by the operating entities.

Under the agreements, in exchange for providing hotel management services to the operating entities, the Marlow group was entitled to certain fees, including a capital gains bonus fee (***CGBF***) upon the sale of the hotels. The agreements provided that the property and the hotels would be sold as 'one package and as a going concern'. The CGBF was to be calculated as 15% of the 'Net Sales Price', less the 'Purchase Price' and 'Net Capital Expenditure'. The agreements separately defined the 'Property' (being the property 'located at' the named address), the 'Hotel' (being the hotel operated at the named address) and the 'Business' (being the management of the hotel). 'Net Sales Price' was defined by reference to:

> the sale price of the Property under a contract signed by the Landowner as the seller (which may include the Company as the seller of the Business), less any adjustments, taxes, fees, legal costs and agents' commissions payable by the Company and the Landowner in connection with its sale or disposition of the Property and otherwise in connection with the operation of the Business.

The landowners went into liquidation. In the winding up, the Marlow group claimed to be entitled to a CGBF under the agreements, calculated on the basis that the 'sale price of the Property' encompassed the sale price of both the land and the hotel businesses. The first respondent (***the liquidators***) sought declarations that this was the proper construction of the CGBF formula to justify those payments to the Marlow group.

The primary judge declined to make the declarations sought by the liquidators, instead holding that the 'sale price of the Property' meant the sale price of the land, including the hotel building constructed on that land, but did not include the sale price of the hotel business operated on that land, or the GMEs used at each of the hotels. The Marlow group appealed.

judgment

The Court of Appeal unanimously dismissed the appeal – Justices Meagher and Kirk in a joint judgment and Chief Justice Bell in a separate judgment. The key grounds for the decision were:

- The natural construction of the text of the agreements did not support one whereby the lease held by the operating entities was within the definition of 'Property'. The agreements referred to the property 'located at' an address. One has a leasehold interest 'in' a property, not 'at' the property. Further, there were separate definitions of 'Hotel', 'Business' and 'Lease' in the agreements that were not consistent with subsuming the business and leasehold interest within the definition of the 'Property'.
- The clause that provided that the property and hotel would be sold as a single package did not support the submission that the Net Sales Price included the property price and hotel price. Rather, it supported the concept that the agreement made a distinction between the property and the hotel. A single package sale could be achieved through separate agreements with separate sale prices (or the sale price could otherwise be apportioned).
- The definition of Net Sales Price referred to 'the Landowner in connection with *its* sale or disposition of the Property'. Only the land (and not the leasehold) was the landowner's to sell.
- 'Property' in the definition of Net Sales Price should be construed in the context of the agreements as a whole and should not be given a different meaning in that clause.

The court (in particular, Justices Meagher and Kirk) acknowledged that there was strength in the Marlow group's submission that this construction undermined the purpose of the CGBF, which it said was to reward the Marlow group for services as hotel manager that contributed to an increase in the overall value of the hotel business. However, the court held that the subjective intention of the parties was not sufficient to displace the plain and ordinary meaning of the text of the agreements, which did not lead to an outcome that was commercially absurd. This was not a case where two alternative constructions of an ambiguous clause were available – regardless of the parties' subjective intentions, the construction put forward by the Marlow group was simply not objectively open on the text of the agreements.

***Quasar Resources Pty Ltd v APG Aus No 3 Pty Ltd* [2023] WASCA 171 - meaning of 'refining' in agreement for sale of mining tenements - use of expert evidence to establish meaning of contractual terms by reference to industry understanding**

In this case, the Western Australian Court of Appeal considered the meaning of the word 'refining' in an agreement for the sale of mining tenements, specifically in relation to a clause requiring the payment of a royalty. The meaning of 'refining' was relevant to determining the costs and charges that could be deducted by the appellant in calculating the royalty that it was required to pay the defendant.

The court dismissed the appeal, and held there was no error in the primary judge's finding that the respondent's narrow construction of the word 'refining' was preferred to the appellant's broad construction, thereby limiting the scope of deductible costs and charges for the royalty.

This case reaffirms that expert evidence may be used as an aid in the construction of contractual terms by reference to industry understandings of the technical meaning of a term. It also demonstrates that expert evidence may be admitted for this purpose without having to meet the stringent requirements that would apply if establishing a term's meaning by reference to a particular custom and usage.

facts

The appellant and the respondent were successors to an agreement for the sale of mining tenements. As part of the consideration, the appellant was required to pay the respondent a royalty that was described as a 'net smelter royalty' .

The agreement contemplated a wide range of mineral products being produced under the tenements for which the royalty would be payable. The appellants were mining uranium using an in-situ leaching mining process and various hydrometallurgical processes to produce yellowcake.

Although the royalty was described as a 'net smelter royalty', there was a formula that governed how it would be calculated. That formula calculated the royalty as the gross amounts received for the sale of (relevantly) yellowcake minus any 'Allocable Charges'. The term 'Allocable Charges' contained costs and charges including those associated with smelting, *refining* and marketing particular metal products.

At the core of the dispute was whether any of the hydro-metallurgical processes used on site as part of the in-situ leaching process and production of yellowcake constituted 'refining'.

The respondent at trial argued a narrow interpretation that 'refining' meant the final processing of a metal bearing product, where impurities were removed to form a pure, or near-pure, final product.

The appellant argued that the term 'refining' should not be given the respondents' narrow interpretation, which, it asserted, was associated with the production of base metals or gold. The appellant asserted that, given the breadth of the mineral products covered by the royalty, the word 'refining' should be given its ordinary and broad meaning, which would cover a variety of processes for a variety of mineral products (not just gold and base metals). It asserted that, in this context, refining meant 'purifying and upgrading a commodity by the removal of impurities'.

The trial judge agreed with the respondent, and found that the parties to the agreement (being participants in the Australian mining industry) objectively knew that 'refining' was understood to have a technical meaning in the mining industry that was consistent with the narrow version propounded by the respondent. In determining how the word 'refining' was in fact understood in the mining industry, the trial judge adopted the meaning advanced in testimony from expert witnesses called by the respondent.

judgment

The essence of the appellant's complaint on appeal was that the trial judge erred in finding that the word 'refining' was to be understood in a narrow, technical sense, and not in a broad, ordinary sense.

The issues for the Court of Appeal to consider were:

1. whether the trial judge's factual findings as to the meaning of 'refining' could be overturned on appeal;
2. if so, whether the word 'refining' had an ordinary or technical meaning when used in the relevant agreement; and
3. whether regard could be had to extrinsic evidence (in the form of expert witness testimony) to determine the technical meaning.

On the first issue, the court held that because the trial judge's factual findings as to the meaning of 'refining' were based on an assessment of the reliability of expert witnesses, the appellant's challenge to the factual findings was not permitted, in accordance with the principle of appellate restraint. As noted by the court, this principle prevents an appellate court from interfering with the findings of a trial judge to the extent they are based substantially on an assessment of the reliability of witnesses, including expert witnesses, unless those findings are clearly wrong or improbable.

On the second issue, the court agreed with the trial judge that 'refining' was to be understood as having a technical meaning, rather than an ordinary meaning. It held that the meaning of 'refining' varies according to the context in which it is used, and in the context of the Australian mining industry, the meaning is a narrow, technical one. The court also held that ascribing a technical meaning to 'refining' was consistent with the terms of the agreement (including the royalty payment clause) and the parties' objective intentions, as well as the agreement's context and background. Additionally, Justice Lundberg held in a separate judgment to the majority (with whom his Honour agreed) that the technical meaning was more likely to further the agreement's commercial purpose than would any ordinary meaning.

As to the third issue, the court held that extrinsic evidence (here in the form of expert witness testimony) was admissible to ascertain the technical meaning of 'refining' as understood in the Australian mining industry. Relevantly, it determined that extrinsic evidence is permissible where one party contends that a word bears a particular or technical meaning, rather than its ordinary meaning. In addition, the majority held that expert evidence can be heard to establish an industry understanding of a contractual term without that evidence having to meet requirements that otherwise apply to establish a meaning by custom or usage – that is, where the custom or usage must be so 'notorious, uniform and certain' that a party can be presumed to have known of it and intended for it to inform the meaning of the relevant term.

***Laundy Hotels (Quarry) Pty Limited v Dyco Hotels Pty Limited* [2023] HCA 6 'usual and ordinary course of business' during COVID-19 pandemic - business sale agreement**

This case concerned the construction of a contract for the sale of the property and assets of a hotel business. The High Court considered whether a vendor's obligation to carry on the business in the 'usual and ordinary course' was breached in circumstances where the business was operating on a restricted basis in accordance with a public health order in response to the COVID-19 pandemic. The court unanimously held that the vendor did carry on the business in the usual and ordinary course, even though the law unexpectedly changed that usual course.

This case demonstrates that the meaning of 'ordinary course of business' in a business sale agreement is a flexible concept, which extends and retracts depending on the legal context. Commercial contracts must account for, and clearly explain, how changes in the legal environment may affect a transaction.

facts

On 31 January 2020, Laundy Hotels (Quarry) Pty Limited (the ***vendor***), entered into a contract with Dyco Hotels Pty Limited (the ***purchaser***) for the sale of the freehold hotel property of the Quarryman's Hotel. The contract included a hotel licence, and other business assets such as electronic gaming machines, gaming machine entitlements and goodwill. The date for completion was 30 or 31 March 2020.

Clause 50.1 of the contract required the vendor to carry on the business in the usual and ordinary course with regard to its nature, scope and manner, from the date of the contract until the date of completion. Clause 51.7 provided that if completion did not occur on the completion date, a party that was ready, willing and able to complete and not in default could serve on the other party a notice to complete.

On 23 March, the New South Wales Health Minister made a public health direction that required hotels to be closed to the public and their business restricted to selling takeaway food and alcohol. A failure to comply with the direction was a criminal offence. In response, the Quarryman's Hotel was closed on 23 March and had reopened by 26 March for takeaway sales only.

On 25 and 27 March, the purchaser informed the vendor that it would not complete the contract because:

1. The vendor was not 'ready, willing and able' to complete, including due to a breach of clause 50.1.
2. The contract had been frustrated.
3. The vendor could issue a notice to complete with which it could not comply, entitling the purchaser to terminate the contract and sue for damages.

The vendor responded that it was ready, willing and able to perform its contractual obligations, including clause 50.1, and called upon the purchaser to complete.

Completion did not occur and the vendor ultimately served a notice to complete and, subsequently, a notice of termination. The purchaser commenced proceedings, seeking declaratory relief that the contract was frustrated, or the vendor was not entitled to issue a notice to complete and its notice of termination was a repudiation, which the purchaser accepted.

judgment

The decision at first instance

In the Supreme Court of New South Wales, Justice Darke held that the contract was not frustrated and that the vendor was not in breach of clause 50.1 – which required it to carry on the business in the 'usual and ordinary course' only so far as was possible in accordance with law. Therefore, the vendor was entitled to serve the notice to complete, the notice of termination was effective and the vendor was entitled to sue for damages for loss of bargain (ie damages to recover the contractual benefits it would have received had the contract been performed).

The decision on appeal

In appealing the decision, the purchaser alleged that the primary judge misconstrued clause 50.1 because the vendor was not 'ready, willing and able' to complete the contract from the date of the Minister's public health direction. The purchaser did not appeal the primary judge's findings on frustration. A majority of the Court of Appeal (Chief Justice Bathurst and Justice Brereton) allowed the appeal. Justice Basten dissented, essentially agreeing with the primary judge's reasoning. The majority was not willing to read into the clause a limitation that it was only required to be complied with to the extent permitted by law. Chief Justice Bathurst considered that the public health direction was a supervening event that had made compliance with clause 50.1 illegal, so that the vendor could not comply with it. Justice Brereton also held that the vendor was in breach of clause 50.1. On those bases, the majority held that the vendor had not been entitled to issue the notice to complete, so that the notice of termination

was invalid. The purchaser was entitled to have its deposit back and was not required to proceed with the acquisition.

The High Court's decision

The vendor appealed to the High Court, which restored the decision of the primary judge. The court found that the vendor was 'ready, willing and able' to complete the sale, and was not in default of its contractual obligations at the time it served its notice to complete on the purchaser.

The court considered that the subject matter of the contract was the business, and that the contract recognised the business was subject to a dynamic regulatory environment. That was not within the control of the vendor, which did not warrant that the value of the business would not change before completion. Until completion, the vendor bore the risk of reduced revenue from any change in law. From the completion date, the purchaser bore that risk. From the perspective of a reasonable businessperson, the court found that the proper construction of clause 50.1 was that it required the vendor to carry on the business in accordance with law. The lawfulness of the operation of the business was objectively essential and a commercial necessity for the parties, as without the hotel licence and associated gaming machine entitlements, there would be no 'business'.

Although the public health direction meant that the vendor was unable to carry on the business in the same way that it had at the time of the contract, this did not mean that it was in breach of clause 50.1. Accordingly, the vendor was 'ready, willing and able' to complete at the time it served the notice to complete on the purchaser. As time was of the essence, the purchaser was in breach of the contract, entitling the vendor to terminate it, keep the deposit and sue for damages.

3 Settlement agreements

It is very common, when a dispute is settled, for parties to provide releases expressed in broad terms. On their face, these releases will often extend well beyond the matters that were the subject of the particular dispute. A question that often arises for courts is whether to give such releases their literal meaning, or whether they should be read down having regard to the dispute that was settled.

The leading case in Australia on this issue is a 1954 decision of the High Court in *Grant v John Grant & Sons Pty Limited*[11]. In that case, the court established three principles when considering deeds of release:

1. As a matter of contractual interpretation, general words in a release are to be interpreted by reference to the particular issues referred to in the recitals.
2. As a matter of contractual interpretation, general words of a release are limited to those matters in contemplation by the parties at the time the release was given.
3. A court might, in its equitable jurisdiction, prevent a party from relying on a release to avoid liability regarding matters unknown to the parties at the time the release was executed (in the absence of clear language indicating such an intention).

In *Protheroe v Protheroe*[12], the New South Wales Court of Appeal emphasised the distinction between the two contractual principles of interpretation and the equitable jurisdiction to prevent unconscionable reliance on the terms of a release. In particular, the court noted that there would be no need for equity's intervention unless, on the proper construction of a contract, a release would otherwise apply. On the facts of that case, the court applied the principles of contractual

[11] (1954) 91CLR 112.
[12] [2023] NSWCA 328.

interpretation to find that the apparently general words of a release did not apply to the dispute before the court.

A similar approach was taken by the Victorian Court of Appeal in *RW & Me Smith Pty Ltd v Boral Resources (VIC) Pty Ltd* [13]. That case is a particularly graphic example of how a court, in applying the rules of contractual interpretation, can give a narrow construction to apparently very wide words used in a release.

Given the similarity between the principles of contractual interpretation and the grounds for equity intervening, it would be quite rare for a party to need to rely on equity's intervention.

Cases:

***Protheroe v Protheroe* [2023] NSWCA 328 - scope of general releases provided for in deeds of settlement - when the equitable doctrine in *Grant v John Grant* will be enlivened**

In this case, the New South Wales Court of Appeal considered whether a release provided for in a deed of settlement was wide enough to extinguish a claim for proprietary estoppel. The release was restricted to claims 'in connection with or arising out of' a statement of agreed facts. The court held that on its proper construction, the release did not apply to the proprietary estoppel claim, as it was not 'in connection with' any matter set out in the statement of agreed facts.

facts

The appellant, Colin Protheroe, owned two farms in northern New South Wales. The respondent, Brian Protheroe, is his son. They were both parties to a deed of settlement that concerned debt recovery proceedings brought by NAB. Clause 7.2 of the deed released both Colin and Brian from all claims 'in connection with or arising out of' a statement of agreed facts.

The statement of agreed facts recorded that Colin was the owner of the two farms. However, Brian contended that he had an equitable interest in them, as Colin had made representations over many years that he would be entitled to the farms upon Colin's retirement or death.

Brian brought a claim against Colin for proprietary estoppel in the New South Wales Supreme Court and was successful at first instance. Justice Slattery upheld his claim and made a declaration that the two farms were held by Colin on constructive trust for Brian. Colin subsequently appealed the decision.

judgment

The New South Wales Court of Appeal dismissed Colin's appeal, on the basis that the release in clause 7.2 of the deed did not apply to Brian's proprietary estoppel claim.

In his judgment, Justice Meagher (with whom Justices Mitchelmore and Basten agreed) noted that in order for Colin to succeed, Brian's claim had to be one that was 'in connection with or arising out of' the statement of agreed facts. However, his Honour did not consider that Brian's claim arose out of the fact that Colin was the legal owner of the two farms; rather, it arose out of representations made by Colin over a long period of time, and on which Brian had relied to his detriment.

Colin argued that in the absence of a reference in the statement of agreed facts to Brian holding any beneficial interest in the farms, the reference to his 'ownership' should have been understood as conveying that Colin's legal interest was not subject to any such beneficial interest. Justice Meagher rejected this argument, and considered there was no reason to read the reference to Colin's ownership as saying anything about any beneficial interest in the two properties held or claimed by Brian.

[13] [2023] VSCA 182.

His Honour also considered the application of the equitable doctrine relating to general terms of release outlined by the High Court in *Grant v John Grant* (1954) 91 CLR 112. The doctrine restrains a party from unconscientiously relying on the general words of a release to defend a claim that falls beyond the true purpose of the release or claims the parties had no knowledge of at the time of execution. However, as Justice Meagher noted, the doctrine can only be enlivened where a claim falls *within* the terms of the release. For the above reasons, the release in clause 7.2 of the deed of settlement, on its proper legal construction, did not apply to Brian's claim. Therefore, in this case it was not necessary for the court to consider whether he was entitled to equitable relief.

***RW & ME Smith Pty Ltd v Boral Resources (Vic) Pty Ltd* [2023] VSCA 182 - scope of release clauses**

In this case, the Victorian Court of Appeal considered whether a release, drafted in wide and general terms, should be confined to apply only to specific subject matter.

The court held that, when properly construed, the relevant clauses only released and indemnified the respondent from claims arising under a short-term contract made after termination of the principal contract. The respondent could not rely on the release in a claim against it for breach of the principal contract.

This case contains an important discussion of the principles of contractual interpretation in relation to the scope of release clauses, and illustrates the tendency of courts to read down the scope of releases.

facts

The applicant is a company owned by Robert Smith and his wife. The applicant delivered concrete for the respondent, Boral Resources, under a concrete cartage agreement (***the agreement***). In July 2015, Boral summarily terminated the agreement by written notice to the applicant after Mr Smith and another employee of the applicant, Mr Pickering, helped Boral employees replace a broken drive chain on an elevator at Boral's concrete plant. Boral alleged the applicant engaged in serious misconduct when assisting with the repair. However, to allow the applicant time to sell its three trucks, Boral and the applicant agreed that the termination would only take effect from 21 August 2015 and, in the meantime, the applicant would continue to provide concrete delivery services to Boral, under a different driver arrangement excluding Mr Smith and Mr Pickering. On 21 August 2015, the parties executed an initial deed of termination in expectation of the completion of the sale of the applicant's trucks to the incoming contractor. The sale could not be completed at that time, so, with consent, the applicant continued providing concrete delivery services to Boral until 13 October 2015, when the truck sales were concluded and a second deed of termination, in identical terms to the first, was executed (the ***termination deed***).

In August 2020, the applicant commenced proceedings in the County Court, alleging that Boral had unlawfully terminated the agreement or, in the alternative, even if the applicant breached the agreement, the conduct giving rise to the breach was done at Boral's direction, and Boral was estopped under section 20 or 21 of the Australian Consumer Law (the ***ACL***) from relying on its own conduct to terminate the agreement. Boral denied the applicant's claims and alleged that, in the alternative, even if it unlawfully terminated the agreement or contravened the ACL, the claim was barred due to the operation of a release and indemnity within the termination deed dated October 2015.

On 30 May 2022, the County Court judge dismissed the claim, finding that:

- The applicant had not proved that the summary termination was wrongful.
- Even if the termination were wrongful, Boral would have terminated the contract on three months' notice regardless, and the applicant would have suffered the same financial consequences.

- The applicant had released Boral from liability, and was precluded from an award of damages by the operation of the release and indemnity contained in the deed of termination.

The applicant sought leave to appeal the decision.

judgment

Justices McLeish, Niall and Macaulay allowed the applicant's appeal, set aside the orders made by the County Court and ordered that judgment be entered for the applicant, the amount to be assessed upon the matter being remitted to the County Court.

The court found that the applicant did not breach the agreement and therefore Boral's right of summary termination was not enlivened. Additionally, the court rejected the primary judge's finding that Boral would have terminated the agreement on three months' notice.

In assessing whether the applicant had released Boral from the claim for wrongful termination under the release and indemnity in the termination deed, the court considered whether the wide, general words of the release and indemnity should be confined to apply to specific subject matter. It considered two principles of contractual interpretation adopted by the High Court in *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112; [1954] HCA 23 (and accepted and applied consistently since in *Wardman v Macquarie Bank Ltd* [2023] FCAFC 13, *Reid v Commonwealth Bank of Australia* [2022] NSWCA 134 and *Burness v Hill* [2019] VSCA 94):

- The general words of a release are to be restrained by the particular occasion referred to in the recitals. If there is 'introductory matter' in a deed, that will qualify the general words of the release.
- The general words of a release are limited to those things that were in the contemplation of the parties at the time the release was given.

Finding that there was residual uncertainty as to the object of the termination deed, based on its 'introductory matter' (ie applying the first principle in *Grant*), the court looked to the circumstances in which the termination deed was made, and what a reasonable person in the position of the parties would have understood the release to mean having regard to them. The court held that:

- Both parties understood and proceeded on the basis that the agreement had ended after the written notice issued by Boral on 22 July 2015.
- The agreement made on 22 July, that the applicant would provide further services, was not a continuation of the agreement, but a 'new bargain', for a limited purpose (to allow the trucks to be sold), on different terms (different driver arrangements), and for a different and defined period.
- There was no suggestion that a release of past liability would be sought as the price of securing further work or Boral facilitating the sale of the trucks.
- A reasonable person in the position of the parties would have understood that the 'Contract' referred to in the 'Background' section of the termination deed referred to the short-term contractual arrangement entered into from 22 July 2015, not the agreement that preceded this.
- Looking at the whole of the termination deed, the intention of the parties when executing it was to terminate the short-term contractual arrangement and to finalise any of Boral's payment obligations.
- Applying both interpretive principles in *Grant*, the release and indemnity must be construed as only releasing and indemnifying Boral from liability arising from the short-term contract, and the vehicles, equipment and drivers used and engaged in the provision of concrete delivery services under that contract.

- The claim pursued by the applicant could not be characterised as arising from that contract, and therefore the release and indemnity in the termination deed had no application in this case.

4 Options

The flexibility of the common law means that courts rarely deliver judgments that appear to be inconsistent with commercial common sense. The judgment of the New South Wales Court of Appeal in *Willis Australia Ltd v AMP Capital Investors Ltd*[14] is, however, such a case.

Essentially, Willis could exercise an option to expand the area of its lease by providing:

a) notice that it wished to exercise the option nine months before a lease expired; and

b) a bank guarantee at any time before the new lease was to commence.

Willis provided notice of its intention to expand its lease more than nine months before the lease expired. AMP therefore terminated the lease of the tenant currently occupying that space.

Shortly before the new lease was to commence (and after the arrival of COVID-19), Willis purported to withdraw its notice exercising the option. It asserted that the option had not been validly exercised because it had not provided a bank guarantee.

At first instance, the trial judge held that AMP could waive the condition requiring timely provision of a bank guarantee because the condition was only for its benefit. Interestingly, the trial judge held that this result only followed because he characterised the option as a conditional contract rather than an irrevocable offer (addressing a long-standing controversy about the proper characterisation of options).

The New South Wales Court of Appeal disagreed. It held that AMP could not waive the requirement to provide a bank guarantee because it was not a 'condition', but merely a step that Willis could choose to take if it wished to exercise the option. The court therefore did not need to address the controversy about the proper characterisation of options.

This issue might have been avoided if the contract had been drafted so that the bank guarantee requirement was an obligation for Willis (after serving the option notice), rather than merely a requirement for validly exercising an option. One suspects that this is how the parties themselves regarded the bank guarantee requirement. However, the Court of Appeal decided that the outcome was not sufficiently absurd to justify departing from the language used by the parties.

Cases:

Willis Australia Ltd v AMP Capital Investors Ltd [2023] NSWCA 158 **- whether terms of option to renew lease amount to conditional contract or irrevocable offer - controversy remains unresolved**

In this case, the New South Wales Court of Appeal was asked to consider whether the options in a lease agreement constituted a conditional contract or an irrevocable offer. However, the court declined to resolve the 'standing controversy' on the legal nature of an option reflecting the choice between a conditional contract or an irrevocable offer. Instead, it applied well-settled principles of construction, removing the need to characterise the relevant clause.

The court held that the lessee was not bound by the second option to take the lease for the expanded space, as it had only exercised three of the five stipulated conditions. The lessor could not waive the

[14] [2023] NSWCA 158.

timely performance of the conditions, as the performance of the conditions was not a right that could be waived.

This case is significant because the Court of Appeal considered the controversial issue of the characterisation of the legal nature of an option as either a conditional contract or an irrevocable offer. The court held that it was not necessary to resolve that issue in this case, instead resolving it under principles of construction.

facts

This case concerned a dispute over a lease agreement that commenced on 1 October 2014 between Willis Australia Ltd (as tenant) and AMP Capital Investors Ltd (as landlord) for Suite 1 of Level 15, and the whole of Level 16 of Angel Place, 117–123 Pitt Street, Sydney. The lease was for a six-year period and included two options to renew. The first was to renew the lease for a further four-year term, and the second was for Willis to take a lease of the balance of Level 15 for a four-year term.

Nine months before the expiry of the lease, Willis gave two notices by letter to AMP, advising it intended to exercise both options. Importantly, the notices satisfied three of the five conditions stipulated in the contract. The other conditions – being the provision of a bank guarantee and the absence of notice of breach – did not need to be satisfied until the expiry of the original lease.

Less than eight months later, Willis withdrew its notice for the second option. It asserted that it was entitled to do so because it had not provided the bank guarantee (being one of the conditions for exercising the option).

Justice White, sitting in the equity division of the Supreme Court, determined that the second option was a conditional contract and that AMP had validly waived the timely performance of the remaining two conditions Willis had not performed, which were wholly for AMP's benefit. Accordingly, his Honour held Willis had exercised the second option, and ordered the specific performance of the renewed lease for both options.

On appeal, the issues were whether the primary judge had erred in:

1. finding Willis had exercised, and was bound by, the second option;
2. characterising the relevant contractual clause as a conditional contract, such that Willis was bound irrespective of its performance of all five conditions;
3. determining AMP had validly waived the performance of the final two conditions of the relevant clause not performed by Willis;
4. determining the relevant clause was a conditional contract because this avoided a commercial nonsense or commercial inconvenience; and
5. determining Willis no longer contended it was entitled to withdraw its notice to AMP.

judgment

As to grounds 1, 2 and 4, the court held that the text of the relevant clause in the lease agreement did not support AMP's construction of a conditional contract. The use of the words 'must' and 'only if' made plain that the landlord has an obligation to grant a new lease for the expanded space under the second option if certain conditions were met. The court held that there was no reason for the primary judge to draw the distinction between the three conditions that were satisfied and the two that were not. Having regard to the wording of the clause, each of the conditions was equal and must have been satisfied before the landlord became obliged to grant the new lease. Further, there was no necessary commercial nonsense; when Willis withdrew its intention to exercise the second option, AMP was entitled to lease the expanded space to another tenant, perhaps at a higher rent.

As to ground 3, the court held that, on the reasoning applied to grounds 1, 2 and 4, AMP had no right created under the relevant clause in the lease that was capable of being waived. For the waiver to be valid, it would have been necessary for it to be in writing and signed by both parties who were affected by it. This requirement was not satisfied and, accordingly, ground 3 was upheld. As to ground 5, the court held that it was not necessary to determine it, as Willis had accepted it added little to its primary grounds of appeal.

The court also commented on the 'standing controversy' (which remains unresolved) regarding the possibility of an option clause being characterised in one of two ways. The first characterisation is where it is construed as being an irrevocable offer by the grantor, which may be accepted by the grantee any time during the specified period. This characterisation involves the notion of there being two agreements: one involves the offer of the option remaining open for a specified period, and the other is that which is created when the option is exercised. The second characterisation is where the option is a conditional contract. This involves simply one agreement subject to one or more conditions subsequent such that if the conditions are not satisfied, that part of the agreement terminates.

Although the characterisation of an option has usually proved immaterial, the issue may be significant where there is a question of the proprietary status of an option and where different considerations arise concerning the assignment of options depending on the nature of the particular option. The court enunciated the following principles relating to the 'standing controversy':

- Whether a step required to be taken by the grantee be construed as a condition precedent or an obligation to be performed after the creation of the agreement depends on the wording of each particular instrument.
- Regard must be had not only to the terms of the clause containing the option, but also to other relevant clauses in the agreement.
- Although a requirement for payment of money may be properly characterised as a condition precedent, that requirement may be 'waived' by the grantor.
- If the option is construed as an irrevocable offer, an argument for the grantee of an option would need to be based on an implied contract arising from the conduct of the parties. There can be no reliance on the doctrines of election and promissory estoppel.

The court set aside the declarations and orders made by the primary judge, and made an order by way of restitution for all sums paid by Willis under the orders made by the primary judge.

5 Repudiation

'Repudiation' is used in a number of different senses. Most commonly, it refers to conduct of one party that gives the other party a right to terminate the contract (other than by relying on an express contractual right of termination).

Repudiatory conduct is often evidenced by a breach of contract (whether breach of an essential term or substantial non-performance of an intermediate term). More difficult issues arise where the alleged repudiation arises not from an actual breach, but from a refusal to perform or from an inability to perform the contract.

The New South Wales Court of Appeal considered the applicable principles in *Oz International Investment Pty Ltd v Star Moon Investments Pty Ltd*[15]. As discussed in last year's *Contract law update*[16], the courts are reluctant to find that a party has repudiated a contract if, acting in good faith, they adopt an interpretation of the contract that ultimately turns out to be incorrect.

The New South Wales Court of Appeal (like the Queensland Court of Appeal last year, and the Victorian Court of Appeal in 2007[17]) adopted what might be called the 'willy nilly' principle, which comes from a passage in a High Court judgment[18] that distinguished between:

- *'persisting in its interpretation willy nilly in the face of a clear enunciation of the true agreement';* and
- a bone fide dispute about the proper interpretation of an unclear contract.

The New South Wales Court of Appeal did not need to apply this distinction, however, as it found that the relevant party's interpretation of the contract was not only adopted in good faith, but was in fact correct.

Cases:

***OZ International Investment Pty Ltd v Star Moon Investments Pty Ltd* [2023] NSWCA 148 - meaning of 'recommend' - principles of repudiation - whether there was breach of essential term that amounted to repudiation of contract**

In this case, the New South Wales Court of Appeal considered the proper interpretation of a deed of rental guarantee, a term of which required the respondent to enter into a lease with any tenant 'recommended' by the appellants. The court found that, on a proper construction of the deed, the appellants had not in fact recommended any tenants to the respondent, so its failure to enter into a lease was not repudiatory conduct.

This case provides helpful guidance on the general principles that apply when a contract is found to be repudiated by a party's conduct.

facts

The case concerned a commercial property in Macquarie Park, Sydney. As part of a transaction by which Oz International Investment Pty Ltd and its sole director, Mr X Yang, (the ***appellants***) bought the property in early 2020, they and Star Moon Investments Pty Ltd (***the respondent***) entered into a deed of rental guarantee (***the rental guarantee deed***), as well as an agreement appointing the appellants as the exclusive managing agents of a property

Under the rental guarantee deed, the appellants were obliged, for a number of years, to cover the difference between the rent actually received by the respondent by leasing the property and a minimum

[15] [2023] NSWCA 148.
[16] Contract Law Update 2022: Repudiation and termination (allens.com.au)
[17] *Sopov v Kane Constructions Pty Ltd* (2007) 20 VR 127; [2007] VSCA 257.
[18] *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423; [1978] HCA 12 per Justice Stephen, Mason and Jacobs at 432–433.

guaranteed rental amount. However, the respondent was obliged to enter into a lease with any tenant 'recommended' by the appellants.

From the time the respondent acquired the property until August 2022, the property remained vacant. The appellants did not pay the minimum guaranteed rental amount.

In May 2021, the respondent commenced proceedings, demanding:

- payment of the minimum guaranteed rental;
- the shortfall between the actual rent received by the appellants for leasing out the property and the minimum guaranteed amount; and
- damages for breach of contract, arguing that the appellants wrongfully repudiated the agreements.

The appellants argued that the respondent was in breach of clause 3 of the rental guarantee deed because it failed to enter into a lease with a tenant the appellants had 'recommended' . The appellants claimed to have recommended a number of tenants, referring to several conversations and to emails sent between the parties.

They submitted that the respondent's failure to comply with Clause 3 was repudiatory conduct, which entitled them to terminate the deed. At first instance, the District Court found in favour of the respondent.

In the New South Wales Court of Appeal, the appellants asserted that the judge at first instance was wrong to find that:

1. They had not recommended any tenants to the respondent.
2. There had been no repudiatory conduct by the respondent entitling the appellants to terminate the deed.

judgment

The meaning of 'recommended'

President Ward (with whom Justices Davies and Hallen agreed) considered the meaning of the term 'recommended' in the context of the commercial arrangements between the parties.

In emails and letters between the parties that the appellants relied upon (among other things), the appellants identified a possible lessee, and requested the respondent to 'Please take consideration of this offer'. The respondent had replied to the effect that there were insufficient details about the lessee, and requested full details of the lease negotiations, and background checks of the proposed tenant. The appellants failed to state that they were 'recommending' the possible lessee, even when asked to do so by the respondent.

The court concluded that the appellants had not recommend any tenants to the respondent.

This was on the basis of findings that, in the natural and ordinary meaning of the word 'recommend', there was a clear distinction between finding or introducing a prospective tenant on the one hand and recommending that tenant on the other. The court held that this natural and ordinary meaning was consistent with the commercial context in which the appellants, as the exclusive managing agent of the property, were in a position 'not simply to identify or put forward potential tenants' but vet them to the extent that they could recommend them to the respondent. It made 'commercial sense' that the distinction was reflected in the wording of the deed.

On the basis of this construction of the term 'recommend', it was found that the appellants had not made any recommendations.

Repudiation

As a consequence of the finding that no recommendation had been made, the repudiation claim failed. However, the court still made some useful observations by way of *obiter*.

It commented upon the seriousness of finding that there had been a repudiation and provided useful guidance on the circumstances where a repudiation would be found to have taken place:

- An intention no longer to be bound by a contract can be evidenced by a refusal or inability to perform an essential term (or a substantial non-performance of an intermediate term).
- On the question of whether a term is 'essential', whether a breach can be adequately remedied by damages is a relevant consideration.
- Repudiation can be by express words, or implied from words and / or conduct.
- The court must consider all of the surrounding circumstances to determine whether the alleged defaulting party's words / conduct carried an intention to repudiate.
- A party maintaining an erroneous interpretation of a contract can, but will not always, amount to repudiatory contract. A party who holds an incorrect view of the construction of a contract but is also willing to be bound by an authoritative exposition of the correct interpretation cannot be said to have an intention to repudiate the contract.

The court found that the obligation to enter into a lease was not an essential term of the deed. A key factor was the finding that if there had been any breach of the term, it could have been adequately remedied by way of damages.

Further, the court held that even if the appellants had, as they asserted, made a recommendation, the respondent's conduct could not be considered repudiatory in all the circumstances. While it had not entered into a lease with the lessee identified by the appellants, it had otherwise consistently acknowledged the binding nature of the deed and had not evinced any intention not to be bound by it.

6 Reliance damages

It is an elementary proposition that damages for breach of contract are usually awarded to put the 'innocent' party in the same position as if the contract been performed.

However, in some cases, a plaintiff might not want to prove (or might not be able to prove) what its financial position would have been if the contract had been performed. In those situations, a plaintiff might instead seek to recover 'reliance damages': that is, damages for expenses that were incurred in the expectation that the other party would perform its obligations under the contract.

An issue considered by the New South Wales Court of Appeal in *123 259 932 Pty Ltd v Cessnock City Council [2023] NSWCA 21*[19] was whether (and when) a plaintiff may seek to recover reliance damages rather than expectation damages. The trial judge had held that a plaintiff could only recover reliance damages if the defendant's breach made it impossible for the plaintiff to calculate its expectation damages. However, the New South Wales Court of Appeal held that a plaintiff can *always* seek to claim reliance damages and that, if it does so, it will *have the benefit of a rebuttable presumption that it would at least have recovered that expenditure had the promise been performed* [at 96]. The burden is then on the defendant to rebut that presumption.

[19] [2023] NSWCA 21.

The court further held that a plaintiff seeking reliance damages was not limited to expenses that it was obliged to incur under the contract, but was entitled to recover expenses '*reasonably incurred in reliance on the defendant's contractual promise'.*

The judgment of the New South Wales Court of Appeal arguably expanded the circumstances in which reliance damages can be sought, and the High Court has granted special leave to appeal against this decision. In the meantime, plaintiffs bringing breach of contract claims should consider whether reliance damages might result in a higher award than expectation damages.

Cases:

***123 259 932 Pty Ltd v Cessnock City Council* [2023] NSWCA 21 - reliance damages**

At first instance, the Supreme Court found that:

- Cessnock City Council (***the council***) was in breach of an obligation to take reasonable action to apply for and register a development plan for Cessnock Airport; but
- 123 259 932 Pty Ltd (***Cutty Sark***) was not entitled to substantive damages because it could not prove that it would have suffered loss if the contract had not been breached.

The New South Wales Court of Appeal allowed an appeal and awarded Cutty Sark substantive damages of over $3.6 million, on the basis that it was entitled to recover reliance damages even though it could not prove that it would have suffered any loss had the council complied with the contract.

This case is significant for two main reasons. First, it was held that if a party elects to claim 'reliance damages', it has a rebuttable presumption that it would have at least recovered that expenditure if the contract had been performed. The defendant therefore has the burden of proving that the party would not have recovered those expenses. Second, in calculating reliance damages, the court held that a plaintiff is not limited to expenses required by the contract to be incurred, but any expenses reasonably incurred in reliance on the defendant's contractual promise can be considered. In making this assessment, the court looks beyond the terms of the agreement and into what is reasonably contemplated by the parties.

The High Court has granted leave to appeal against this decision.

facts

The council entered into a contract with Cutty Sark for a 30-year lease of a part of Cessnock Airport. The council was the applicant and relevant consent authority for approving the subdivision. Under the contract, it promised to 'take reasonable action' to apply for and register a development plan for Cessnock Airport, by the sunset date in late September 2011.

Cutty Sark proceeded to construct an aircraft hangar – for its business conducting advanced flight aerobic training and joy rides – at a cost exceeding $3 million.

The council did not fulfil its obligation to apply for and register the plans by the sunset date, and the airport remained undeveloped. By then, Cutty Sark no longer operated its business on the hangar, as it struggled to attract business while the airport remained undeveloped. The company vacated the hangar and was subsequently deregistered. As a result, the council terminated the contract and, under its terms, paid ASIC $1 to acquire the hangar.

judgment

The court considered two important questions.

- Can a plaintiff claim reliance damages (ie expenses incurred in reliance on the defendant's broken promise):
    - only if it is impossible to prove damages in the usual manner (ie damages that put the plaintiff in the same position as if the contract had been performed); or

- at the plaintiff's election (whether or not it is possible to prove damages in the usual manner)?

The court held that a plaintiff can *elect* to claim reliance damages. If it does so, it will *have the benefit of a rebuttable presumption that it would at least have recovered that expenditure had the promise been performed* [at 96]. The burden is then on the defendant to rebut that presumption.

The council argued that it had, in any case, rebutted the presumption because Cutty Sark's business on the hangar was unsuccessful. The court rejected this argument. It considered Cutty Sark's early losses in light of a 30-year lease, which, if the promise were kept, would have made it possible for Cutty Sark to restart its business, recover its losses and benefit from a better commercial environment with surrounding commercial developments.

- Are reliance damages limited to expenses that a plaintiff is obliged to incur under the contract?

The court held that a plaintiff was not limited to such expenses, and instead could recover expenses '*reasonably incurred in reliance on the defendant's contractual promise'.* It considered this to be an extension of the rule in *Hedley v Baxendale,* and that the right to recover expenses '*turns on whether it was the type of expenditure as might naturally be incurred in preparing for, performing or exploiting the benefit of the contract, or is or ought to have been contemplated by the defendant'* [at 70]. An allowance would, however, need to be made for any offsetting benefit received under the contract.

The council argued that Cutty Sark was not entitled to recover the costs of building a hangar because there was no contractual obligation to incur these costs. The court rejected this argument and held that the costs of developing the hangar were *reasonably contemplated* by the parties. It emphasised that preliminary works on the hangar had started during contract negotiations and that it would have been obvious these expenses would be wasted if the council did not fulfil its promise to take reasonable action to register the plan.

7 Rectification

If a contract does not reflect the common intention of the parties, it might be 'rectified' to reflect that common intention. The decision of the New South Wales Court of Appeal in *The Property Investors Alliance Pty Ltd v C88 Project Pty Ltd (in liq)*[20] provides a useful summary of some of the key principles to be considered in a claim for rectification. It is also a typical example of the difficulty in applying those principles, as there were different views in the court as to whether rectification was available on the facts (the majority held that it was not).

The key principles summarised by the court were as follows:

(a) A party seeking rectification has a 'heavy onus' of establishing, by 'clear and convincing evidence', that the contract does not reflect the common intention of the parties.

(b) The relevant intention is the actual, subjective intention of the parties, which (in the case of the party resisting rectification) will usually be determined by reference to their correspondence or statements at the time of contracting.

(c) The court referred to:

(i) a decision of the New South Wales Court of Appeal in 2007[21], which held that the 'common intention' must be communicated (or 'manifested') between the parties, rather than being an undisclosed intention; and

[20] [2023] NSWCA 291.
[21] *Ryledar Pty Ltd v Euphoric* (2007) 69 NSWLR 603.

(ii) a more recent decision of the High Court[22], which stated it was not necessary for the common intention to be *expressly* stated, without discussing or needing to decide whether there was any inconsistency between these two statements.

(d) The party seeking rectification must show, in 'clear and precise terms', what was the common intention.

Cases:

***The Property Investors Alliance Pty Ltd v C88 Project Pty Ltd (in liq)* [2023] NSWCA 291**

In this case, the New South Wales Court of Appeal considered the principles governing contract rectification on the ground of common mistake.

The court held that applicant had not discharged its onus and established that the asserted common intention existed between the parties, and dismissed the appeal in so far as it related to rectification claim.

This case highlights the need for a party seeking contractual rectification on the basis of a common intention to provide clear and convincing evidence of the subjective intentions of the parties to a contract. It also highlights that although Jones v Dunkel inferences can be drawn in rectification suits, they do not permit the court to bridge gaps in a party's evidence.

facts

C88 was incorporated for the purpose of developing residential units and PIA was a real estate agent. The parties entered into a sole agency agreement under which:

- PIA would act as a selling agent for certain residential units that C88 had developed.
- C88 would pay PIA a commission for these sales.
- PIA could lodge caveats over the units in the event C88 failed to pay its commission.
- Clause 1.1(g) confined the meaning of 'Commission' to commission payable to PIA for sales made after entering the sole agency agreement. This meant that any outstanding money owed to PIA for its work before entering it could not be secured under these protections in case of default by C88.

Before entering into the sole agency agreement, the parties entered other agency agreements in relation to the same residential development. As a result, C88 also owed PIA a substantial number of additional commission payments for earlier sales.

At first instance, PIA sought rectification of this clause, on the basis that the parties had a common intention that the sole agency agreement would secure all amounts then and thereafter owed by C88 to PIA. Relevantly:

- PIA's sole director, Mr Wang, gave evidence of conversations with a director of C88, Mr Fayad, which PIA submitted demonstrated the parties' common intention that the sole agency agreement would secure all commissions owed by C88 to PIA.
- C88 did not call any witnesses involved in its management before its liquidation, including Mr Fayad, to give evidence about their understanding of clause 1.1(g).

The primary judge accepted Mr Wang's evidence as credible, but nevertheless denied relief in the nature of rectification, on the basis that PIA had not provided clear evidence it had a common understanding with the managers of C88 of clause 1.1(g) .

[22] *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85.

On appeal, the court relevantly considered:

a) whether PIA had discharged its onus to provide clear and compelling evidence that both parties subjectively intended clause 1.1(g) to secure all money owed by C88 to PIA; and

b) whether C88's failure to call any witnesses to give evidence on the rectification issue gave rise to a *Jones v Dunkel* inference, such that any evidence that Mr Fayad or C88's management may have given would not have assisted C88's position in relation to the common intention of clause 1.1(g).

judgment

The court considered whether the appellant had provided satisfactory evidence of its asserted common intention as to the meaning of a clause in an agreement that governed the commissions payable from the appellant, The Property Investors Alliance (***PIA***), to the respondent, C88 Project Pty Ltd. The court also considered the application of *Jones v Dunkel* to rectification suits.

The majority of the court (Justice Kirk and Acting Justice Griffiths, Justice White in dissent on this issue) dismissed the appeal in so far as it related to the rectification claim, although the appeal was upheld on other grounds.

The majority was not satisfied that PIA had discharged its heavy onus of providing clear and convincing evidence of the existence of the asserted common intention.

Justice Kirk and Acting Justice Griffiths emphasised that a party seeking rectification of a contract must provide clear and compelling evidence of:

- the substance and the detail of a common intention between the parties; and
- how the contract departs from that common intention.

The majority confirmed that clear and convincing proof of the parties' common intention must include not only objective material, but also evidence of the parties' subjective intention and understanding, referring to *Ryledar Pty Ltd v Euphoric* [2007] NSWCA 65 at [182], [185] to [186].

In the present case, the court considered that nothing in the conversations the subject of Mr Wang's evidence indicated that Mr Fayad agreed and intended that the sole agency agreement would secure the commission and interest that C88 had failed to pay for past sales. Simply because Mr Wang's evidence regarding the terms used in the relevant conversations was accepted by the primary judge does not mean that those terms, when considered in light of all the relevant surrounding circumstances, constituted clear and convincing proof of the alleged common intention.

The majority confirmed that *Jones v Dunkel* inferences may be available in rectification suits, although the rule does not permit the court to bridge gaps in a party's evidence. The *Jones v Dunkel* principle permits it to draw an inference that evidence not called by a party would not have assisted the party. The rule does not permit the court to infer that the uncalled evidence would have been positively damaging to that case.

In finding that PIA failed to discharge its onus of establishing the asserted common intention, the majority observed that any inference that the evidence of Mr Fayad's or C88's former managers would not have assisted C88 could not make up for that absence of evidence.

In dissent, Justice White considered that rectification would be available in circumstances where the parties' intention to achieve a legal effect is 'clearly predominant' over their intention to give effect to the contract as it is worded. Having regard to the lengthy commercial relationship between the C88 and PIA, his Honour considered that it was fair to infer that the managers of C88 shared the intention with Mr Wang that clause 1.1(g) include the commission payable for prior sales.

Finally, Justice White considered that a *Jones v Dunkel* inference adverse to C88 was available from the evidence led by PIA, and that C88's failure to call any witnesses on this point strengthened the inference that the parties shared the common intention asserted by PIA.

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