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Contract Law Update

Introduction

Is the literal interpretation of a contract always the correct interpretation?

How should a contract be construed when the literal interpretation leads to a result that is uncommercial and, presumably, unintended? Many contract law disputes during 2020, as in previous years, were a product of the tension that often arises between:

- a literal interpretation of the particular words used in the contract; and
- an interpretation that is more commercial and more consistent with the likely intention of the parties.

Numerous cases summarised in this year's *Contract Law Update* involve Australian appellate courts considering different means for trying to resolve this tension. These include:

- arguing that the proper construction of the agreement is not necessarily the most literal construction;[1]
- asking the courts to imply a term into the agreement, to supplement the words actually used;[2]
- asserting that the powers granted by a contract cannot be exercised literally because they are subject to a good faith obligation (whether expressed or implied);[3] or
- seeking to alter the terms of the contract by an order for rectification.[4]

Even if a plaintiff successfully proves a breach of contract, there may be limitations on the right to terminate or on other 'penal' contractual consequences.[5] There may also be uncertainty as to the quantum of damages (if any) to which a plaintiff is entitled. Some of the 'damages' issues considered by Australian appellate courts last year include the 'Bellgrove Principal, the availability of 'reliance damages; and the presumptions that can be made about the 'counterfactual'.[6]

Where to from here?

A year ago, we might have anticipated that the 2020 *Contract Law Update* would be dominated by consideration of 'force majeure' clauses and the doctrine of frustration. Although that did not happen last year, it may be in 2021 that these issues reach Australian appellate courts.

In this year's Contract Law Update, we will look at the most significant recent judgment of Australian appellate courts in the areas of:

interpretation of contracts;

- implied terms;
- termination, relief against forfeiture and penalties; and
- damages.

1: Interpretation of contracts

A literal interpretation of particular words used in a contract will often lead to an uncommercial outcome that is inconsistent with the likely intention of the parties. There are a number of ways by which a party

[1] These cases are discussed in Section 1 of this *Update.*
[2] See Section 2.
[3] See some of the cases discussed in Section 1.
[4] There are no rectification cases in this *Update*, although there are cases in Section 1 that consider 'rectification by construction'.
[5] See Section 3 for cases on termination and penalties.
[6] See section 4 of this *Update*.

might seek to persuade the court to construe a contract in a manner different from the most obvious, literal interpretation. These include persuading a court that:

- the words in the contract are capable of more than one meaning, and that another meaning, even if less obvious or less 'literal', is more consistent with the objectively ascertained intention of the parties;
- there is a clear mistake in the language of a contract that can be corrected through the process of interpretation;[7] or
- the obvious, literal interpretation would lead to an absurd outcome.

Interpretation of contracts containing drafting mistakes

In *HDI Global Speciality SE v Wonkana No 3 Pty Limited,*[8] the NSW Court of Appeal considered exclusions in insurance policies that referred to legislation that had been repealed and replaced. In the absence of any plausible reason why the exclusion should refer to repealed legislation, the court considered different arguments in favour of a more purposive interpretation of the exclusion (so that it would be understood as referring to the replacement legislation). In particular, the insurer argued that

- the reference to the repealed legislation was a mistake, which, as a matter of interpretation, could be read as referring to the new Act; or
- the reference to the old legislation 'and subsequent amendments' could be construed so as to include a replacement Act.

Ultimately, however, the NSW Court of Appeal declined to interpret the relevant words so as to refer to the new legislation. The court did, however, provide a useful discussion of when a court can depart from the literal meaning of the words used.

In two other cases during 2020, appellate courts were persuaded that contracts were affected by a mistake in the drafting. In *Pittmore Pty Ltd v Chan,*[9] handwritten amendments to one clause were inconsistent with another clause in the contract. The court, through a process of construction, effectively also amended the wording of that other clause. In *James Adam Pty Ltd v Fobeza Pty Ltd,*[10] however, the court held that, although there was an obvious mistake in the drafting of the contract, it was not clear what was intended by the parties. The court was therefore unable to construe the contract in the manner proposed.

Literal or commercial interpretation?

Courts often prefer a strictly literal approach when construing notice clauses. An example last year was the decision of the Queensland Court of Appeal in *Wagners Cement Pty Ltd v Boral Resources (Qld) Pty Limited*[11] which was a typical example of a careful, precise analysis of the actual words used in the contract.

The court was more willing to adopt a commercial interpretation in *Pilbara Iron Ore Pty Ltd v Ammon.*[12] In that case, the court considered an obligation on the party to complete a 'feasibility study', with the contract not containing a definition of the term. Ammon therefore asserted that the contract should imply terms as to the requirements of a feasibility study (including that it be accurate enough to allow Ammon to raise project finance). The court declined to imply terms to this effect. It held, however, that the phrase 'feasibility study', properly construed in context, required a study that would suffice to allow Ammon to

[7] Mistakes can also sometimes be corrected by an equitable order for rectification of the contract. Equitable orders are not considered in this *Uupdate*..
[8] [2020] NSWCA 296.
[9] [2020] NSWCA 344.
[10] [2020] NSWCA 311.
[11] [2020] QCA 289.
[12] [2020] WASCA 92.

raise project finance. However, as Ammon had not put its case in this manner (relying only upon an implied term argument), the matter was sent back to a Warden for final determination.

Interdependent obligations

As a general principle of contract law, a party is not excused from complying with its obligations merely because the other party has failed to comply with their obligations. An exception does arise, however, where the obligations are 'interdependent'. Such interdependency was argued, unsuccessfully, in *Kay v Playup Australia Pty Ltd.*[13] An interesting extension of the interdependency principle was considered by the NSW Court of Appeal in *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd.*[14] In that case, the court held that a franchisee was excused from paying licence fees to the franchisor because of the franchisor's breach of interdependent obligations under a different agreement.

Good faith

A court might also decline to apply the most natural, literal interpretation of words in a contract if they are inconsistent with other terms it contains. For example, in *Macquarie International Health Committee Pty Ltd v Sydney Local Health District,*[15] the contract gave the respondent an 'absolute and unfettered discretion' to set a new timetable. Notwithstanding these clear words, the NSW Court of Appeal held that this discretion was still subject to an express, contractual obligation of good faith (even though the obligation of good faith was stated to be 'without limiting the generality of any other provision of this deed'). The court found, however, that there was not, in fact, any breach of a duty to act in utmost good faith.

Cases

- *HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* [2020] NSWCA 296
- James Adam Pty Ltd v Fobeza Pty Ltd [2020] NSWCA
- *Pilbara Iron Ore Pty Ltd v Ammon* [2020] WASCA 92
- *Kay v Playup Australia Pty Ltd* [2020] NSWCA 33
- *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd* [2020] NSWCA 234
- *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District*
- *Wagners Cement Pty Ltd & Anor v Boral Resources (Qld) Pty Limited & Anor* [2020] QCA 289

2: Implied terms

The implied duty of co-operation

In a famous passage, Chief Justice Griffith stated in *Butt v. M'Donald:*[16]

It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.

This passage, which has been endorsed by the High Court,[17] appears to impose a wide, uncertain obligation on contacting parties to have regard to each other's interests. It is therefore frequently relied upon by parties seeking to avoid the literal impact of their contracts, and was considered in three appellate judgments last year.

[13] [2020] NSWCA 33.
[14] [2020] NSWCA 234.
[15] [2020] NSWCA161.
[16] (1896) 7 QLJ 68, at pp 70-71 .
[17] *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* [1979] HCA 51; (1979) 144 CLR 596, which referred to the implied obligation to allow the other party to have the benefit of fundamental obligations under the contract

The Victorian Court of Appeal gave careful consideration to this implied term[18] in *Adaz Nominees Pty Ltd v Castleway Pty Ltd,*[19] and also considered a related implied term that a party will not hinder or prevent the fulfilment of the purpose of the express promises in the contract.[20] The court emphasised that the purpose of the implied term was to ensure that party receives the benefit of its contract, rather than being a wider obligation to act in another party's interests. It also emphasised that the test of 'necessity' does not only explain the existence of terms implied by law but also *'the circumstance which must be 'demonstrated' for them to be operative'*, and that such necessity can be demonstrated if the enjoyment of rights conferred by the contract would otherwise '*be rendered nugatory, worthless, or, perhaps, seriously undermined'.* The court held that the contract did contain such an implied term and that it had been breached, after rejecting an argument based on a term implied in fact.

In reaching its conclusion, the Victorian Court of Appeal mentioned that the implied duty to co-operate is conditioned by reasonableness, following the decision of the Queensland Court of Appeal in *Wellington & ors v Huaxin Energy (Aust) Pty Ltd.*[21] In that case, the Queensland court also considered the leading authorities on the implied term (or rule of construction) of co-operation. The court emphasised that the duty to co-operate is '… *not one to do all things necessary (in effect "to do whatever it takes") to enable the other party to have the benefit of the contract, rather the scope of the implied duty is conditioned by the concept of reasonableness'*. The court found that the relevant conduct pleaded by the appellants went beyond what was reasonably required by the implied term of co-operation. Reliance on the implied term of co-operation was also unsuccessful in *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District.*[22]

Implications of terms by fact

The implication of terms by fact was considered by the Queensland Court of Appeal in *Glencore Coal Queensland Pty Limited v Aurizon Network Pty Ltd* [2020] QCA 182. In that case, parties to a contract purported to serve notices that enabled them to stop paying for segments of a rail network, despite the fact that they were still using them. The trial judge found that, although the contractual requirements for serving a notice were satisfied, serving the notice breached an implied (in fact) obligation of good faith. The Court of Appeal dismissed the appeal, but for different reasons from the trial judge. It held, as a matter of construction, that a notice could only be served if the segments were no longer required. In the alternative, the court would have implied a term (in fact) preventing service of a notice in relation to segments that were still required. Although it was not strictly necessary to consider the question, the court indicated that it would have been reluctant to find there was a breach of an implied duty of good faith.

Cases

- *Adaz Nominees Pty Ltd v Castleway Pty Ltd* [2020] VSCA 201
- *Wellington & Ors v Huaxin Energy (Aust) Pty Ltd (formerly Cuesta Coal Limited) & Anor* [2020] QCA 114
- *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District*
- *Glencore Coal Queensland Pty Limited v Aurizon Network Pty Ltd & Ors; Yarrabee Coal Company Pty Ltd & Ors v Aurizon Network Pty Ltd & Ors* [2020] QCA 182

[18] There is an academic debate whether this obligation is a term implied in law or should more properly be regarded as a rule of construction; a difference described by the High Court in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 at 187 [24] as involving '*taxonomical distinctions which do not necessarily yield practical differences.*
[19] [2020] VSCA 201.
[20] Citing *Peters (WA) Ltd v Petersville Ltd* (2001) 205 CLR 126 at [36].
[21] [2020] QCA 114.
[22] [2020] NSWCA 161.

3: Termination, relief against forfeiture and penalties

Acting in good faith through a termination process

The interaction between termination clauses and express contractual obligations to act in good faith was considered by the Full Court of the Federal Court in *Neptune Hospitality Pty Ltd v Ozmen Entertainment Pty Ltd.*[23] The court held that an obligation to act in good faith would prevent a party from capriciously initiating a termination process. The court also noted the general principle that if one party was responsible for causing the other to breach a contract, then it could not rely on that breach to terminate. However, there were no factual findings that prevented the respondent from exercising its right to terminate the contract. The court in this case also mentioned some other important principles relating to the termination of contracts, including that:

- there is a presumption (which can be ousted with clear language) that common law rights of termination exist alongside any contractual rights; and
- if a clause requires a party to 'remedy a breach' (or risk termination), that can be done by putting matters right 'for the future', even if the past breach could not technically be cured.

Relief against forfeiture and penalties

In *Kay v Playup Australia Pty Ltd,*[24] the NSW Court of Appeal considered a contract provision providing that if the buyer was more than seven days late in paying an instalment, it would lose the benefit of the warranties and restraints in the agreement. The buyer argued that this clause infringed the penalties doctrine or, in the alternative, that it should be entitled to relief against forfeiture. The court agreed that the clause was unenforceable as a penalty, as the consequences of breach were 'out of all proportion' to the seller's legitimate interest in securing payment of each instalment. The court would not, however, have granted relief against forfeiture, as the rights being forfeited were neither proprietary nor possessory.

Cases

- *Neptune Hospitality Pty Ltd v Ozmen Entertainment Pty Ltd* [2020] FCAFC 47
- *Kay v Playup Australia Pty Ltd* [2020] NSWCA 33

4: Damages

Common assumptions in damages disputes

It is well established that damages for breach of contract are usually measured by comparing:

- the actual position of the plaintiff; with
- the position of the plaintiff if the contract had been performed.

What happens, however, if the party that breached the contract could have performed the contract in different ways, with different consequences for the 'innocent' party? In *Berry v CCL Secure Pty Ltd,*[25] the High Court confirmed the 'assumption' that the party in breach would have performed the contract in the manner that minimised its liability for damages. This is, however, only an assumption, and the court held that, on the evidence, the party in breach would not have exercised a contractual right to terminate.

A plaintiff may be concerned about their ability to provide that they would, in fact, have been in a better position if the contract had been performed. One option for a plaintiff in this case may be to seek 'reliance

[23] [2020] FCAFC 47.
[24] [2020] NSWCA 33.
[2525] [2020] HCA 27.

damages' (for losses incurred by a plaintiff in performing a contract), rather than 'expectation damages' (for profits lost as a result of the contract not being performed. In *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd,*[26] the appellant argued that 'reliance damages' were only available if it was not possible to calculate expectation damages (and that, on the facts of the case, expectation damages were zero). The court held, however, that:

- an 'innocent' party may choose to seek reliance damages, rather than expectation damages; and
- if such a choice is made, the party in breach bears the onus of proving that the reliance expenditure would have been wasted.[27]

On the facts, the party in breach failed to discharge that burden.

Damages in the absence of financial harm

A plaintiff may also face difficulties proving loss where it is clear that no financial harm resulted from the breach. In *Leeda Projects Pty Ltd v Zeng,*[28] the plaintiff was unable to occupy premises due to a breach of contract. The Victorian Court of Appeal held that it would be inappropriate to award damages by reference to the rental value of the property (being the usual measure of damages for not being able to occupy real property) because the plaintiff intended using the premises as a private art gallery. But how should damages be measured (if awarded at all)? The court's answer was to award damages in some respects similar to reliance damages: that is, damages calculated by reference to the amount spent by the plaintiff on the property during the period that she was not able to use it (although the court was reluctant to endorse a general principle that a plaintiff unable to use property could always recover wasted expenditure).

The Bellgrove Principle

The usual measure of damages can create injustice where the cost of putting the plaintiff in the same position as if the contract had been performed is disproportionate to the loss caused by the breach. This can be a particular concern in building contracts, where the costs of rectification can be many times larger than the loss of value caused by the breach.[29] This concern is addressed by the 'Bellgrove Principle', which prevents a plaintiff recovering the costs of rectification work if such work would not be a reasonable response to the defect. This principle was applied by the Full Court of the South Australian Supreme Court in *Tincknell v Duthy Homes Pty Ltd*[30] to deny a plaintiff the costs of rectification. In that case, the Full Court also agreed with an argument that the 'prevention principle' (which applies when a defendant's breach of contract was caused by the plaintiff's own breach) does not apply where the plaintiff owner's breach entitled the defendant to an extension of time to complete the work.

Cases

- *Berry v CCL Secure Pty Ltd* [2020] HCA 27
- *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd* [2020] NSWCA 234
- *Leeda Projects Pty Ltd v Zeng* [2020]
- *Tincknell & Anor v Duthy Homes Pty Ltd & Anor; Duthy Home Pty Ltd & Anor v Tincknell & Anor* [2020] SASCFC

[26] [2020] NSWCA 234.
[27] Following the judgment of Chief Justice Mason and Justice Dawson in *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 at 86-90.
[28] [2020] VSCA 192.
[29] And there is obligation on a plaintiff, having been awarded the costs of rectification, to actually carry out the rectification work.
[30] [2020] SASCFC.

CASES

***Adaz Nominees Pty Ltd v Castleway Pty Ltd* [2020] VSCA 201 Principles of construction of commercial contracts – principles in relation to terms implied by law**

In this case, the Victorian Court of Appeal considered the implied term that each party is obliged to do all things necessary to enable the other party to have the benefit of the contract and not hinder or prevent the fulfilment of express promises.

The court held that a substantial charitable donation that significantly impacted the remuneration payable to the other party to a contract was a breach of an implied term to do all things necessary to enable the other party to have the benefit of the contract. This had the effect of seriously undermining the value of the contract.

This case is significant because it highlights the existence and operation of an implied term in commercial contracts to do everything necessary to enable the other party to have the benefit of a contract and not to hinder or prevent the fulfilment of the purpose of express promises made in the contract. Although such an implied term will always be informed by the contract's express terms, it will be implied where deemed necessary to ensure the enjoyment of rights conferred by the contract.

Facts

In 2010, Castleway Pty Ltd entered into a property development and services agreement (the ***PDSA***) with a group of companies associated with the Rado family, known as the 'TPC Group.' The PDSA appointed Castleway as the 'Manager', to provide property and development services to the TPC Group. Castleway's remuneration comprised a 'Service Fee', being a scaled percentage of the TPC Group's profit, and 'Commission', which was based on the number of projects introduced by Castleway to the TPC Group.

The PDSA was terminated on 29 June 2017. Immediately before the termination, Adaz Nominees Pty Ltd (one of the companies comprising the TPC Group) made a charitable donation of $20 million. This resulted in a significant $8 million reduction in the service fee that Castleway would be entitled to in relation to the 2016–17 financial year.

In proceedings before Justice Robson in the Supreme Court of Victoria, Castleway claimed that the making of the donation was the result of a conspiracy to injure Castleway, and a breach of directors' duties.

Justice Robson rejected the breach of duty and conspiracy claims as to the $20 million donation. His Honour considered whether there was an implied term in the PDSA that requires a party to do all things necessary on its part to enable the other party to have the benefit of the contract, and to act reasonably and in good faith so as not to frustrate or prevent the contract's purpose being fulfilled. His Honour also considered, in the alternative, whether such a term could be implied under the principles in the decision of *BP Refinery v Hastings* (1977) 180 CLR 266. In the end, Justice Robson held that, for the purpose of calculating the service fee, the PDSA did not permit expenses to be deducted from the TPC Group's profit that were not incurred in the normal course of business.

The matter was appealed to the Victorian Court of Appeal.

Judgment

Justices Whelan and Riordan, with whom Justice McLeish agreed, allowed the appeal.

In doing so, the majority rejected Justice Robson's finding that the PDSA contained an implied term that only expenses incurred in the course of the TPC Group's 'normal business activities' can be included in calculating the service fee payable to Castleway. There was no ambiguity in the express terms of the PDSA: all tax deductible expenses, including donations, must be taken into account in calculating the

TPC Group's profit. To imply a term confining the relevant expenses to 'normal business activities' would contradict the express terms of the PDSA.

The majority did, however, consider there to be an implied term in the PDSA that a party allow the other party to have the benefit of the agreement. A number of authorities recognising such an implied term were discussed, with the court noting that the principle of 'necessity' was the rationale for such an implied term to be operative. This implied term is deemed necessary where, absent the implication, the enjoyment of the rights conferred by the contract would be nugatory, worthless or seriously undermined, or the contract would be deprived of its substance.

On this basis, the law will imply, in appropriate circumstances, a positive obligation to take action to enable another party to have the benefit of, and a negative covenant not to hinder or prevent, the fulfilment of the purpose of the express promises made in the contract. Such a term will be informed by the contract itself and cannot be used as a basis for imposing something commercially disadvantageous for which the contract does not provide.

In this regard, the court found the $20 million donation by Adaz Nominees to be a breach of this implied term. The donation was unprecedented and extraordinary. It was an action that necessarily had the effect of substantially reducing the TPC Group's profit, thereby preventing Castleway from having the benefit of the PDSA, and hindering the fulfilment of an express promise by depriving Castleway of a significant part of its remuneration. The donation seriously undermined and drastically devalued the benefit for which Castleway had contracted.

It follows that the implied term was breached because the conduct of Adaz Nominees prevented Castleway from deriving the intended benefit from the PDSA. The TPC Group was liable for a breach of contract.

***Berry v CCL Secure Pty Ltd* [2020] HCA 27 Calculation of damages for loss of contract where wrongdoer had a lawful right to terminate – burden of proving whether the contract would have been lawfully terminated**

In this case, the High Court considered the calculation of damages for the loss of the claimant's contract, where that contract would have allowed the respondent to lawfully terminate, in any event.

The court held that the respondent had failed to prove that it would have exercised its contractual termination rights. The respondent had resorted to deception to terminate its contract, creating a natural inference it was not prepared to use its lawful means of termination, and its evidence failed to overcome this inference.

A respondent's right to terminate does not automatically reduce any damages payable for loss of a contract. A court must assess whether the respondent would, in fact, have used its termination rights. Where a respondent terminates a contract by fraud, it can be inferred they were not prepared to use their legal rights, and an evidential burden shifts to them to show otherwise.

Facts

CCL Secure Pty Ltd, then named Securency, manufactured polymer for the production of bank notes. In June 2006, Securency engaged Dr Berry and his company GSC as its sole agent to market polymer to Nigeria, and the parties entered into a written agency agreement. The agreement provided for a commission to Dr Berry and GSC on the sale of polymer.

The agreement was expressed to be valid until 30 June 2008, and to automatically renew for a further term every two years. The agreement could be terminated on 30 days' written notice before the renewal date by either party, or on 60 days' written notice by Securency.

In January 2008, the Nigerian Mint placed orders for polymer with Securency, which did not tell Dr Berry and GSC. Instead, by misleading and deceptive conduct in contravention of section 52 of the *Trade Practices Act 1974* (Cth) (the ***TPA***), Securency misled Dr Berry into terminating the agreement with effect from 31 December 2007. He was unaware of his termination until 2009.

Dr Berry and GSC sued for damages under the TPA. The parties proceeded on the basis that damages were referable to the commissions that would have been payable over the term of the agreement had termination not occurred.

Securency argued it would have exercised its unhindered right to terminate on 60 days' notice, or would have, at least, given 30 days' notice expiring on 30 June 2008. Before the High Court, it was not disputed that the agreement would have been terminated at the latest by Securency in 2010, when it terminated all of its agency agreements worldwide.

In the Federal Court, the trial judge found that the agreement would have continued through 2010 but for Securency's deception. The Full Court overturned this finding and considered, in the absence of evidence of Dr Berry's substantial involvement in Securency's business after February 2008, there was no reason to assume Securency would not have lawfully terminated by 30 June 2008.

Dr Berry and GSC appealed to the High Court.

Judgment

Although this was a s52 case, Justices Bell, Keane and Nettle explained that where a contract is wrongfully terminated, a claimant for damages bears the burden of establishing the objective value of the contract had it not been terminated. If a wrongdoer would have lawfully terminated by another path, then a claimant's lost contractual rights must be valued accordingly.

The majority emphasised that the existence of a right to terminate does not automatically reduce a claimant's damages. The question is whether the wrongdoer *would* have lawfully terminated had there been no unlawful termination, which requires all the facts and circumstances of a case to be considered.

The majority considered that, although a claimant bears the ultimate burden of establishing its case, the practical burden of introducing evidence can shift. In this case, it was established that Securency deliberately deceived Dr Berry. The natural inference from this was that Securency was not willing to use its lawful termination rights, given courts assume people do not resort to fraud without sufficient motivation. The burden shifted to Securency to adduce evidence that it would have lawfully terminated.

The majority held that the Full Court incorrectly reversed the onus of proof by assuming that the reasons for Securency removing Dr Berry as agent by fraud were also strong enough for it to use its contractual termination rights. The majority considered that Securency led no evidence establishing a real possibility that it would have lawfully terminated, and thus failed to discharge its evidential onus.

Furthermore, the majority considered that, on the evidence, it was highly improbable Securency would have terminated without deceiving Dr Berry, including because Dr Berry being aware of his termination would have risked Securency damaging its relationship with the Nigerian Government.

Justices Gageler and Edelman agreed with the majority that Securency failed to discharge its evidential burden. They considered that, on the case as pleaded, it was sufficient for Dr Berry and GSC to point to the agreement's automatic renewal. The evidential burden was then on Securency to establish it would have terminated, but it relied in its pleaded defence on reasons for termination that the trial judge ultimately did not accept on the evidence. On the pleadings, no further factual inquiry was required, and so the Full Court erred by assuming Securency would have terminated, in the absence of evidence from Dr Berry and GSC.

***Glencore Coal Queensland Pty Limited v Aurizon Network Pty Ltd & Ors; Yarrabee Coal Company Pty Ltd & Ors v Aurizon Network Pty Ltd & Ors* [2020] QCA 182 Implied terms – implied term of good faith**

In this case, the Queensland Court of Appeal considered whether the appellants could give notice to vary a deed based on the terms of the contract, the effect of which would result in the appellants not having to pay the agreed fees for the development of rail network infrastructure, while enjoying the benefits for which they bargained.

The court held that the proper construction of the deed did not allow the appellants to give any such notice unless the relevant part of the rail network was no longer necessary for the performance of the entire network. The court held that, if incorrect in its construction of the contractual provisions, the same outcome would be reached by an implied term of business efficacy.

This case is significant, as the trial judge considered whether a duty of good faith is implied into commercial contracts. On appeal, the Court of Appeal found it was unnecessary to consider the potential for an implied term of good faith, given its conclusion regarding the construction of relevant provisions of the contract. This area of law remains unsettled.

Facts

The respondent, Aurizon, operates the Central Queensland Coal Network, which is a rail network for shipping coal from mines to several port facilities on the Queensland coast. The appellants are four coal mining companies that contracted with Aurizon to use the rail network.

At the time the contracts were entered into, the appellants were developing the Wiggins Island Coal Export Terminal as a new port facility for the shipping of their coal. The appellants, along with other coal mining companies not party to these proceedings (each considered a 'customer'), entered into a deed to have Aurizon upgrade the capacity of the rail network to facilitate the transport of the customers' coal to the new terminal. In consideration for Aurizon doing so, the customers agreed to pay Aurizon a fee. The fee amount was different for each customer, as the fee was calculated according to each customer's anticipated use of the upgraded sections of the rail network and that anticipated use differed between customers. The upgrade to the rail network involved six segments. Where a segment served more than one customer, the fee for that segment was apportioned between the customers by consensus, based on the different levels of anticipated use of that segment.

The agreed apportionment to a segment was able to be varied by one customer giving notice under clause 6.1(c) of the deed. The consequence of such notice, if validly given, was that the customer giving it would no longer be liable to contribute towards the upgrade of that segment. The burden of what had been that customer's contribution was to fall on the remaining customers, effectively prejudicing the other customers and exposing Aurizon to a risk that it would not recover the full amount of the fees.

On 30 September 2015, one of the appellants, Glencore Coal Queensland, gave a notice, purportedly under clause 6.1(c), for each of its segments. If valid, the notice would relieve Glencore of its obligations to pay its fee, which at that time amounted to $185 million, and cause the other customers sharing that segment to become liable for that fee amount. The following day, the other appellants served notices, also purportedly under clause 6.1(c), which, if valid, would cause the entirety of the appellants' fee to fall on one customer. Aurizon brought proceedings in the Supreme Court of Queensland, to dispute the validity of those notices.

This case centres on clause 6.1(c) and the validity of the notices. Aurizon made three arguments for the invalidity of the notices:

- First, that on the proper construction of clause 6.1(c), a notice could not be given unless the customer would no longer be using the segment of the rail network to transport its coal to Wiggins Island Coal Export Terminal, which had not been the case with the appellants' notices.

- Second, that by an implied term, a customer could give a notice under clause 6.1(c) only if acting in good faith, and none of the appellants had done so.
- Third, that the notices were given too late.

At first instance, Justice Jackson of the Supreme Court of Queensland rejected Aurizon's first argument but accepted its case on the good faith issue. His Honour did not need to consider the third argument but said that, had it been necessary, he would have rejected Aurizon's argument in relation to the timing of the notices.

Each of these three issues was challenged on appeal. The appellants argued that they were entitled to make the notices on the proper construction of the deed and were not constrained by a duty of good faith. The respondent, Aurizon, argued that it ought to have succeeded in its argument regarding the construction of clause 6.1, or on either of its alternative arguments, at trial.

Judgment

The Queensland Court of Appeal dismissed the appeal, albeit based on different reasons from those of the trial judge. Justice McMurdo (Appeal Justices Fraser and Mullins agreeing) disagreed with the trial judge's conclusion on the construction of clause 6.1(c). Justice McMurdo held that the correct construction of the provision was that a notice could only be given if the distinguishing feature of the customer's segment of the rail network no longer existed. Justice McMurdo stated that clause 6.1(c) was intended to capture a situation where a segment of the rail network was no longer necessary for the functionality of the entire rail network. His Honour's construction was derived from the terms of the deed, the recitals, and the expression in clause 6.1(c) 'cease being a Customer's Segment'.

In the event that His Honour was incorrect in his construction of clause 6.1(c), Justice McMurdo held that he would give the same effect to the clause by an implied term. The term that would be implied is that a notice under clause 6.1(c) could not be given for a segment that remained necessary to facilitate access to the rail network. Justice McMurdo noted that the implied term would be necessary for business efficacy, as it would not make commercial sense if the customers could opt out of contributing to the cost of the delivery of the infrastructure, while enjoying the benefits of the infrastructure. His Honour said that the other conditions of an implied term were also satisfied, those being that:

- the implied term would be reasonable and equitable;
- having regard to the essential purposes of the contract (ie the delivery of the infrastructure that was necessary to meet the needs of the customers in return for the customers contributing to the cost of the delivery), the implied term would be so obvious that it would go without saying;
- the implied term would not contradict any express terms of the contract; and
- the implied term could be clearly expressed.

Due to Justice McMurdo's conclusions regarding the construction of clause 6.1(c) and his views on the implied term, it was unnecessary for His Honour to consider the trial judge's reasoning in relation to any implied term of good faith or fair dealing. However, Justice McMurdo did comment that he 'would have difficulty in accepting that the Customers' exercise of the power under cl 6.1(c) was in breach of any implied term of good faith and fair dealing'. The reason for this being that the trial judge said that 'whether the Customer was acting in good faith and fairly would depend not only upon whether it still needed the Segment, but upon all of the circumstances, and his Honour [the trial judge] may not have identified the circumstances of this case by which the appellants' use of the power was in bad faith or unfair'.

The Court of Appeal concluded that the notices given by the appellants were ineffective. The court dismissed the appeal and upheld the trial judge's orders.

***HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* [2020] NSWCA 296 Contractual construction – uncommercial literal meaning**

In this case, the NSW Court of Appeal considered whether business interruption insurance policies issued by the plaintiffs covered business interruption caused by COVID-19. The relevant policies provided cover for interruption or interference caused by the outbreak of an infectious or contagious disease, but excluded diseases declared 'quarantinable diseases' under the *Quarantine Act 1908* (Cth) and subsequent amendments. Before the period of cover for the policies, the Quarantine Act had been repealed and replaced with the *Biosecurity Act 2015* (Cth), under which certain diseases could be determined 'listed human diseases'.

The court held that the exclusion did not extend to diseases determined to be a 'listed human disease' under the Biosecurity Act. Accordingly, the insurance policies did not exclude defendants' claims for indemnity for business interruption caused by COVID-19.

This case highlights that courts will not always remedy a mistake in the language of a contract, even where the words are not consistent with the apparent commercial intent.

Too, it highlights the difficulty in interpreting contracts when the literal meaning gives rise to an uncommercial outcome.

Facts

The plaintiffs were two insurers who provided business interruption insurance cover to the defendants. The first policy was held by a tourist park for the period 28 February 2020 to 28 February 2021, and the second policy was held by a health store for the period 11 May 2019 to 11 May 2020. Both policies indemnified the insured businesses for business interruption caused by the outbreak of an infectious or contagious disease occurring within a 20-kilometre radius of the respective premises. The policies excluded indemnity for interruption caused by diseases that were 'declared to be quarantinable diseases under the Australian Quarantine Act 1908 and subsequent amendments'.

The Quarantine Act was repealed and replaced on 16 June 2016 with the Biosecurity Act. Under the Quarantine Act, the Governor-General could, by proclamation, declare a disease to be a quarantinable disease. Under the Biosecurity Act, the Commonwealth Director of Human Biosecurity may, by writing, determine that a disease is a listed human disease. On 21 January 2020, the Director of Human Biosecurity determined COVID-19 to be a listed human disease under the Biosecurity Act.

The insured businesses claimed indemnity under thenmklpkolMN
……
/ respective policies for business interruption caused by COVID-19. The insurers denied the claims, and sought declarations from the court that the exclusion clause included diseases 'determined to be listed human diseases under the *Biosecurity Act*'. The insurers argued that the reference to 'and subsequent amendments' should be read to include replacing the Quarantine Act. The insurers also argued that the reference to the Quarantine Act was a mistake because it had been repealed at the time the policies were entered into, and that it was self-evident the parties intended to refer to legislation actually in operation that dealt with quarantinable diseases.

Judgment

The Court of Appeal, sitting with five judges, held that the literal meaning of the reference to the Quarantine Act 'and subsequent amendments' only referred to amendments to the Quarantine Act and did not refer to the Biosecurity Act as a replacement enactment. In three separate judgments, the court found that, even though the policies referred to legislation that had been repealed at the time the policies were entered into, the literal meaning of the exclusion clause could not be corrected to be read to include the Biosecurity Act.

Chief Justice Bathurst and President Bell observed that the insurers' argument the exclusion clause should be read to include the Biosecurity Act required a departure from the actual words of the contract on their ordinary grammatical meaning. Their Honours held that the principles of contractual construction were not flexible enough to permit the insurers to expand the meaning of the exclusion clause to include reference to the Biosecurity Act

Justices Meagher and Ball held that the language of a contract can be corrected if the literal meaning of the language is absurd or clearly mistaken, and the parties' objective intention is clear. In this case, however, even assuming that the parties made a mistake and had not realised the Quarantine Act had been repealed at the time the policies were entered into, the reference to the repealed Quarantine Act was not absurd and did not reveal an objective intention to refer to the Biosecurity Act.

Justice Hammerschlag considered that, in order to correct the meaning of the exclusion clause, the insurers had to show that the literal meaning of the words was absurd. His Honour recognised that while the reference to the repealed Quarantine Act did not make commercial sense and was likely caused by a mistake, it cannot be assumed that it was a mistake. His Honour found that the literal meaning of the clause was not absurd, as the exclusion clause still operated to exclude the 10 diseases that had been declared quarantinable diseases under the Quarantine Act at the time of its repeal.

Accordingly, the court held that COVID-19 was not excluded from the disease benefit clauses, as it was not a disease declared to be a quarantinable disease under the Quarantine Act.

James Adam Pty Ltd v Fobeza Pty Ltd [2020] NSWCA 311 **Construction of contract – mistake – objective intentions of parties – rectification**

In this case, the NSW Court of Appeal of the Supreme Court considered whether a purchaser of land in rural NSW had validly rescinded its contract of sale.

The court dismissed the appeal from the vendor and held that, while the terms of the contract were absurd, that absurdity could not be rectified by construction, as it was not self-evident how the mistake should be fixed.

This case reinforces the basic principles underlying the 'rectification by interpretation' of contracts. When attempting to rectify a mistake, the courts will first attempt to correct it through construction. This requires a finding that the literal meaning is absurd or inconsistent and that it is clear what the objective intention is taken to have been. However, while it may be clear that the literal meaning of a contract is absurd, it is difficult to correct a mistake if it is not self-evident how the mistake should be fixed. This is a high bar and may result in one party being able to rescind the contract despite the fact that the contract only contains a small error.

Facts

James Adam (vendor) and Fobeza (purchaser) entered into a contract for the sale of rural land that was to be subdivided. 'Lot 101' in the proposed subdivision was to be excluded from the sale. Annexed to the contract was a sketch plan of the proposed subdivision, and clause 39 of the contract stated that completion of the contract was conditional 'upon the registration of the plan of subdivision in accordance with the sketch plan'. The sketch plan incorrectly stated the area of Lot 101 as 2001m^2 when it was actually 2205m^2. The correct area was included on the plan of the subdivision when it was registered.

James Adam notified Fobeza of the subdivision following registration in accordance with the contract. Fobeza then rescinded the contract in accordance with clause 41, which granted the purchaser the right to rescind if the area of Lot 101 'in the plan of the subdivision as registered is shown on the plan as being 2100 sq. m or more'. The vendor denied the validity of the rescission and served a notice to complete. The purchaser brought proceedings seeking a declaration that it had validly rescinded and the return of its deposit. The vendor sought a declaration that the contract be constructed to read '2310' instead of '2100' in clause 41, as this was what the parties clearly meant. At first instance, the primary judge held that the purchaser had validly rescinded. The vendor appealed.

Judgment

The court considered three issues.

- The first issue was whether the literal construction of clause 41 was absurd:
  - The court held that the construction of clause 41 was absurd or inconsistent, and this satisfied the first requirement that would allow for the contract to be corrected through construction.
  - The absurdity or inconsistency flowed from the fact that the sketch plan identified both a precise physical area by dimensions and bearings and an area of 2001m2, the latter being used to derive the area in clause 41 on which the purchaser's right of rescission depended, despite the fact that it was incorrect.
  - The vendor's obligation was to register the plan of subdivision in accordance with the sketch plan, but if the vendor complied with this obligation, as it did in this case, the purchaser would inevitably have a right to rescind. There had been a 'clear mistake', as the literal meaning of clause 41 was 'something opposed to reason'. There was no rational basis for imputing such an intention to the parties.
- The second issue was whether, if so, the intended meaning of clause 41 was self-evident:
  - As the first condition necessary for the correction of the contract by construction was satisfied, the court had to consider whether a different construction of clause 41 could be upheld.

- On this issue, the court held that even where it is clear there is a mistake in the language of a contract, it cannot be corrected by construction if it is unclear how the absurdity or inconsistency should be resolved.
- Unlike cases where there is a binary choice between constructions, and it is self-evident which is to be taken to have been the parties' objective intention, here there were a number of possible constructions of clause 41, none of which was self-evident. There must be a high level of certainty that certain words should be inserted into a contract and that threshold was not satisfied in this case. Therefore, the contract could not be rectified by construction and the rescission by the purchaser was upheld.
- The vendor argued that the reference to '2100 sq m' in clause 41 was from the incorrect area of 2001m^2 found in the sketch plan and in clause 39, to which 5% had been added. The vendor argued that, therefore, clause 41 should be read as '2310' on the basis that this figure was approximately 5% greater than 2205, which was the correct area of the land.
- However, the court held that it was not clear this is what the parties meant and that there was no way of determining what the actual value should be. None of the suggested figures were self-evident. The parties had agreed upon a contractual right of rescission and that right must be capable of being articulated with precision.

- The third issue was the distinction between rectification by construction and rectification in equity:
  - President Bell and Justice Macfarlan held that the use of the terms 'rectification by construction' and 'rectification in equity' were confusing and that courts should refrain from using this terminology. The principle behind the concept of 'rectification by construction' is that a contract can be construed, in very limited circumstances, in a way that involves recognition that the drafting of the contract has miscarried. However, this principle does not need to be elevated to the status of doctrine, as that would undermine the importance of courts adhering to the language that parties have chosen to use in setting out the nature and scope of their contractual relations.
  - Justice Leeming disagreed, and discussed the difference between the doctrines of 'rectification by construction' and 'rectification in equity'. He stated that both correct a demonstrable mistake in a written instrument. However, they remain conceptually distinct. Ordinarily, rectification by construction through ascertainment of the true meaning of a document should be used before a claim for rectification in equity. Rectification in equity turns upon establishing that the document does not reflect the parties' actual intentions, viewed objectively from their words or actions. Rectification by construction does not rely upon evidence of the parties' intentions. Instead, it is necessary to conclude that the literal meaning is absurd or inconsistent and that it is clear what the objective intention is to be taken to have been.

***Kay v Playup Australia Pty Ltd* [2020] NSWCA 33 Dependent and independent contractual obligations – whether 'clear words' are required to find a relation of independency between obligations– penalty doctrine extends beyond payment of a stipulated sum of money to deprivation of contractual rights; relief against forfeiture – whether doctrine confined to proprietary or possessory rights, as distinct from mere contractual rights**

In this case, the New South Wales Court of Appeal considered:

(i) whether there was a relation of independency between contractual obligations in the absence of 'clear words' to that effect;

(ii) whether the doctrine of relief against forfeiture could be available in circumstances where the subject of the forfeiture was a mere contractual right, as opposed to a proprietary or possessory right; and

(iii) whether the penalty doctrine extends beyond the payment of a stipulated sum of money to the deprivation of contractual rights.

The decision is significant because it:

(i) rejects the notion that 'clear words' are required in order to make a finding of independency between contractual obligations, instead emphasising that the intention of the parties is paramount;

(ii) extends the penalty doctrine to accrued contractual rights, despite the doctrine's 'standard application' being to the payment of a stipulated sum of money; and

(iii) upholds the traditional view of the doctrine of relief against forfeiture, being that it is confined to proprietary or possessory rights and does not extend to mere contractual rights.

Facts

Mr Kay and Playup entered into a contract for the sale and purchase of Mr Kay's 100% shareholding in a company for $1.6 million. Of that sum, $1 million was payable on exchange, with the remaining $600,000 to be paid in 24 monthly instalments following the 22 May 2018 'completion date' stipulated in the contract.

The seller gave a number of warranties regarding the state of the company and agreed to restraints on operating a competing business for three years. Clause 4.3(b) of the contract stipulated that if the buyer was more than seven days late making any of the monthly instalment payments, the warranties and restraints were immediately 'void ab initio' and the total amount of the remaining monthly instalments became payable immediately.

Neither the buyer nor the seller performed any of their completion obligations on the 22 May 2018 'completion date'. The following events then occurred:

- 7 June 2018: the seller performed all but two of his completion obligations. From this date onwards, the parties acted as if completion had occurred.
- 22 June 2018: the first monthly instalment fell due, being one month after the 22 May 2018 'completion date' stipulated in the contract.
- 16 July 2018: the seller performed one of his remaining completion obligations, which was to calculate an adjustment amount that was due to be paid upon completion of the transaction. (The seller's other remaining obligation was to provide the buyer with updated lists of liabilities and debtors, which he did not ultimately comply with.)
- 8 August 2018: as the buyer had not made any monthly instalment payments, the seller served a creditor's statutory demand for the $600,000 total of the monthly instalments minus the adjustment amount.

- 13 August 2018: the buyer began making instalment payments to the seller, but did not pay the full amount of the statutory demand.
- 10 September 2018: the seller commenced winding up proceedings against the buyer.

In order to procure dismissal of the winding up proceedings, the buyer paid the outstanding balance of the monthly instalments. The buyer then commenced proceedings for declaratory relief that the restraints and warranties were not void, contending that:

- Its obligation to pay the monthly instalments was suspended until the seller had agreed to the adjustment amount. As that did not occur until 16 July 2018, its obligation to pay the monthly instalments commenced on 16 August 2018. Given that this was three days after it made its first instalment payment, clause 4.3(b) was not engaged.
- Clause 4.3(b) was void as a penalty.
- Alternatively, if clause 4.3(b) was not a penalty, it should be granted relief against forfeiture.

The buyer succeeded at first instance, with the primary judge agreeing (albeit via different reasoning) that clause 4.3(b) had not been engaged. Had it been necessary, the primary judge would have rejected alternative arguments that clause 4.3(b) was an unenforceable penalty or that relief against forfeiture should be granted. The seller appealed the primary judge's principal finding, with the buyer cross-appealing the judge's findings on the alternative arguments.

Judgment

In deciding the appeal on the primary judge's principal finding, the court had to determine whether the buyer's obligation to pay the monthly instalments was independent of the seller's obligations to calculate the adjustment amount and provide the updated lists of liabilities and debtors. In doing so, the court held that, on its proper construction, the contract dealt with two distinct concepts that were not to be conflated:

- the 22 May 2018 'completion date' – the date on which the parties were obliged to complete the transaction; and
- 'completion' – the word used by the contract to describe the actual event of completion.

The fact that the parties failed to complete on 22 May 2018 meant that they were in default of their contractual obligations – this did not alter the meaning of the term 'completion date'.

The buyer's obligation to pay the monthly instalments was linked to the 'completion date', whereas the relevant obligations of the seller were linked to the concept of 'completion'. As such, there was no relation of interdependency between the two sets of obligations, and the buyer's obligation to make the monthly instalments had not been suspended by the seller's failure to discharge some of his completion obligations.

Although clause 4.3(b) would have been engaged by the buyer's failure to make the instalment payments on time, the court unanimously held that the clause was an unenforceable penalty as to the warranties and restraints.

Justice Brereton further observed that if clause 4.3(b) was not a penalty, relief against forfeiture would not be available, given that no proprietary or possessory rights had been forfeited. Justices Macfarlan and Simpson declined to express a view on relief against forfeiture, as it was not necessary to resolve the appeal.

Independency

The court held that, on proper construction of the contract, the buyer's obligation to pay the monthly instalments was not dependent upon the seller's obligation to calculate an adjustment amount, nor the seller's obligation to deliver updated lists of liabilities and debtors.

The court's ruling is significant in that it rejects the notion that 'clear words' are required in order to make a finding of independency, instead emphasising that the intention of the parties is paramount.

The court identified a number of factors that indicated the parties did not intend the two sets of obligations to be dependent upon one another:

- Where interdependency was intended in relation to other obligations in the contract, the contract stipulated this expressly.
- The adjustment amount was to be paid on the actual date of completion, and was not connected to, or paid out of, the monthly instalments (which were triggered by and ran from the 'completion date' stipulated in the contract, not the actual date of completion).
- The doctrine of merger tends against the notion that post-completion obligations would be dependent on obligations to be performed upon completion.
- The seller's obligation to calculate an adjustment amount and ensure that it was paid was not a condition precedent to completion. The seller's failure to tender the adjustment payment might have entitled the buyer to refuse to complete, but the buyer did not do so.

Consequently, the court held that while the buyer was entitled to retain the objectively correct adjustment amount out of the monthly instalments, it was not entitled to treat the obligation to pay the monthly instalments as suspended until the seller had agreed to the adjustment amount.

The court also observed that seller's obligation to provide updated lists of liabilities and debtors was not necessary to give content to any of the seller warranties, as any new liabilities that would have been disclosed in the updated lists were already covered by an indemnity provided by the seller. The court therefore held that there was no relevant connection between the seller's obligation to provide the updated lists and the buyer's obligation to pay the monthly instalments.

Penalty

The court held that clause 4.3(b) was a penalty insofar as it operated to avoid the seller warranties and restraints, and was thus unenforceable. This finding is significant in that it extends the penalty doctrine to accrued contractual rights, despite the doctrine's 'standard application' being to the payment of a stipulated sum of money.

Although the parties did not dispute that the penalty doctrine could apply to accrued contractual rights, the court nevertheless noted that restricting the doctrine to its standard application would 'elevate form over substance'.

When determining that clause 4.3(b) , in substance, a penalty, the court identified two key factors:

- Restraints and warranties are a fundamental protection of the goodwill of the subject business, so as to ensure that the buyer actually gains the benefit of the business. Avoidance of the restraints and warranties is a severe consequence that is 'out of all proportion' to the seller's legitimate interest in securing the payment of each monthly instalment.
- The clause operated indiscriminately – it applied not only in the case of a total failure to pay, but also in the event of a delay of one day after the grace period in paying the very last monthly instalment.

The court also noted that while clause 4.3(b) was the product of robust negotiation between two properly advised parties of comparable bargaining power, this did not alter the fact the clause was penal in character.

Relief against forfeiture

Justice Brereton further held that if the court was wrong and clause 4.3(b) was not a penalty, relief against forfeiture would not be available as an alternative. This finding is significant in that it upholds the

traditional view of the doctrine, being that it is confined to proprietary or possessory rights and does not extend to mere contractual rights.

Justice Brereton made the following observations in response to Justice Edelman's suggestion in *Mineralogy Pty Ltd v Sino Iron Pty Ltd (No 6)*[31] that the scope of the doctrine could be broadened beyond proprietary rights:

- Although there have been cases that suggested or assumed that relief against forfeiture might be available for a contractual license, these can be distinguished from the facts at hand. The present case deals with a mere contractual or personal right, whereas the licensee in each of the precedent cases held not merely a contractual license but also an equitable interest in land. None of the precedent cases extended the doctrine to a bare licence – relief was only granted where there was some estate or interest in land that equity would protect.
- It is true that a foundational rationale for the doctrine – that it is a constraint on the unconscionable exercise of contractual power – is not tied to the existence of a proprietary right. However, the precedent cases are against the application of the doctrine to merely contractual rights, as distinct from proprietary or possessory rights. Although this may mean that the court's inquiry then becomes what is a 'proprietary' right for the relevant purpose, it is nevertheless an identifiable discriminator of the scope of the doctrine.
- Expanding the scope of the doctrine to all contractual rights and leaving control of its use to judicial discretion would 'offend against the well-recognised need to ensure that equity does not undermine the certainty of the law'.

Although Justice Brereton held that relief against forfeiture was not available for the above reasons, he noted that had the doctrine been applicable, he would have granted relief on discretionary grounds.

[31] [2015] FCA 825.

***Leeda Projects Pty Ltd v Zeng* [2020] VSCA 192 Damages for loss of use and enjoyment of asset — method of valuing loss**

In this case, the Victorian Court of Appeal considered whether a landowner can be compensated by a contractor for loss of use and enjoyment of their property as a result of a breach of contract, and, if so, the method of valuing such an intangible loss.

The court held that a person could be compensated for the loss of use and enjoyment of property as a result of a breach of contract. The court held that, in this case, the loss was not to be measured by the lost rental value during the period when the property could not be used, but instead by the wasted expenditure related to the property the landowner incurred during the period they could not use or enjoy the property.

This case confirms that a person may recover substantial damages as a result of a breach of contract that causes a party to lose the use of their property, but that there is no universal rule for valuing a person's loss of use and enjoyment of their property, and each claim for loss must be approached on a case-by-case basis. This highlights the uncertainty in the liability of a party who breaches a contract that causes an intangible loss to the other party.

Facts

Ms Zeng and her husband engaged Leeda Projects Pty Ltd to perform building works to fit out their apartment in Melbourne as a private art gallery with a separate two-bedroom residential component. Ms Zeng and her husband did not intend to lease the property, and had access to a number of other residences in Melbourne.

Leeda Projects breached an implied term of the contract to complete the works by 3 December 2014. It did not complete the work until 2 June 2017, which was a delay of 130 weeks in which Ms Zeng and her husband could not use the property. During this period, Ms Zeng incurred a number of expenses attributable to her ownership of the property, including owners corporation fees, council rates and utility charges.

VCAT (Victorian Civil and Administrative Tribunal) at first instance awarded only nominal damages of $100 to Ms Zeng for the breach of contract, on the basis that she suffered no substantial loss, as she had not intended to live at the property or make it available for lease. On appeal to the Victorian Supreme Court, a judge awarded Ms Zeng substantial damages of $357,500 (plus interest) as damages for her loss of use of the property during the delay period. The figure of $357,500 was calculated as the property's rental value of $2750 per week for the period of the delay of 130 weeks. The judge rejected Ms Zeng's claim for wasted expenditure of $283,802.17 comprising council rates, owners corporation fees and utility charges incurred during the delay period, on the basis that these expenditures would have been incurred regardless of the breach of contract.

Judgment

Justice McLeish, with whom Justice Tate and Justice Kaye agreed, held that Ms Zeng could be compensated for her loss of use of the property during the delay period, but that the appropriate measure of damages was the wasted expenditure of $283,802.17, rather than the rental value of $357,500. Justice Kaye and Justice McLeish both reviewed a number of previous cases, and held that a landowner can be compensated for their inability to use their land as a result of a breach of contract, despite the loss being intangible with no obvious measure of the loss.

Justice Kaye considered that the appropriate measure of valuing the loss of use of land is the 'holding cost' of the land during the period in which a person cannot use the property. Justice Tate and Justice McLeish declined to embrace a universal principle, and held that the loss must be valued on a case-by-case basis according to the particular facts of each case. Justice McLeish observed that residential land stands in a special position, as it used not just for profit or pleasure alone but to meet a necessity. Justice

McLeish explained that, given the multiple purposes for which land may be owned, it is inappropriate to measure the loss of use and enjoyment according to one particular standard for all cases.

In this case, the court unanimously held that Ms Zeng's loss of use of her apartment during the 130-week delay period could not be the rental value of the property because she did not intend to lease the property. Instead, the court held that the appropriate measure of Ms Zeng's loss was the expenses she was willing to incur to enable her expected use of the apartment as a private art gallery for her enjoyment and occasional residence. On this basis, the court valued Ms Zeng's loss of her ability to use her apartment due to the breach of contract as her wasted expenditures of owners corporation fees, council rates and utility charges during the delay period.

***Macquarie International Health Clinic Pty Ltd v Sydney Local Health District* [2020] NSWCA 161**

Default of obligations – breach of contract – right to terminate

In this case, the NSW Court of Appeal of the Supreme Court considered whether the termination of an agreement to build a hospital was valid.

The court held that various notices of default and notices of termination were validly issued and that the termination of the agreement was valid.

This case reinforces the basic principles underlying the construction and interpretation of contracts. When interpreting a contract, the court will always look at the reasonable meaning of the text and the surrounding commercial circumstances. When considering whether a party to a contract has been given a reasonable time to remedy a default, the actual time given to remedy the default will be considered.

Facts

In 1996, Macquarie International Health Clinic Pty Ltd entered into an agreement with Sydney Local Health District to construct and lease a private hospital and related facilities. The agreement gave SLHD the power to grant an extension of time for particular activities involved in the development if there was a delay. Macquarie had several obligations under the agreement, including to lodge all required applications with the council in relation to the development.

Plans for the hospital were lodged with a development application and a building application in 1997. In 2000, SLHD tried to terminate the agreement, a move the Court of Appeal found to be invalid in 2010. Macquarie regained possession of the site in 2015. In 2015, SLHD proposed an extension of time due to the delay and warned Macquarie not to propose a different development than it had been contracted to build. SLHD told Macquarie that it was obliged to make a further application for a construction certificate. Without SLHD's knowledge, Macquarie submitted a different proposal than agreed.

In February 2017, SLHD served notices of default on Macquarie regarding the agreement. In August 2017, SLHD terminated the agreement. Macquarie challenged the validity of the notices and the termination. At first instance, the court held that the notices and termination of the agreement were valid. Macquarie appealed this decision to the Court of Appeal.

Judgment

The court considered three issues.

- The first issue was whether Macquarie was in default of its obligations under the agreement at the time the notices of default were issued;
    - This required an examination of what the agreement required and was a matter of construction. It is well established that the meaning of the terms of a commercial contract are to be determined by what a reasonable businessperson would have understood those terms to mean. It requires consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purposes to be secured by the contract;
    - Under the agreement, it was an essential term that Macquarie was required to lodge a building application that was consistent with the initial development plans;
    - Macquarie initially lodged a building application that had expired. Due to the delays in construction between 1998 and 2016, it became necessary to lodge a fresh application to gain further approval. The agreement allowed SLHD to extend its timetable and to provide for a new date by which Macquarie had to obtain a construction certificate. The court held that the discretion was subject to the good faith obligation set out in the agreement, notwithstanding that the power was granted to SLHD in its 'absolute and unfettered discretion'. SLHD used this discretion in good faith as there is nothing unreasonable about requiring Macquarie to comply with a milestone as an essential term;

  - Macquarie then lodged a building application that differed from the Development Application and did not propose to build the hospital in the way that was originally agreed upon. This was a breach of the agreement and meant Macquarie was in default of its obligations.

- The second issue was whether non-compliance with the notice of default meant SLHD lost the right to terminate the agreement;
  - Section 129 of the *Conveyancing Act 1919* (NSW) requires that notices of default that will terminate a lease specify the particular breach that needs to be rectified and what needs to be done to remedy the breach, as well as provide a reasonable time within which to remedy the default;
  - In this case, the notice of default specified which clause of the agreement had been breached and the required remedy, which was that a construction certificate needed to be lodged by a certain date. Macquarie was aware of what was required to go on this certificate. The court held that this was sufficiently specific;
  - The notice of default only has to state that the tenant has a reasonable time to remedy the default but there is no need to specify a particular amount of time. If the notice does state a time period, this reference can be disregarded if it is not a reasonable time. Termination can only take place after an objectively reasonable time to remedy the default has elapsed;
  - In this case, while SLHD had only given Macquarie 28 days to remedy its breach in the notice of default, in reality it did not terminate the agreement for six months after the notice of default was sent. The original 28 days could be disregarded and did not affect the validity of the notices. The court determined that SLHD did give Macquarie a reasonable time to remedy its default;
  - As the notices were valid, SLHD therefore validly terminated the agreement based on non-compliance with the notices.
- The third issue was whether there was a breach of the duty of cooperation.
  - Macquarie argued that SLHD was breaching its implied duty of cooperation by trying to terminate the agreement as it was bona fide seeking to exercise its rights under the contract;
  - The court held that there was no breach of the implied duty to cooperate at the date of termination, as SLHD did not have to consent to the modification of the development plans as that was within its contractual rights.
- An application for leave to appeal to the High Court was dismissed.

***Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd* [2020] NSWCA 234 Damages for wasted expenditure – interdependent contracts – force majeure**

In this case, the NSW Court of Appeal considered whether the loss of a head franchise agreement constituted a force majeure event, whether poor business performance could negate a claim for wasted expenditure, and whether franchise and licence agreements were interdependent such that a party's breach of one agreement prevented its enforcement of the other.

The court held that the loss of the head franchise agreement was not outside the franchiser's reasonable power and control and therefore was not a force majeure event. The court found that poor business performance in the first two years of operation did not establish that expenditure would have been wasted had the contract been fully performed and did not defeat a claim for wasted expenditure. Finally, the court held that the franchise and licence agreements in question were interdependent because they were clearly inextricably linked. The appellant's breach of the franchise agreement excused the respondent from meeting its obligations under the licence agreement.

This case is significant because it examines a typical force majeure clause formulation and damages for wasted expenditure in a common commercial context. Further, it shows that in the doctrine of interdependent contracts, references to another contract, the annexing of documents, interconnected obligations and even the content of recitals can serve as indicators of interdependence.

Facts

On 9 July 2015, the first respondent, Ivanman Pty Ltd, contracted to purchase a Meet Fresh franchise business selling traditional Taiwanese desserts, beverages and snacks operating at premises in Burwood. The owner of the Meet Fresh intellectual property, Easy Way Station Co Ltd, granted the right to grant franchises to carry on the business in Australia to Meetfresh Australia Pty Ltd, which in turn granted that right to the appellant, Meetfresh Franchising Pty Ltd. Ivanman obtained from the appellant a franchise agreement and a licence to conduct the business at the premises. Both were due to expire in late 2017.

In January 2016, the appellant required Ivanman to undertake a new fit out of the premises. The appellant represented to Ivanman that:

- it would not renew the franchise and licence agreements unless the fit out was completed; and
- the agreements would not be affected by any termination of the head franchise agreement held by the appellant.

Ivanman completed the fit out at a cost of $119,580 and the parties entered into the second franchise agreement for a five-year term.

The first and second franchising agreements contained a force majeure clause, which provided that the appellant was not liable for loss caused by events beyond the appellant's reasonable control.

On 10 January 2017, Ivanman received notice from Easy Way that Meetfresh Australia, and, as a consequence, its sub-franchisees, were no longer entitled to use the Meet Fresh intellectual property. On 27 July 2017, the appellant advised Ivanman that it could no longer use the Meet Fresh intellectual property. The appellant did not offer a renewal or extension of the licence and, on 10 November 2017, served on Ivanman a notice of termination of any 'holding over' licence or franchise agreement.

Ivanman surrendered possession of the premises to the appellant and brought proceedings against the appellant in the District Court. The primary judge found that:

- the first franchise agreement contained the implied terms alleged by Ivanman: in particular, the warranty that Ivanman would be authorised by Easy Way to conduct the franchise throughout the term of the franchise agreement;
- those terms had been breached;

- the force majeure clause did not exempt the appellant from liability because the appellant was in a position of control and power; and
- Ivanman was entitled to recover the amount it spent refitting the premises, on the basis it was wasted expenditure made in the expectation of the benefit of the second franchise agreement for its full term.

Judgment

The issues on appeal were:

- whether the force majeure clause in the franchise agreements excused the appellant's breaches of contract;
- the quantum of damages; and
- regarding the cross claim, whether the franchise and licence agreements were interdependent such that the appellant was precluded from recovering amounts due under the licence agreement when it did not fulfil its obligations under the franchise agreements.

Force majeure

The court found that rather than qualifying the scope of the appellant's obligation, the force majeure clause operated as an exception to it. This was a matter of construction. The obligations were set out in a broad and relevantly unqualified fashion, and the force majeure clause was included among incidental clauses at the end of the contract. Thus, the appellant bore the onus of demonstrating the applicability of the force majeure clause. The appellant failed to do so because of an absence of evidence to establish how the force majeure event (the loss of the appellant's right to use the intellectual property) came about and the appellant's lack of control to prevent that event.

Damages for wasted expenditure

The court made it plain that Ivanman's claim was not for loss of profits amounting to expectation damages but, rather, for what has been described as wasted expenditure or reliance damages. *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; [1991] HCA 54 established that for such a claim:

- the law assumes a plaintiff would at least have recovered their expenditure had the contract been fully performed;
- the onus of proof rests on the defendant to establish that the reliance expenditure would have been wasted even if the contract had been performed (in this case, over the course of the first and second franchise agreements); and
- the court may award reliance damages where the evidence does not establish any loss of profits.

To establish that the expenditure would have been wasted in any case, the appellant sought to rely on the poor performance of the business over the first two years of its operation. The court found this was insufficient to discharge the appellant's onus. Ivanman's decision to seek a second franchise agreement indicated it had reasonably anticipated it would cover its costs or make profits in the future. Expert evidence also projected Ivanman would earn substantial profits from the beginning of the second franchise term.

The appellant submitted that Ivanman did not incur the costs of the refit as a result of the appellant's breach of contract, but because it was obliged under the franchise agreement to refurbish the premises at its own expense when the appellant reasonably required it to do so. The court held the appellant had not established its request was reasonable for the purposes of the clause, most notably because only five months of the first two-year term had expired.

Interdependent contracts

By its cross claim, the appellant sought $41,575 for licence fees and other monies payable under the licence agreement after its expiry in August 2017. The appellant alleged the agreement had continued on a month-to-month basis. The court agreed with the primary judge that the franchise and licence agreements were interdependent. The court held that the agreements were inextricably linked because:

- the premises were licenced to Ivanman for the sole purpose of carrying on the franchise business there;
- the franchise agreements provided that Ivanman was to licence the premises from the appellant and conduct the business from the premises; and
- the licence agreement referred to the franchise agreement in its recitals and annexed the appellant's lease under which the permitted use was specified to be 'Taiwanese dessert house.'

The appellant's failure to comply with the franchise agreements therefore excused Ivanman from meeting its obligations under the licence agreement.

Other than a small reduction in damages owing to a concession given by Ivanman, the primary judgment was upheld.

***Neptune Hospitality Pty Ltd v Ozmen Entertainment Pty Ltd* [2020] FCAFC 47 Whether parties are entitled to issue breach notices if they have breached good faith obligations – whether breaches are possible to be remedied by 'putting things right for the future'**

In this case, the Full Court of the Federal Court considered whether a party to a joint venture was precluded from issuing a notice to remedy breaches because of its (alleged) own bad faith conduct or where it was contended that it was impossible for the joint venturer to remedy the breaches in the notice.

The court rejected the allegation of bad faith. It further held parties may validly issue breach notices in good faith even if they are a repudiating party, as long as the issuer does not act capriciously. The court also held that the correct approach for remedying past breaches is to consider whether the party in breach can 'put things right for the future', rather than whether the party can nullify the effect of past breaches.

This case examines the operation of termination clauses where there are (alleged) breaches of contract by both parties and where one party's contract is repudiatory.

Facts

This case involved a joint venture between the appellant, Neptune, and Kanki Sea Tourism to carry on a hospitality business onboard the vessel 'Seadeck' owned by the respondent, Ozmen. The two parties were to be equally responsible for the daily operations of the business.

Under the joint venture agreement, Neptune guaranteed Kanki an annual net profit of $5 million subject to the vessel being approved to carry 800 passengers. Additionally, Neptune promised to provide Kanki with financial information, to operate the joint venture in good faith and to avoid making unilateral decisions.

The relationship with the parties broke down following the failure to approve the vessel for the specified capacity and Neptune's failure to provide Kanki with the requisite financial information. Kanki served a breach notice on Neptune, requiring certain breaches to be remedied in 14 days, including Neptune's failure to provide financial information required under the contract and the return of the vessel to Sydney after Neptune had unilaterally moved the vessel.

Kanki launched proceedings in the Federal Court to wind up the joint venture and contended that the unremedied breaches entitled them to termination of the joint venture agreement. At first instance, the primary judge concluded the breaches were established and granted relief.

Neptune appealed the decision and contended that:

- Kanki was disentitled from issuing a breach notice, as Kanki itself failed to comply with the agreement by not fully cooperating or acting in the best interests of the business;
- that the breaches identified by Kanki were not sufficiently serious to justify issuing a breach notice, and later a notice of termination; and
- the breach notice was invalid, as Neptune was not capable of remedying the breaches within the time period provided by Kanki.

Judgment

Deciding the appeal, Justices McKerracher, Markovic and Anastassiou found that, on the substantive issues, The Trial Judge was correct and the appeal was dismissed, notwithstanding minor grounds of the appeal being upheld.

The right to terminate and obligations of good faith

The court found, however, that Neptune had not proved the allegations of bad faith against Kanki on the basis of issuing the breach notice. The primary judge also correctly found that Neptune had either repudiated the contract or breached the contract's terms. However, the court noted that the parties' rights to issue notices are limited where they act 'capriciously.'

In making this finding, the court identified that merely issuing a default or breach notice is not demonstrative of bad faith. The court relied on the fact that the rights to terminate following a breach notice in the contract, in addition to the obligation to act in good faith, indicated the parties contemplated circumstances where breach notices could be issued in good faith.

The court also identified that there is no general law principle that prevents repudiating parties from exercising their rights to terminate, such as where both parties are found to have repudiated the contract or one party is a victim of fraud, citing the decision of Justice Perram in *Allphones Retail Pty Ltd v Hoy Mobile Pty Ltd* (2009) 178 FCR 57 [56]. The court also confirmed the well-established principle that a contractual regime for terminating (following a breach) does not, in the absence of clear words, oust common law rights to terminate.

Remedying breaches by 'putting things right for the future'

Having found that Kanki could validly issue the breach notice and that Neptune did make serious breaches of innominate terms of the contract, the Full Court rejected Neptune's argument that it was impossible to remedy past failures to provide financial information within a specified window as the period for delivery had lapsed.

The court found that the correct test to be applied for determining when past breaches were technically no longer able to be cured was to assess whether the party in breach can 'put things right for the future', citing the House of Lords decision in *L Schuler AG v Wickman Machine Tool Sales Limited* [1974] AC 235.

The court identified that Neptune was able to provide the historical financial information upon receiving the breach notice and substantially comply with provision of future information, provide the details of the catering contract and return the ship to Sydney within fourteen days, as required by the breach notice. Neptune failed to provide the balance of the financial information to Kanki and refused to return the ship to Sydney within the prescribed window, both of which the court found to be possible. The court identified that, even where the breach notice was not effective to bring about automatic termination, Neptune's omissions allowed Kanki to treat the contract as at an end when Neptune failed to comply with any of its requirements.

***Pilbara Iron Ore Pty Ltd v Ammon* [2020] WASCA 92 Interpretation of express terms of commercial joint venture contract – implied terms of fact**

In this case, the Western Australian Court of Appeal considered the process of interpreting a commercial joint venture agreement, where a key term of the contract was undefined and one of the parties alleged a number of implied terms to give meaning to that key term.

The court held that before a court can find implied terms of a contract, it must first consider the proper interpretation of the express terms of the contract. In this case, the court found the alleged implied terms were not part of the contract following the proper interpretation of the express terms of the contract in light of the commercial context of the joint venture agreement.

This case reinforces that courts are reluctant to imply terms into a contract, and will only do so where those terms are certain and necessary. Accordingly, parties to a contract should not expect to rely on implied terms of a contract and attention to detail must be given to the express terms. The case also highlights the importance of the commercial context of a contract, and that courts place great importance on ensuring that ambiguous terms of a commercial contract are given a businesslike meaning.

Facts

Derek Ammon was the holder of an exploration licence under the *Mining Act 1978* (WA). Pilbara and Ammon entered into a joint venture agreement to explore and, if feasible, mine minerals covered by the exploration licence.

The joint venture was structured so that Pilbara would earn an 80% interest in the joint venture if it completed a feasibility study by a specified time. If it did not, it would be deemed to have withdrawn from the joint venture. The joint venture did not specify the content of the feasibility study.

Pilbara completed a feasibility study and lodged a transfer for an 80% interest in the joint venture with the Western Australia Department of Industry and Resources. Ammon argued that the report produced by Pilbara did not meet the requirements of the joint venture agreement and was therefore deemed to have withdrawn from the joint venture. Specifically, Ammon claimed that the joint venture agreement contained four implied terms that the feasibility study be:

- accurate enough to allow Ammon to raise project finance;
- independently verified;
- reliable; and
- include any reserve statement required to enable Ammon to seek to raise project finance.

Judgment

The court, in a unanimous joint decision, interpreted the joint venture agreement with an approach to give a 'businesslike interpretation' of the terms of the contract in order to be 'consistent with the commercial object of the agreement'. The court noted that 'feasibility study' was not defined in the contract, but that it had to be understood in the commercial context of the joint venture agreement. In particular, the feasibility study altered both the parties' economic positions because, once the feasibility study was completed, the parties had a choice of whether or not to proceed with the joint venture.

The court found the feasibility study had to be a report for which the nature, scope and analysis would meet the minimum requirements of financiers to the mining industry to allow the parties to raise project finance. In effect, the court gave a technical, rather than ordinary, meaning to the term 'feasibility study'.

In light of this interpretation of the express terms of the contract, the court found that the alleged implied terms were not a part of the contract. It considered the contract operated efficiently without the alleged implied terms when considered against the technical meaning of 'feasibility study'. Further, the court held that the alleged implied terms were too imprecise and uncertain to 'go without saying'.

The court considered that it was not in a position to determine whether Pilbara's report met the requirements of a feasibility study. Accordingly, it remitted the matter to the mining warden to determine the matter without reference to the alleged implied terms.

An application for special leave to appeal to the High Court in this matter was dismissed with costs.

[*Tincknell & Anor v Duthy Homes Pty Ltd & Anor; Duthy Home Pty Ltd & Anor v Tincknell & Anor* [2020] SASCFC](#) The *Bellgrove* principle and the prevention principle – seeking damages from defective and delayed building work

In this case, the Full Court of the Supreme Court of South Australia considered whether damages sought for defects in a residential construction were reasonable, in line with the '*Bellgrove* principle'.[32] The court also considered how the prevention principle[33] applied in a claim for damages for delay in relation to the same residential construction.

The court held that the damages sought for the building defects were unreasonable. It also held that the prevention principle will not operate where a building contract confers on a builder a right to a time extension for delays caused by the owner's breach.

This case provides a detailed examination of the 'Bellgrove principle' and the potential development of this principle in South Australia. It also reinforces the limited circumstances where the prevention principle will aid parties to a building contract.

Facts

Beth and Michael Tincknell entered into a contract with Duthy to construct a three-level residential property in Mannum, South Australia. The contract price was $2.3 million and the property was to be completed by September 2011.

In December 2012, Duthy informed the Tincknells that the building works had reached practical completion and issued the final progress claim. The Tincknells responded by claiming that the property had not reached practical completion and issued Duthy with a list of defects. Following the receipt of this list, Duthy undertook certain remedial works and then issued a revised notice of practical completion. In response, the Tincknells served Duthy with a notice outlining that, due to its failure to remedy the defects, they would engage others to perform that remedial work.

Duthy initiated proceedings against the Tincknells for the recovery of the final progress claim of $271,434.65 and the return of the bank guarantee of $115,000. The Tincknells denied liability and pursued a cross-claim. They argued that Duthy had breached the building contract for allegedly defective work. The Tincknells also sought damages for the delay in completing the work. They argued that Duthy's delay in completing the property was in breach of clause 12.2 of the contract and had prevented them from selling their current residence, moving into the new property and reinvesting the profits from this sale.

At first instance, the primary judge found that there were certain minor defects and ordered Duthy to rectify certain defective work. Because of these defects, Her Honour found that Duthy was entitled to a reduced final payment of $173,049.41. The primary judge dismissed the Tincknells' claim for damages for delay, pain and suffering. This claim was dismissed, as it was unclear what the respective contributions of the Tincknells and Duthy were to the delays, and because the primary judge considered that the Tincknells had decided not to move into their new property for reasons unrelated to the delay. The Tincknells appealed to the South Australian Supreme Court.

Judgment

The Tincknells raised a number of issues on appeal, but the main questions were:

- whether the primary judge had correctly applied the '*Bellgrove* principle' in her assessment of damages for the defects; and
- whether the prevention principle applied to bar the Tincknells' claims for damages for delay, pain and suffering.

[32] *Bellgrove v Eldridge* (1954) 90 CLR 613.
[33] *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 69 LGR 1.

Defects

The two most significant defects that the Tincknells raised on appeal concerned waterproofing and termite protection. In dealing with each, the court outlined the '*Bellgrove* principle': where building work is defective and remedial work is required to ensure conformity with the contract, the measure of damages will be the cost of the remedial work. However, the remedial works must be a reasonable response to fix the defect. The court also outlined the case of *Stone v Chappel*,[34] where the Full Court of the South Australian Supreme Court suggested that if a defendant's conduct in relation to a building contract was 'intentional, sharp, cynical, profit-driven or opportunistic', then it would be more difficult to demonstrate that the remedial work would be unreasonable.[35]

The court found that the principle from *Stone v Chappel* had not been expressly adopted in other Australian authorities.[36] Nonetheless, the court applied it to the waterproofing defect, finding that the evidence did not establish that Duthy's actions were 'intentional, sharp, cynical, profit-driven or opportunistic'.[37] More importantly, the court also found that the primary judge did not err in her finding that for both the waterproofing and termite protection defects, the costs of the proposed remedial works would not be reasonable.

Regarding the waterproofing, the court found that that the evidence did not go beyond establishing that there was a slight risk of water damage during the economic life of the building. Therefore, it held that the Tincknells' claim for damages of $198,913 would not be reasonable to rectify this defect and the court dismissed this ground of appeal.

Similarly, the court found that while termite protection had not been applied to the full extent required by the contract, there was a low risk of a termite problem for the building. This was because there was no evidence of termite presence, the building was made of concrete and steel and a 10-year manufacturer warranty for the termite protection had been provided. Considering these factors, the court held that the Tincknells' claim for damages of $245,993 was not reasonable to remedy the termite protection defect and it also dismissed this ground of appeal.

Delay

Regarding the claim for damages for delay, the Tincknells argued that the primary judge had 'tacitly' applied the prevention principle in dismissing their claim. This principle specifies that where a party to a contract has prevented the other party from fulfilling its contractual obligations, the preventing party cannot then insist on the strict performance of the contract by the other party. Relying on *Built Environs Pty Ltd v Tali Engineering Pty Ltd*,[38] the Tincknells argued that the prevention principle cannot apply where a building contract contains a provision that gives the builder a right to an extension of time for delays caused by the owner's breach of contract. As clause 12.3 of the contract gave Duthy such a right, the Tincknells argued that the prevention principle could not apply.

The court did not find any tacit application of the prevention principle by the primary judge, but it did accept the correctness of *Built Environs* and held that, due to clause 12.3 of the contract, the prevention principle had no application here. As such, it found Duthy to be prima facie liable for losses arising from the delay in practical completion of the works. However, like the primary judge, the court also dismissed this ground. It found that for reasons unrelated to the delay, the Tincknells would not, in any case, have moved into the house at that time and sold their current residence. The court held that the chain of causation leading to the Tincknells' loss was broken by their own choice not to move into the property when it was complete.

[34] (2017) 128 SASR 165.
[35] Ibid [253].
[36] *Tincknell & Anor v Duthy Homes Pty Ltd & Anor; Duthy Home Pty Ltd & Anor v Tincknell & Anor* [2020] SASCFC, [93].
[37] Ibid [94].
[38] [2013] SASC 84.

***Wagners Cement Pty Ltd & Anor v Boral Resources (Qld) Pty Limited & Anor* [2020] QCA 289**

Contractual interpretation – the doctrines of waiver and election between inconsistent rights

In this case, the Queensland Court of Appeal considered the validity of notices issued by the purchaser of a cement supply contract showing that it could buy cement elsewhere at a lower price (and requesting the supplier match that price). This in turn required consideration of whether the contract had been validly suspended by the supplier, in which case the purchaser was not liable for payment under take-or-pay provisions.

The court held that upon the proper construction of the contract, the contract was not validly suspended at the time the purchaser issued its notice (but was later suspended when a subsequent notice, which did fulfil the contractual requirements, was submitted).

This case is a reminder of the need to ensure compliance with requirements for notices in contracts. It also affirms that the doctrine of election between inconsistent rights does not apply to parties who rely only on the absence of a legal right in another party.

Facts

In a contract dated 8 December 2011, Wagners Cement Pty Ltd sold cement to Boral Resources (Qld) Pty Ltd. Under the contract, Boral was required to purchase a minimum quantity of cement from Wagners annually. If Wagners could not supply all of the cement required by Boral, the contract allowed this quantity to be adjusted downwards. If Boral did not purchase the required minimum quantity, clause 8 of the contract required Wagners to notify Boral of the shortfall and for Boral to pay for that shortfall in order to meet its take-or-pay obligations for the year.

Boral was required to pay a set price for the cement, subject to:

- annual adjustments (eg CPI) during the term of the contract; and
- a contractual price adjustment mechanism in clause 7, which enabled Boral to pay a lower price if it issued a 'pricing notice' to Wagners. This notice required Boral to provide market pricing evidence (ie a bona fide offer or quotation by another supplier) that the price payable for a particular cement product was lower than the price in the contract. Upon issuing this notice, Wagners could then either reduce the cost of the product to that lower competing price or elect to suspend its supply of cement (as well as Boral's obligations to pay) if it disputed the notice. If the supply was suspended, Boral had to resume purchasing from Wagners if it ceased to be able to (or chose not to) procure the cement from a third party supplier at the price specified in the notice.

The timeline of events unfolded as follows:

- 1 March 2019: Boral gave Wagners a pricing notice under clause 7, which included a quotation from Cement Australia for the supply of cement at a specified price over an eight-month period (from 1 May to 31 December 2019) that was lower than the price in the contract.
- 18 March 2019: Wagners gave notice to Boral of its suspension of supply.
- 26 March 2019: Boral and Cement Australia entered into a contract under which Cement Australia agreed to supply cement to Boral over a nine-month period based on the price specified in Boral's pricing notice to Wagners. Boral then proceeded to purchase those products from Cement Australia and acquired further products from two other suppliers.
- 1 April 2019: Boral issued Wagners with a second pricing notice attaching the agreement with Cement Australia, providing for a set price over a nine-month period (from 1 April to 31 December 2019).
- 1 May 2019: Wagners again gave notice to Boral of its suspension of supply.
- 2 October 2019: Boral sent a third pricing notice to Wagners attaching a further contract with Cement Australia under which the parties had agreed to an extension of the original agreement at a new price. Wagners disputed the validity of this notice but did not issue any notice purporting to suspend supply.

Justice Bond, the trial judge, held:

- Boral's March pricing notice was invalid because the quotation did not suggest that the lower price was applicable as at the date of the notice (as was required by clause 7). However, Wagners' March suspension notice was a valid notice electing to suspend supply from 18 March 2019 for six months (ending 18 September 2019); and
- Boral's April pricing notice was also invalid because Boral had no contractual power to issue a pricing notice during a suspension period. This also meant that Wagners' May suspension notice was invalid. However, Boral's October pricing notice was effective (as the suspension period has expired in September) and because Wagners had not elected to suspend supply, the price in the new agreement with Cement Australia would apply under the contract with Wagners and Boral.

Justice Bond accepted Boral's argument that even if the March pricing notice was invalid, the March suspension notice was valid and Wagners had waived any invalidity in the pricing notice. Put another way, Wagners should be treated as having made an election between inconsistent rights, and it could not be permitted to submit that its own notice was ineffective.

As the suspension notice was effective in suspending supply (and Boral's obligations to pay), this meant Boral could avoid paying the penalties associated with any yearly shortfalls under the take-or-pay provisions in clause 8 of the contract and Wagners, in turn, would have been unable to recover those costs.

Judgment

On appeal, Justices Fraser, Philippides and Crow:

- affirmed the trial judge's conclusion that Boral's March pricing notice did not satisfy the contractual requirements under clause 7. The court considered that an essential attribute of the pricing notice was to provide a price at which the cement 'can be purchased' when the notice is given that is lower than the price prevailing under the contract. The court identified that this is consistent with the volatility in market prices catered for by clause 7. The quotation provided by Cement Australia only commenced the offer for supply from May 2019 and hence was not an immediate or 'current' market price at the relevant time. Accordingly, the court found that the pricing notice did not satisfy the contractual requirements under clause 7;
- overturned the trial's judge's conclusion that the March suspension notice was effective to suspend supply. Instead, the court held that the notice was invalid. Boral argued that Wagners was precluded by an election between inconsistent contractual rights from denying that Boral's notice was effective as a pricing notice under clause 7. On this point, the court discussed the elements of and relevant authorities regarding the doctrines of estoppel, waiver and election. Ultimately, the court rejected Boral's argument and found there was no scope for the application of the doctrine of election between inconsistent contractual rights or for the doctrine of waiver. Wagners had no right to waive non-conformity of the pricing notice with the definition of a such a notice in clause 7;
- overturned the trial judge's conclusion that Boral's April pricing notice and Wagners' May suspension notice were ineffective. Instead, the court held that given the March suspension notice was invalid and did not suspend supply, Boral did not serve its April pricing notice during a suspension period. In addition, the pricing notice set out Cement Australia's offer to supply from 1 April 2019 onwards (so it satisfied the requirements that rendered the March pricing notice ineffective). Hence, the April pricing notice and subsequent May suspension notice were deemed valid; and
- agreed with the trial judge's conclusion that Boral's October pricing notice was valid, but for a different reason. While the court found that Wagners' suspension notice created a suspension period from 1 May 2019, the court had to consider whether a pricing notice is ineffective if issued during a suspension period (which the trial judge had decided in the affirmative). In this regard, the court interpreted clause 7 as giving Boral a right to give successive pricing notices 'at any time and from time to time' when it suited, which included during a suspension period.

Interestingly, on the issue of the efficacy of Wagners' March suspension notice, the court considered that Boral may have had a viable claim based on estoppel or a variation of the contract. If Wagners represented that an ineffective notice was effective as a pricing notice under clause 7 and Boral acted

upon that representation to its detriment, Wagners may have been precluded from disputing the validity of the pricing notice. Alternatively, the court considered that the parties may have been found to have varied the contract by treating an ineffective notice as though it was effective as a pricing notice when issued. However, neither of these claims were advanced by Boral.

***Wellington & Ors v Huaxin Energy (Aust) Pty Ltd (formerly Cuesta Coal Limited) & Anor* [2020] QCA 114 Implied terms; implied duty of cooperation**

In this case, the Queensland Court of Appeal considered the scope of the implied duty of cooperation and, specifically, whether this duty required the respondents to conduct certain exploratory works in relation to an exploration permit for coal.

The court held that there was no breach of contract, as the appellants failed to establish that the implied duty of cooperation required the respondents to conduct further exploratory work to enable the appellants to have the benefit of the contract.

This case is significant as it provides guidance on the scope of the implied duty of cooperation. While it is widely accepted that an implied duty of cooperation is in every contract, the court reinforced that this duty is qualified by the concept of 'reasonableness'. That is, the parties are only required to do what is reasonably necessary to enable the other party to have the benefit of the contract.

Facts

On or around 1 July 2009, Mr Wellington applied for an exploration permit for coal (***EPC***) over 45,000 hectares of land in the Galilee Basin, Queensland. The permit (referred to as EPC 1802) was granted in October 2010. Between applying for the permit and it being granted, the appellants, Mr Wellington, Mrs Wellington and Mr Fox, contracted with the respondents, Blackwood Exploration Pty Ltd and Blackwood Coal Pty Ltd (which was later replaced by Cuesta Coal Limited), for the sale of EPC 1802.

While there were various iterations of the contract of sale, under the final contract the respondents made a number of payments to the appellants, including a $50,000 cash component and two tranches of payments. The dispute in this case arose in relation to the third tranche of payment, which was payable conditional on EPC 1802 receiving a 'Measured Mineral Resource', which is a particular grade that refers to the level of confidence in the quality and quantity of an area's mineral resources.

Between January 2012 and October 2013, the second respondent conducted exploratory work that enabled an 'Inferred Mineral Resource' to be estimated on EPC 1802. Relevantly, an Inferred Mineral Resource means that the quality and quantity of the mineral resource had been estimated based on limited geographical evidence and sampling. Regarding this grading system, an Inferred Mineral Resource suggests that, with further exploration, the resource could be upgraded to an Indicated Mineral Resource or a Measured Mineral Resource.

After the Inferred Mineral Resource on EPC 1802 was announced, no further exploratory work was conducted to further upgrade the mineral resource and no further payment was made.

The appellants commenced proceedings, claiming that the second respondent should have conducted further exploratory work, such as drilling or sampling, to upgrade the mineral resource to a Measured Mineral Resource.

At first instance

The appellants pleaded that there was an implied duty on the first respondent to cooperate so that the appellants could have obtained the benefit of the upgrade, which was the third tranche of payments. Specifically, the appellants alleged the implication of an implied duty of cooperation as a matter of law and an implied exploration term as a matter of business efficacy. The appellants contended that the content of these implied terms required the second respondent to conduct further exploratory work and that its failure to do so constituted a breach of the final contract. The respondents denied these contentions.

At trial, the primary judge held that the implied duty to cooperate was not made out, and His Honour also rejected the existence of the alleged implied exploration term. The appellants appealed His Honour's decision.

Judgment

Implied duty to cooperate

On appeal, the court upheld the primary judge's conclusion that the appellants failed to establish that the implied duty to cooperate required the respondents to conduct exploratory work as particularised by the appellants. The court confirmed that the source of the implied duty to cooperate does not require one to do all things necessary but, rather, is conditioned on what is considered reasonable.

The court noted a number of difficulties with the appellants' characterisation of the implied duty of cooperation, including that:

- first, the appellants did not qualify the scope of the implied duty by what was *reasonably* necessary by way of exploration work to ascertain a higher mineral resource grade; and
- second, the appellants' particularised what was necessary under the implied duty as the '21 hole exploration program', which was a certain program proposed by the appellants' expert. The court held that this proposal was based on the benefit of hindsight, instead of considering what was necessary at the date of the final agreement.

Due to these issues, the court refused to imply the duty to cooperate into the final contract, even though the appellants' conditional entitlement to the third tranche of payment was valueless without further exploration work. With regard to this perceived loss of opportunity, the court remarked:

> It is important to bear in mind that, notwithstanding that necessity is the source of the implication of the *Secured Income* duty to cooperate, the rationale being to prevent the enjoyment of the rights conferred by the contract being rendered nugatory, worthless, or seriously undermined, as stated in *Australis*: "It would be, however, fallacious to elide the purpose of implying such terms with the terms themselves. To do so would replace necessity with desirability."

Implied exploration term

The appellants argued that the implied exploration term required that the respondents undertake the 21-hole exploration program as a matter of business efficacy. As the appellants were at risk that the respondents would not conduct the work necessary to have EPC 1802 graded as a Measured Mineral Resource, the appellants pleaded that the term was so obvious that it went without saying. The court rejected this contention and held that had the parties wanted to include a term concerning exploration, they had a number of solutions to choose from including, but not limited to, the 21-hole exploration program.

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