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Contract law update

Welcome to the 10th edition of the Allens *Contract Law Update*.

Contract law is at the core of almost every lawyer's practice. Historically, however, law firm publications tended to focus on particular industries or particular areas of practice. Contract law – perhaps because it is so all-pervasive – was overlooked. We began the Allens *Contract Law Update* to fill that gap, and to ensure that both our clients and our lawyers were kept abreast of the latest developments in contract law.

We prepare the *Contract Law Update* by reviewing every contract law decision handed down by Australian appellate courts during the year and preparing summaries of those most relevant to lawyers in commercial practice. At the end of each year, after reviewing those summaries, we prepare editorial sections outlining the significance of those cases for the development or understanding of contract law.

We would, of course, welcome your feedback on the form of the *Contract Law Update*. Its 10th anniversary, coming during the firm's 200th anniversary, is a good time to reflect on how we can best keep you on top of developments in contract law. In the meantime, we hope you enjoy reading this update.

Interpretation

The difficulties in drafting and interpreting contracts have been illustrated by many cases during 2021.

There were surprisingly few appellate judgments during 2021 that considered the impact of Covid19 on the performance of contractual obligations. One such case, however, was the decision of the NSW Court of Appeal in *Dyco Hotels Pty Ltd & Ors v Laundy Hotels (Quarry) Pty Ltd*[1]. Although a frustration argument was not pursued on appeal, the court did need to consider the impact of Covid on a hotel vendor's obligation to '*carry on the Business in the usual and ordinary course as regards its nature, scope and manner*' until completion of the sale. Did the vendor comply with this obligation when public health orders restricted the operation of the hotel to being a small takeaway business? That is, to what extent should changes in the regulatory context be considered when deciding what is the 'usual and ordinary course'? There was no simple answer: although one appellate judge thought the vendor did comply with this obligation (having regard to what was usual during the period of the relevant public health orders), the majority disagreed. Although the vendor would not be liable for damages for breaching this obligation (given that compliance would have been illegal), the non-compliance meant that the vendor was required to refund the deposit and could not compel the purchaser to complete the contract.

In recent years, there has been much judicial consideration of the implied term of co-operation and related implied terms. Sometimes, however, parties include express obligations to a similar effect. For example, in *Rankin Investments (Qld) Pty Ltd & Anor v CMC Property Pty Ltd & Ors*[2] the Queensland Court of Appeal considered obligations *'to take all necessary steps … to give full effect to the provisions of this Agreement*' and '*not to do or cause or permit to be done any act, matter or thing whereby in any way the continued enjoyment of the Land for the purposes of the Joint Venture might be jeopardised*'. The case is a good example of courts giving provisions of this type a broad, commercial application.

The failure of a party to comply with a time period specified in the contract is a frequent source of contract disputes. If the failure is a breach of contract, there may be a dispute as to whether the other party is entitled to terminate. Subject to the terms of the contract, the mere failure to comply with a time period does not usually entitle the other party to terminate. This is sometimes described as time not 'being of the essence'. Conversely, the failure of a party to exercise a right within the time specified – such as not exercising an option within the specified time – generally will prevent the power being exercised; in this context, time is 'of the essence'.

[1] [2021] NSWCA 332.
[2] [2021] QCA 156.

In *Chevron (TAPL) Pty Ltd v Pilbara Iron Company (Services) Pty Ltd*[3] the Western Australian Court of Appeal considered whether a party could initiate a price review, despite failing to do so within the contractually specified time. Consistently with other cases concerning the exercise of rights, rather than the performance of obligations, the court found that time was 'of the essence'. The reasoning of the court suggests, however, that the right/obligation distinction will not necessarily be determinative of disputes as to whether time is of the essence.

When heads of agreement envision a future, more detailed contract being entered into, then the heads of agreement itself could be characterised as:

- a non-binding agreement;
- a binding agreement to negotiate a more detailed contract (but not otherwise binding); or
- a binding agreement that will continue to operate even if a more detailed agreement cannot be agreed.

The heads of agreement itself should make this clear. If not, then disputes will arise such as that considered by the NSW Court of Appeal in *AMA Group Limited v ASSK Investments Pty Limited*[4]. In that case, the trial judge found that the heads of agreement was itself a binding agreement to sell a business, and that a condition precedent of board approval was only a condition precedent to the entry into a more detailed agreement (and was not a condition precedent to the sale of the business). The Court of Appeal disagreed, and held that the heads of agreement was only a binding agreement to try to negotiate a sale agreement, and that board approval was a condition precedent to any sale proceeding. These issues could have been resolved by clearer drafting, although there is always the possibility that the ambiguity in the agreement reflected a compromise between the parties when negotiating the heads of agreement.

Definitions are an essential tool in most commercial agreements. In theory, a definition should work so that each occurrence of the defined term can be replaced by its definition. In practice, a literal, complete insertion of the defined term often does not work. One method for dealing with this problem is to state that definitions apply 'unless the context otherwise requires'. This can, of course, lead to disputes as to whether the context does otherwise require – one such dispute came before the Queensland Court of Appeal in *CS Energy Limited v GPS Power Pty Limited & Ors*[5]. The court's judgment shows a willingness to take a commercial approach in determining when the context 'otherwise required'. Of course, in an ideal world parties would only use definitions where the entire definition can be inserted in place of each use of the defined term.

The use of surrounding circumstances when interpreting contracts continues to be an issue considered by appellate courts in Australia. In *Ulladulla Creative Images Pty Ltd v Tibbles*[6] the NSW Court of Appeal confirmed the basic principles that, when interpreting a contract:

- a court may sometimes have regard to objective surrounding circumstances known to the parties that assist in identifying the purpose or object of the transaction; but
- a court may not have regard to the parties' statements reflecting their actual intentions and expectations.

In so far as the trial judge did have regard to evidence of a party's subjective intention in interpreting the agreement, this would have been an error. However, the court ultimately came to the same conclusion about how the contract should properly be interpreted.

The court also noted that evidence of matters known to the parties could be considered for the purpose of ascertaining the subject matter of the contract. The court therefore had regard to such evidence in

[3] [2021] WASCA 193.
[4] [2021] NSWCA 45.
[5] [2021] QCA 194.
[6] [2021] NSWCA 289.

determining what was '*the claim made against the Company's insurers*' (the proceeds of which were to be shared among the parties).

***Dyco Hotels Pty Ltd & Ors v Laundy Hotels (Quarry) Pty Ltd* [2021] NSWCA 332 – contractual interpretation – termination of contract – COVID-19 – interpretation of clause in sale of hotel and associated business requiring business to be conducted in its '… usual and ordinary course… until completion' – whether an implied term to the effect that the obligation limited to the extent permitted by law – severance of contractual terms**

In this case, the New South Wales Court of Appeal considered whether a vendor's termination of a contract for the sale of a hotel and associated business, which was affected by the COVID-19 pandemic, was valid.

The court (2:1) held that termination was invalid, on the basis that the vendor had defaulted on a provision requiring it to maintain the hotel business in its 'usual and ordinary course' up until completion, and therefore the vendor was not entitled to call on the purchasers to complete.

This case is an important example of the application of a standard clause in a sale of business agreement to the consequences of the COVID-19 pandemic.

Facts

On 31 January 2020 Dyco Hotels and Quarryman Hotel Operations (***Quarryman***) entered into an agreement with Laundy Hotels to purchase a hotel and associated business known as the 'Quarryman's Hotel' in Pyrmont, Sydney. Relevantly, the contract provided that:

- settlement of the sale and purchase of the business assets would take place on 30 March 2020, and the settlement of the purchase of the property, licence and gaming machine entitlements take place on 31 March 2020;
- if completion did not take place on the relevant completion date, a party that was ready willing and able to complete and not in default, could serve the other party with a notice requiring completion not less than 10 business days after the date of that notice and making time of the essence (a ***notice to complete***); and
- until completion, Laundy was required to, '… carry on the Business in the usual and ordinary course as regards its nature, scope and manner…' (***clause 50.1***).

On 23 March 2020 the Public Health (COVID-19 Places of Social Gathering) Order 2020 came into effect. The order, which was made under the *Public Health Act 2010* (NSW), relevantly provided that pubs must not be open to the public except for the purpose of selling food and beverages for persons to consume off the premises (the ***First Public Health Order***). On 14 May 2020 a substitute order was made: the Public Health (COVID-19 Restrictions on Gatherings and Movement) Order (No 2) 2020. The order relaxed the restrictions somewhat by providing that, in addition to selling food and drink for consumption off the premises, licensed premises could sell food or drink to not more than 10 persons at any time but only if liquor were sold ancillary to food service.

From 30 March 2020 up to the date on which the contract was terminated, the Quarryman Hotel sold craft beer from a takeaway window but food was only offered on select days because demand was minimal. Evidence adduced at trial showed that alcohol sales for April were a little over $11,000 and food sales a little over $1,000, while in May alcohol sales were just over $7,000 and food sales were around $750. During this period, the hotel managed to retain only six staff, compared with the 20 staff that were employed before the institution of the First Public Health Order.

On 25 March 2020 solicitors for Dyco and Quarryman wrote to Laundy, asserting Laundy was not ready, willing and able to complete the contract because of an ongoing breach of clause 50.1. On 27 March 2020 Laundy's lawyers responded, stating that compliance with that obligation was rendered illegal due to

the First Public Health Order and that the provision was severable under the terms of the contract. Following further correspondence, on 28 April 2020, Laundy served on Dyco and Quarryman a notice to complete. The same day, Dyco and Quarryman commenced proceedings seeking a declaration that the contract was frustrated; a declaration that Laundy was not entitled to issue a notice to complete; or, alternatively, a declaration that while the First Public Health Order was in force and the business was not trading as a going concern, Laundy was not ready, willing and able to complete the contract and not entitled to issue a notice to complete.

At first instance, the court held that: the contract was not frustrated; Laundy had validly served a notice to complete; Laundy had not defaulted on its obligation to carry on the business in the usual and ordinary course; and Laundy was entitled to terminate the contract due to the repudiation of Dyco and Quarryman. Dyco and Quarryman appealed this decision to the Court of Appeal

Judgment

The court considered three main issues.

- **The first issue was the construction of Clause 50.1 and the obligation that the business was to be carried on '… in the usual course of things' until completion.**
    - The court affirmed that the clause was to be construed by what a reasonable person would understand it to mean. This means consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or object to be served by the contract.
    - According to the majority of Chief Justice Bathurst and Justice Brereton, the primary judge erred in construing the clause as obliging Laundy to only carry out the business in the usual and ordinary course as regards its nature, scope and manner, *so far as it was permitted to do so according to law*.
    - Factors that, in the opinion of the majority, supported the conclusion such a restriction was not within the objective intention of the parties included:
        - warranties in the contract that emphasised the importance of the licence permitting the trading activities to be carried on;
        - the lease provided an express obligation for the tenant to keep the premises open during the usual hours of trading; and
        - that under the contract, risk passed from the vendor to the purchasers on completion, not on exchange.
    - For similar factors as listed above, the majority also rejected assertions that a contractual term to the effect that the business needed only to be carried on to the extent permitted by law should be implied into the contract.
    - By contrast, Justice Basten, in dissent, considered that it was reasonable to infer that it was within the parties' expectations the business was one that would be carried on lawfully, and therefore would have rejected the appeal on this ground.
- **The second issue was whether clause 50.1 should be severed.**
    - The severability provision in the contract set out that where any court considered any part of the contract was void, voidable, illegal or otherwise unenforceable, or the contract itself would be rendered as such unless the relevant part of the contract were severed, then that part would be severed.
    - Although no formal application was made for clause 50.1 to be severed, the majority indicated they would have rejected such an application, for the following reasons:
        - the public health orders only rendered clause 50.1 unenforceable on a temporary basis. The severability provision did not operate to effect temporary severances;

        - Clause 50.1 was indivisible, as it formed an essential part of the property and hotel business to be transferred to Dyco and Quarryman as a going concern; and
        - the contract allocated to the vendors the risk of supervening illegality before completion.
- **The third issue was whether Laundy was entitled to issue the notice to complete and terminate the contract.**
    - The primary judge's conclusion that the contract was not frustrated was not challenged by either party.
    - The question therefore remained whether Laundy was entitled to demand completion in circumstances where it was, in the opinion of the majority, unable to deliver possession of the hotel as a going concern.
    - The majority ruled that as Laundy was unable to convey the hotel licence and other assets as a going concern at the time of the notice to complete and termination (due to the effect of the First Public Health Order), the notice to complete and resulting termination was invalid. This was both because Laundy:
        - could not be considered to be ready, willing and able, a necessary pre-condition for serving a notice to complete at common law; and
        - Laundy was in default of Clause 50.1. Not being in 'default' was an express pre-condition to notices to complete.
    - In the words of Justice Brereton, 'the Vendors were in no position to convey that subject matter to the Purchasers: they could convey only a modified, reduced, and scaled-down version.'
    - Chief Justice Bathurst also rejected Laundy's alternative argument that Dyco and Quarryman had repudiated the contract by asserting that the contract was frustrated. His Honour reasoned that Dyco and Quarryman, while incorrect on the issue of frustration, were correct in asserting that they were not required to complete the contract due to Laundy not being ready, willing and able.
    - Justice Basten, in dissent, opined that clause 50.1 was not a condition precedent, either at common law or as defined under the contract. As such, his Honour considered Laundy to have been entitled to have issued the notice to complete and to terminate the contract.

***Rankin Investments (Qld) Pty Ltd & Anor v CMC Property Pty Ltd & Ors* [221] QCA 156 – construction – obligation not to jeopardise enjoyment of the land for the purposes of a joint venture; construction – whether obligation to take all necessary steps to give effect to an agreement also prevents acts inconsistent with that agreement**

In this case, the Queensland Court of Appeal considered an appeal from a finding of the Queensland Supreme Court that the appellants had breached terms of a joint venture agreement, entitling their fellow 'joint venturer' to buy them out. The terms found to have been breached in the lower court involved obligations upon the parties not to jeopardise 'the continued enjoyment of the land for the purpose of the Joint Venture' and to take all necessary steps to give effect to the agreement.

The court dismissed the appeal, and held that the appellants had breached their obligations to take all necessary steps to give effect to the agreement and/or to ensure continued enjoyment of the land for the joint venture. The notice of event of default, allowing buyout under the agreement, was therefore valid.

The decision shows the willingness of courts to enforce clauses that are expressly intended to facilitate the conduct of commercial endeavours.

***The decision also highlights that obligations to take all necessary steps to effect an agreement will usually, and perhaps predictably, prevent conduct contrary to that agreement*.**

Facts

The parties to the dispute were in a joint venture to redevelop the Big Pineapple on the Sunshine Coast. This joint venture took the form of a company, Big Pineapple Corporation Pty Ltd, as trustee for the Big Pineapple Unit Trust (***BPUT***). The joint venture comprised:

- the appellants, Mr Rankin and his company, Rankin Investments (Qld) Pty Ltd, with a 50% interest in the BPUT (***Rankin Interests***); and
- the first respondent, CMC, which was controlled by Mr Kendall and Mr Ahern and collectively also had a 50% interest in BPUT (***Kendall Interests***, collectively with Rankin Interests, the ***joint venturers***).

Under their agreement, the joint venturers agreed that Big Pineapple Corporation would 'lease, licence, and/or develop and/or ultimately dispose of the Property or do any other act, matter or thing as the Board may determine from time to time' (clause 2.1). The board was therefore made responsible for the project on behalf of the joint venture and its decisions would bind the joint venture (clause 5.4)

The Big Pineapple Corporation resolved to advance the development and engage several entities to assist, including for finance, contract tender, securing tenants and surveying. However, in late December 2019, Mr Rankin emailed these entities unilaterally and, in varying terms, told them to cease work indefinitely. The email thread forwarded by Mr Rankin revealed a dispute between the joint venturers to these third parties.

Subsequently, in early 2020, following the contractual process, a notice of event of default was served on the Rankin Interests. It triggered provisions within the joint venture agreement that entitled the Kendall Interests to buyout the Rankin Interests.

At first instance, the appellants, the Rankin Interests, challenged the validity of the notice of event default, arguing that they had not breached the joint venture agreement. This primarily turned on alleged breaches of clauses 6.1(a) and 6.1(c) of the agreement, which provide that each of the parties undertakes with the other:

- 6.1(a): 'to take all necessary steps on its part to give full effect to the provisions of this Agreement'; and
- 6.1(c): 'not to do or cause or permit to be done any act matter or thing whereby in any way the continued enjoyment of the Land for the purposes of the Joint Venture might be jeopardised'.

The challenge to the notice was unsuccessful and so the Rankin Interests appealed to the Queensland Court of Appeal.

Judgment

The court unanimously dismissed the appeal and held that the notice of event of default was valid. Necessary for that conclusion was a finding that the Rankin Interests had breached the joint venture agreement. The Justices' reasoning for this conclusion varied:

- Justice Applegarth, providing the primary reasoning referred to by the other two Justices, found that clauses 6.1(a) and (c) had been breached;
- Appeal Justice Bond agreed with the orders proposed by Justice Applegarth but would have instead based the conclusion on the breach of clause 6.1(a) (and did not consider it necessary to decide whether clause 6.1(c) had been breached); and
- President Sofronoff agreed with the reasons of both Justices and thus found breaches of both clause 6.1(a) and (c).

Clause 6.1(c)

The construction of clause 6.1(c) was significant in this case, as the conduct of the Rankin Interests in instructing the third parties to cease work did not directly bear upon the land on which the Big Pineapple sits.

Justice Applegarth was the only Justice to address clause 6.1(c). He found that the actions of the Rankin Interests in instructing the third parties to cease works amounted to a breach of clause 6.1(c). Importantly, in reaching this conclusion, he rejected a more narrow reading of that clause, that it would only limit actions that impaired the availability of the land for the joint venture. Instead, it was emphasised that the commercial and contractual context of 'continued enjoyment' extended to 'development with a view to leasing areas and possibly disposing of the property'. Instructing the third parties to cease works was thus found to be incompatible with this enjoyment of the land.

Clause 6.1(a)

The construction of clause 6.1(a) was also relevant as an alternate basis upon which the notice of event of default could be based.

Justice Applegarth elaborated on two possible routes to the conclusion that the clause had been breached. First, he addressed the question of whether the positive obligation within the clause 'to take all necessary steps … to give full effect to the provisions of the Agreement' gave rise to a negative corollary: that one must not take steps contrary to the agreement. Justice Applegarth addressed several arguments from the appellants that this negative corollary could not exist and dismissed contentions that:

- the express terms of clause 6.1(a) prevented the existence of such a term;
- the negative stipulations in other sub-paragraphs of clause 6.1, including clause 6.1(c), evidence an intention that the negative stipulation would not exist;
- the implication of such a negative stipulation was precluded by an entire agreement clause found within the joint venture agreement; and
- the negative stipulation was inappropriate, as whether something was inconsistent with the agreement was subject to an uncertain subjective lens.

Justice Applegarth dismissed these arguments, finding that the negative stipulation was not covered by the wording of clause 6.1(a) but could, and should, be implied. In doing so, the primacy of the parties' plain intentions was emphasised. Thus, the agreement was breached by taking a step incompatible with giving effect to it – interfering with the resolutions of the Big Pineapple Corporation.

However, Justice Applegarth, joined by both other Justices, also articulated an alternate path of reasoning to the same result. The simpler and shorter reasoning involved an inquiry into whether the Rankin Interests had taken 'all necessary steps' to give effect to the agreement. It was found that they had not, by virtue of not implementing the resolutions of the company to engage the third parties.

Finally, the court also dismissed a request for leave to argue a new point that the conduct of Mr Rankin was not conduct of the 'joint venturers' under the agreement, as it would have required consideration of further evidence.

The appeal was therefore dismissed and the notice of event of default found to be valid.

***Chevron (Tapl) Pty Ltd v Pilbara Iron Company (Services) Pty Ltd* [2021] WASCA 193 – construction of contract – whether time stipulation in price review clause is essential – whether notice initiating a price review given outside the stipulated time period is effectual – presumption that time is not of the essence**

The Court of Appeal (WA) considered a contractual dispute between Chevron and Pilbara, concerning whether:

- a time stipulation for notice within a price review clause was of the essence;
- notice for such a price review given outside this time period was effectual; and
- a presumption should be made that time is not of the essence.

The court held that when considering the construction of a price review clause in a long-term contract, time is of the essence and that the power to initiate a price review can only be invoked by giving notice within the notice period.

This case provides clarity on the interpretation of price review clauses, emphasising the need for companies to comply with specified time stipulations. More broadly, it also provides guidance on the principles of construction of contracts.

Facts

The appellants (the ***sellers***) are joint venture participants in the Gorgon Gas project. The respondents are entities in the Rio Tinto Iron Ore Group and operate iron ore mines in North West, Western Australia. The first respondent (the ***buyer***) agreed to purchase gas over a period of a number of years under a gas sale agreement (the ***GSA***).[7] The GSA is a long-term contract, which creates a separate agreement between the buyer and each seller proportionate to the seller's share of gas to be sold to the buyer. The GSA is a 'take or pay' contract.[8] The second and third respondents guaranteed the buyer's obligations.

Clause 14.3 of the GSA stipulated that, after a specified number of years,[9] either party may initiate a price review of the gas by issuing a price review notice not more than 120 days nor less than 90 days before the price review date. In 2020 the buyer issued a price notice three weeks late, which fell outside this timeframe.

In the primary proceedings, the buyer claimed that the price review notice was effective notwithstanding that it was issued outside the timeframe. The primary judge found in their favour.[10] Alongside textual and purposive considerations, the primary judgment considered whether the parties objectively intended the time stipulation found in clause 14.3 to be essential. The judgment noted that the factors of significance were:[11]

(1) the way in which 'Price Review Notice' is defined, so as to exclude the time stipulation, when that term is read into clause 14.5;
(2) the purpose of clause 14;
(3) the limited termination rights in the context of a take or pay contract;
(4) the absence of a deeming provision setting out the consequences of non-compliance with the time stipulation; and
(5) the uncommerciality of a construction of clause 14 under which the right to a price review regarding a price review date may be lost simply by a failure to issue the notice within the timeframe stipulated in clause 14.3.

The appellants appealed on the grounds that their opposing construction should be preferred, and the words 'not more than 120 days nor less than 90 days prior' should be construed as being essential.

7 Specific number of years redacted in judgment.
8 A 'take or pay' contract provides protection for a seller by requiring the purchaser to either take delivery of the product from the supplier or pay a penalty if they fail to do so.
9 Specific number of years redacted in judgment.
10 *Pilbara Iron Company (Services) Pty Ltd v Chevron (TAPL) Pty Ltd* [2020] WASC 296.
11 *Chevron (Tapl) Pty Ltd v Pilbara Iron Company (Services) Pty Ltd* [2021] WASCA 193, [34].

Judgment

The key question in this appeal was whether the time stipulation in clause 14.3 was essential. The court and the parties agreed this was a question of construction. In considering this, the court outlined the following principles of construction of written contracts from previous case law:[12]

- In order to understand the construction of a contract, the court must determine the meaning of the contract's words by reference to its text, context and purpose. Initially, the court must look to the language in the clause and identify all possible meanings of the words chosen by the parties.
- In doing so, the court should consider what a reasonable person would have understood the terms to mean. The court should consider the language used, the circumstances covered by the contract, and the commercial purpose of the contract.
- The instrument must be read as a whole and a construction that makes multiple parts of the instrument harmonious is preferable. Each part of the instrument should be construed to have some operation, if possible.
- The instrument should be given a businesslike interpretation. If there is no clear intention to the contrary, the court should assume the parties intended to achieve a result that makes commercial sense. The terms should therefore be constructed in line with the commercial objective of the instrument, bearing in mind that business common sense may differ among parties.

Proper construction of clause 14

In applying the above principles of construction, the court held that clause 14.3 was the only way in which a party can initiate a price review under the instrument, as any other construction would create disharmony between the provisions within clause 14. The court determined that the parties were sophisticated, well-resourced, and specifically set out provisions that specified set price review dates over a long-term contract. Either party could submit a review within the review period, or it would be held over to the next review period. The court found that it is not unthinkable the parties were aware that if they failed to initiate a price review within the period, they would lose the opportunity to invoke it until the next review period.

Presumption that time is not of the essence

The respondents argued there is a presumption time stipulations in machinery provisions for determining price adjustments under a contract are not essential. The court rejected this argument. It did not accept there is any such general principle applicable to all contracts containing provisions for the adjustment of price, irrespective of the nature, terms, subject matter and market in which the contract operates. Furthermore:

- the court did not construe clause 14.3 as merely a machinery provision within the context of the contract as a whole; and
- the court emphasised the distinction between time stipulations for performing obligations (where time is more likely to be of the essence) and time stipulations for exercising rights or powers (where time is less likely to be of the essence)

The task for the court is to discern the intention revealed by the terms of the agreement, and, given the length and detail in the terms:

12 *Black Box Control Pty Ltd v TerraVision Pty Ltd* [2016] WASCA 219; *Sino Iron Pty Ltd v Mineralogy Pty Ltd* [2019] WASCA 80; (2019) 55 WAR 89.

[the court was] unable to see any principled basis on which the court should approach the task of objective ascertainment of these sophisticated commercial parties' intentions by reference to a presumption, or with any predilection one way or another as to the parties' intentions.'[13]

***AMA Group Ltd v ASSK Investments Pty Ltd* [2021] NSWCA 45 – interpretation of contract – condition precedent**

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

- a 'Binding Heads of Agreement' was a binding agreement to sell a business, or merely a binding agreement to try to negotiate a sale of business agreement; and
- whether any sale or agreement was conditional on the approval of the purchaser's board.

The court allowed the appeal, finding that the parties only agreed to negotiate a sale of business agreement and that this obligation was subject to board approval of the purchaser.

This case illustrates the ambiguities that can arise from 'binding' heads of agreement that envisage further agreements and are subject to 'board approval'.

Facts

The parties entered into a 'Binding Heads of Agreement' (***HOA***) for AMA to acquire ASSK Investments. The relevant clauses of the agreement were:

- clause 2(b), which stated that the 'parties agree to enter into Business Sale Agreements subject to the terms and conditions set out in' the HOA;
- clause 6, which provided for AMA to 'carry out a comprehensive due diligence' and, subject to that process, 'the transaction will be recorded in a Business Sale Agreement'; and
- clause 7(b), which was labelled as a condition precedent and required 'all necessary third party consents, authorisations and approvals being obtained (including the Purchaser's Board approval)'.

After the execution of the HOA, AMA completed a due diligence process. It concluded that the deal did not meet the requirements for board approval and terminated the agreement. ASSK Investments sought an order for specific performance and was successful at first instance.

Judgment

The primary issues for the court were:

a) whether the HOA was an agreement to sell the business, or merely an agreement to negotiate a sale agreement; and
b) whether clause 7(b) was a condition precedent.

President Bell (with whom Justices Leeming and Emmett agreed) allowed the appeal and held that:

- the HOA comprised an obligation to negotiate a business sale agreement; and
- clause 7(b) was a condition precedent to that obligation.

On the first issue, the court disagreed with the primary judge's conclusion that the HOA 'legislate[d] comprehensively for the sale and purchase of the Business'. The court noted that the HOA did not identify any material contracts or key personnel, envisaged further due diligence and left open the possibility of further warranties. Any sale was therefore to be effected by a new agreement, not the HOA.

On the second issue, the court stated that clause 2 made it explicitly clear that the agreement was conditional upon the terms and conditions set out in the agreement. One of those conditions was the

13 *Chevron (Tapl) Pty Ltd v Pilbara Iron Company (Services) Pty Ltd* [2021] WASCA 193, [284].

approval of AMA's board. The condition was not satisfied and AMA was therefore entitled to terminate the agreement.

In response to an argument that this conclusion would make the promises in the HOA illusory, the court observed that where a contract affords one party a discretion, or where a contract is subject to a party's approval, there is usually an implied requirement for the benefiting party to act honestly, and sometimes reasonably, in exercising that power. However, there was no issue before the court as to the honesty or reasonableness of the board's decision.

CS Energy Limited v GPS Power Pty Limited & Ors [2021] QCA 194 – approach to construction of defined terms in a complex commercial contract

In this case, the Queensland Court of Appeal considered an appeal relating to the construction of a key clause of a commercial contract that involved the use of a defined term.

The court held that, given the complexity of the defined term in question, the primary judge did not err in approaching the construction of the relevant clause by carefully considering which aspects of the defined term were applicable, having regard to the context and purpose of that particular clause.

This case sounds a significant cautionary note for parties who rely on lengthy, multi-faceted defined terms in their contracts. It cannot be automatically assumed that the entirety of a defined term will apply in each instance in which it is used where the contract ascribes particular meaning to words and phrases with the proviso 'unless the context otherwise requires'. Care should be taken in complex commercial arrangements to define terms as simply and succinctly as possible to ensure that the parties' intentions are given effect.

Facts

The dispute in this case centred on the proper construction of clauses in a long-term contract concerning Queensland's Gladstone Power Station (***GPS***). The appellant is a Queensland Government owned electricity provider and the 'Nominated Generator' for the GPS under the National Electricity Rules governing the National Electricity Market. The respondents are the owners of the GPS, which is Queensland's largest power station and supplies the state's largest individual user of electricity, the Boyne Aluminium Smelter.[14]

The relationship between the appellant and the respondents regarding the electricity generated by the GPS is governed by a contract known as the Interconnection and Power Pooling Agreement (***IPPA***).[15]

Under the IPPA, the appellant is required to purchase electricity generated from the respondents' operation of the GPS to power the smelter; however, the appellant is entitled to trade for profit any excess generated. The ability of the appellant to do so is necessarily dependent on coal availability.[16]

The appellant contended that the respondents failed to procure and maintain a coal stockpile in accordance with their obligations under the IPPA, compromising the benefit that the appellant was entitled to under the contract.[17]

The IPPA has a number of defined terms. Clause 1.1 of the IPPA provides that words and phrases used in the contract have the meaning ascribed to them in the annex to the contract, unless the context requires otherwise.[18]

[14] *CS Energy Limited v GPS Power Pty Limited & Ors* [2021] QCA 194, [19].
[15] Ibid, [14].
[16] Ibid, [24]-[25].
[17] Ibid, [26].
[18] Ibid, [14], [85].

The main issue on appeal was whether the primary judge erred in construing clause 23 of the IPPA, which addresses the procurement and management of coal, by failing to fully apply the defined term 'Station Annual Forecast' in interpreting that clause.[19]

The appellants contended that, in accordance with the definition of that term in the annex, 'Station Annual Forecast' includes the upper and lower annual estimates of dispatch of GPS.

Considering the text, context and purpose of clause 23, the primary judge reasoned that the reference to 'Station Annual Forecast' did not include those upper and lower estimates.[20]

The appellant urged the Court of Appeal to declare otherwise, arguing that that the primary judge neglected to follow the 'orthodox' approach to defined terms.[21]

Judgment

The court rejected the appellant's appeal.

It acknowledged that the correct approach to the construction of the parties' contract must reflect its commercial character, and did not refute the appellant's general contention that the 'orthodox' approach to defined terms in the context of negotiated commercial contracts is to confer upon them the meaning that the parties have agreed.[22]

However, the court held that the so-called 'orthodox' approach was not applicable in this case, having regard to the following factors:

- The IPPA 'is a complex commercial arrangement between sophisticated parties and was drafted with the assistance of experienced lawyers'[23]
- the defined meaning of 'Station Annual Forecast' only applies if the context does not otherwise require[24]
- the definition of the term 'Station Annual Forecast' is unusual and has many parts. The term is defined as 'a forecast containing [prescribed] material'. As such, it is possible that if some of the material in the forecast is not relevant to the purpose of a particular clause, the term Station Annual Forecast might apply to the clause without regard to information that is irrelevant to that clause[25]

As a result, it was appropriate for the trial judge to approach the use of the defined term 'Station Annual Forecast' in clause 23 by asking whether the context and purpose of that clause required the use of that term to include the upper and lower estimates, and it was reasonable for the trial judge to conclude that it did not.[26]

Summarising the conclusion reached, Justice Mullins (who delivered the leading judgment) said at [122]:

> The short answer to the appellant's submission that the primary judge failed to apply the orthodox approach to the use of the defined term is that the definition of Station Annual Forecast was not an orthodox definition that was amendable to the orthodox approach of substituting the full meaning for the defined term without considering the nature of the defined term and whether the context required otherwise than the incorporation of all the pieces of information included in the defined term.

The court's ruling on this point was unanimous[27] and provides useful guidance to commercial parties on the use of defined terms.

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[19] Ibid, [99].
[20] Ibid, [103]-[107].
[21] Ibid, [28], [32], [116].
[22] Ibid, [79], [84].
[23] Ibid, [79].
[24] Ibid, [118].
[25] Ibid, [119].
[26] Ibid, [120]-[123].
[27] Note that Justice McMurdo delivered a separate judgment, agreeing with Justice Mullins on all issues but one relating to the utility of declarations sought by the appellant concerning the calculation of the coal stockpile. Justice Fraser agreed with Justice Mullins.

***Ulladulla Creative Images Pty Ltd v Tibbles* [2021] NSWCA 289 – whether monies received from an insurance claim by the company are payable to former shareholders under a share sale agreement**

In this case, the NSW Court of Appeal considered whether former shareholders of a company were entitled, under a share sale agreement, to monies received by the company for losses not covered by its insurance policy.

The court held that, on its construction, the uninsured losses were payable to the respondents under the share sale agreement.

This case illustrates the use by courts of evidence of 'surrounding circumstances' when interpreting ambiguous clauses, and the difference between admissible evidence of surrounding circumstances and inadmissible evidence of the parties' expectations.

Facts

The respondents entered into a share sale agreement (the ***agreement***) to sell their shareholdings in the appellant. Clause 15 of the agreement related to an insurance claim that the appellant had made under its insurance policy with its insurer, QBE Insurance (Australia) Ltd (the ***policy*** and ***QBE***, respectively), for damage and loss of business that it suffered from a fire originating from a neighbouring property. The clause provided:

> 15.1 The Company has made a claim against the Company's Insurers for loss arising out of a fire that took place in the premises known as Unit 83 Collers [sic] Road, Ulladulla, being Lot 18 in Strata Plan 82760 (the 'Premises').
>
> 15.2 The Company agrees that if it receives any further money from the Insurance Company beyond those monies received up to the date of this Agreement then any such monies shall be divided equally between the shareholders Debbie, Ian, Karen and John paid to each of the parties within seven (7) days from the date of the receipt of any such monies of the Insurance Company.

Between the time of the fire and entering into the agreement, the appellant made two claims with QBE under its policy, one for property damage and one for business interruption insurance. The appellant also pursued another claim to recover uninsured losses against the owner of the neighbouring property where the fire originated. The neighbour was also insured by QBE. While the amount received from the policy was distributed (or agreed to be distributed) equally in accordance with clause 15.2, the amount received from the appellant's uninsured loss claim was not.

Judgment

Interpretation of clause 15

The court applied the reasoning in *Toll (FDCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 291 CLR 165 that the 'meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean', which 'normally, requires consideration not only to the text, but also of the surrounding circumstances known to the parties, and the purpose of the transactions'. In doing so, the court noted that:

- the purpose of the agreement was to sell a small business that had recently been impacted by a fire;
- the parties were commercially unsophisticated;
- the parties did not possess specialised knowledge of an insurance 'claim'; and

- the respondents did not have oversight of the appellant's insurance claim.

For these reasons, the court construed the plain words of the clause to include any amounts paid by QBE as a result of the claim against the neighbour. In reaching this conclusion, the court:

a) had regard to the fact that the appellant had asked QBE (as its insurer) to bring a subrogated claim against the neighbour, as this evidence was admissible to explain the phrase 'claim against the Company's insurers' in clause 15.1; but

b) did not have regard to a file note of a solicitor (allegedly) recording the parties' expectations as to how such recoveries might be distributed.

The uninsured losses were therefore required to be paid in accordance with clause 15.2 to the respondents.

In reaching this conclusion, the court accepted that clause 15.1 had no operative effect and acted as a recital to clause 15.2. However, that did not mean clause 15.1 was redundant, because it aided in the interpretation of clause 15.2 by limiting 'further money' to the fire described in the clause. The absence of clause 15.1, read literally, would require the appellant to pay out any money that it received from its insurance provider at any point for any event.

Implied terms

Implied duty to co-operate again the subject of appellate consideration.

In the 2020 *Contract Law Update* we summarised three appellate judgments that considered the implied duty to co-operate. That implied duty was again the subject of appellate consideration during 2021. In *Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd*[28] the Victorian Court of Appeal followed its judgment last year in *Adaz Nominees Pty Ltd v Castleway Pty Ltd*[29] and held that the duty to co-operate is an implied term of a contract, rather than an obligation arising by operation of law. One consequence of this conclusion is that the implied term 'must give way to the express terms of the contract'.

The court further noted the connection between this duty and the 'prevention principle', and held that the implication of the implied duty to co-operate must satisfy the requirements in *BP Refinery*[30] – although those requirements are arguably only applicable to terms implied in fact, rather than terms implied in law (such as the implied duty to co-operate).[31]

The court also emphasised that:

- the content of the implied duty to co-operate is '*to afford the other party the benefit of what he or she has contracted for, not a duty to act generally in the other party's best interests*'; and
- the prevention principle applies to conduct that 'hinders or prevents' the fulfilment of a contractual promise – it does not need to make performance impossible.

On the facts of the case, the court found that there was no breach of the prevention principle or the implied duty of co-operation.

The application of *BP Refinery* to oral (or partly oral) contracts was considered by the Full Court of the Federal Court in *Hardingham v RP Data Pty Limited*[32]*.* The court followed earlier authority that emphasised the *BP Refinery* criteria should be considered, but are not decisive, when implying terms into

[28] [2021] VSCA 69
[29] [2020] VSCA 201.
[30] *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266.
[31] See also Chapter 2 of the 2014 Allens *Contract Law Update*.
[32] [2021] FCAFC 148.

oral contracts. However, it will usually still be essential that the proposed implied terms be 'necessary' for the reasonable operation of the contract and be 'so obvious that it goes without saying'. The majority held that, applying these tests, the proposed term (allowing sublicensing of copyright) should not be inferred.

The Full Court also noted the distinction between *inferred terms*, which a court concludes were agreed between the parties (which might be shown, for example, by their course of conduct) and *implied terms*, which were not, in fact, agreed, but would have been agreed had the parties turned their minds to it.[33] Notwithstanding this logical distinction, the court noted that it is not always easy to differentiate between inferred and implied terms.

Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd [2021] VSCA 69 – implied duty of cooperation prevention principle

In this case, the Victorian Court of Appeal (Justices Niall, Emerton and Sifris) considered the scope of the duty to cooperate to perform the contract, and examined how that duty relates to the so-called 'prevention principle'.

The court held that the contractual duty to co-operate arises by implication, assessed on a test of necessity, and can be characterised as a negative covenant not to hinder or impede the performance of the contract.

This case has three significant doctrinal implications for contract law. First, it articulates the nature and scope of a contracting party's duty to cooperate with the other party to perform the contract. Second, it clarifies the threshold for the 'prevention principle' that may arise upon breach of contract. And, finally, it considers the relationship between the duty to co-operate and the prevention principle.

Facts

Bensons Property Group Pty Ltd and Key Infrastructure Australia Pty Ltd (***KIA***) entered into a development management agreement (***DMA***) for a prospective property development.

Under the agreement, KIA was responsible for procuring a planning permit by the sunset date in the DMA. In return, Bensons was to pay KIA a 'development management fee' of $2 million in four instalments. The material events subsequently occurred:

- KIA's planning permit application to the council was unsuccessful, and it initiated an application in the Victorian Civil and Administrative Tribunal for review of the council's decision.
- On 10 May 2016 Bensons wrote to KIA, stating that a VCAT application would be a breach of the DMA ***(the letter***). Accordingly, KIA withdrew its application.
- Approximately two months later, KIA reinstated the application in VCAT. The Tribunal ultimately ordered the council to issue the planning permit; however, by this time the sunset date had passed and KIA was in breach of contract.

The primary issue on appeal was whether Bensons' conduct had deprived KIA of a substantial chance of procuring the permit by the sunset date, thereby preventing it from fulfilling its contractual obligations.

Judgment

Implied duty to co-operate

The first issue the court considered was whether Bensons had a 'duty to cooperate' under the contract to ensure KIA obtained the planning permit. It characterised the duty to co-operate as a type of implied term, which a court will assess using the test of necessity. As the duty is one that is implied into a contract, the parties are at liberty to modify or oust its operation using express terms.

[33] The distinction between inferred and implied terms was discussed by the Victorian Court of Appeal in *Uren v Uren* [2018] VSCA 141 and summarised in the 2018 Allens *Contract Law Update*.

The scope of the duty to co-operate is, in essence, a negative covenant not to hinder or prevent the fulfillment of the purpose of the express promises made. The duty does not go so far as to impose a general duty to act in the other party's best interests or to always act to commercial advantage.

On the facts, the court determined that Bensons' letter was not a breach of the duty to co-operate, as it did not prevent KIA from satisfying the permit condition, nor did it render the contract nugatory, worthless, or seriously undermined.

The 'prevention principle'

The court also considered the related 'prevention principle', which applies where the conduct of one party alleged to be preventing performance deprives the other party of a substantial chance of meeting the condition.

The court said that the prevention principle is not a 'free-standing of law' but only arises where there has been a relevant breach of a contractual term.

KIA's argument that Bensons' letter had prevented it from obtaining the permit was rejected. The letter, which was based on an erroneous construction of the DMA, did not prevent KIA from obtaining the planning permit because KIA was at all relevant times free to form its own view on the effect of a VCAT application on the DMA.

In the result, the court held that Bensons had not impeded or prevented KIA from satisfying the relevant conditions under the DMA.

In finding that Bensons had not breached its duty of co-operation or bore responsibility for KIA's own breach in failing to obtain the permit, the Victorian Court of Appeal allowed the appeal.

***Hardingham v RP Data Pty Limited* [2021] FCAFC 148 – implying and inferring terms into oral informal commercial agreements**

In this case, the Full Court of the Federal Court of Australia considered whether intellectual property rights created under informal oral contracts were infringed, and whether a licence was created through implied or inferred terms that extended to the first respondent's use of intellectual property under the agreements, therefore making the agreements subject to the first respondent's own terms and conditions permitting it to sub-licence the intellectual property to third parties.

The court held by a 2-1 majority (Justices Greenwood and Rares, Justice Jackson dissenting) that the first respondent had infringed the appellant's copyright. The court held that there were no inferred or implied terms that the agreements created a licence subject to the first respondent's terms and conditions.

This case is significant because it affirms that:

- While there is some degree of overlap with the principles governing inferred and implied terms, there are important differences;[34]
- When inferring or implying a term into an informal oral commercial agreement, the term must be:
    - reasonable and equitable to both parties and so obvious it goes without saying;[35] and
    - necessary for the reasonable or effective operation of the contract in the circumstances of the case;[36]
- An oral commercial agreement must, notwithstanding the oral informal character of the contract, be construed and interpreted in seeking to imply a term in a manner it is presumed the parties

[34] At [83] per Justice Greenwood.
[35] See eg: at [82] per Justice Greenwood.
[36] See eg: at [82] per Justice Greenwood.

> would have agreed upon had they turned their mind to it; or that is 'taken' to have been the intention of the parties or the latent unexpressed intention of the parties. In those circumstances, the court will not lightly imply a term if it has adverse commercial consequences for one party to the contract.[37]

The judgment of Justice Greenwood at [82] provides a useful analysis of the principles to be applied in determining whether a term is to be implied in a contract.

Facts

The first appellant, James Kelland Hardingham (***Hardingham***), is a professional photographer. He is the sole director of the second appellant, Real Estate Marketing Australia Pty Ltd (***REMA***). REMA was commissioned by various real estate agencies to produce photographs and floor plans for marketing campaigns for the sale and leasing of properties. The agreement between REMA and the real estate agents did not expressly deal with the ownership or licensing of copyright. The agreement was oral – the agent would call Hardingham, who would agree to take photos and then send the invoice. The agreement provided the real estate agents with a licence to use the photographs and floor plans for marketing purposes, and REMA was aware that a key part of the agents' marketing and sales campaigns was to upload the commissioned photos to platforms such as realestate.com.au.

The various real estate agencies uploaded the photos and floor plans to realestate.com.au. The respondent, RP Data Pty Ltd (***RP Data***), operates the website www.corelogic.com.au. Through its website, subscribers can access a product that includes a number of reproductions of Hardingham's photographs and floor plans. RP Data obtained the photographs and floor plans from the cross-respondent, realestate.com.au Pty Ltd (***REA***), a wholly owned subsidiary of REA Group Ltd. Hardingham and REMA commenced proceedings against RP Data in the Federal Court of Australia, alleging copyright infringement. Hardingham and REMA contended that they had not licensed RP Data to publish the photographs or floor plans.

Separately, when uploading property listings to realeastate.com.au, REA requires the agents to agree to its terms and conditions. These terms and conditions provide REA the right to license to third parties the right to use the materials (including the photographs and floorplans). REA provided this licence to RP Data.

The key issue, therefore, was whether REMA's agreements with the real estate agents was broad enough to authorise the use of the photos and floorplans by RP Data.

At first instance, the Federal Court of Australia held that it was an implied term of the oral informal agreements that the photographs and floor plans would be uploaded, as Hardingham 'must have known' that the materials would be uploaded to realestate.com.au. Accordingly, Hardingham and REMA authorised the agents, by way of implied licence, to upload the photographs and floor plans to the realestate.com.au platform and REA was able to sub-licence to RP Data in accordance with its terms and conditions.

Judgment

The Full Federal Court held by a 2-1 majority (Justices Greenwood and Rares) that REA and RP Data had infringed Hardingham's copyright in the photographs and floorplans, as the granting of the sub-licence to RP Data was not permitted through an implied or inferred term in the oral agreements.

Justices Greenwood and Rares, in separate decisions, relied on a number of authorities, including B*P Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 and *Byrne v Australian Airlines Limited* (1995) 185 CLR 410, to conclude that it was not clear the implication that the agreement between Hardingham and the agents created a licence that extended to being subject to the REA terms and

[37] See eg: at [103] per Justice Greenwood and [114] per Justice Rares.

conditions was 'so obvious it goes without saying' or such an implication was necessary to give business efficacy to the agreement.[38]

Justice Greenwood noted in relation to inferred terms that while there is some degree of overlap with the principles governing implication of terms, there were important differences.[39]

Justice Greenwood held that when considering whether to infer a term, the court must ask itself: 'What, if any, are the terms which can properly be inferred from all the circumstances as having been included in the contract as a matter of actual intention of the parties?'[40].

Justice Greenwood contrasted inferred terms with implied terms. In the case of implication, the court seeks to adopt a presumed construct reflecting imputed intention, on the assumption that had the parties addressed the relevant matter, they would have agreed it should be part of the contract.[41]

In resolving the appeal, the majority acknowledged that the criteria set out in *BP Refinery* is a necessary starting point when considering whether a term is to be implied; however, it cautioned against a rigid or formulaic application of the five criteria set out in that judgment. Both Justices Greenwood and Rares relied on the High Court reasoning in *Byrne* as their principal authority to state the most important factors when considering an implied term, especially in an informal contract of this nature, was:

- that the term is so obvious it goes without saying;
- that the implication of the term must be necessary for the reasonable or effective operation of the contract in the circumstances of the case; and
- that the implied term does not operate in a partisan matter contrary to the interests of one party.[42]

Justice Greenwood held that the parties having an understanding that the agencies would engage with REA and accept their terms and conditions was not a sufficient basis for inferring or implying a term in the contract.[43] The alleged REA agreement that was relied upon by the first respondent, 'virtually expropriate[s] the ownership of the copyright' in Hardingham's work and a licence with such a result must not be inferred lightly. Justice Rares held that, given the informality of the oral agreements, the implied term was 'not necessary for the reasonable or effective operation of those contracts'.[44]

Promissory estoppel

Promissory estoppel can be a 'sword' as well as a 'shield' – at least outside NSW.

Promissory estoppel can prevent a party from relying on its contractual rights. Broadly, if a party represents that it will not enforce its contractual rights, and the other party relies on that representation to its detriment, then the first party might be 'estopped' from enforcing those rights (unless, perhaps, it remedies the detriment).

A more controversial issue is whether promissory estoppel can prevent a party from denying the existence of legal rights. That is, can promissory estoppel effectively create new rights (because the other party is estopped from denying that those rights exist)? This issue is sometimes described as the use of promissory estoppel as a 'sword' and not just as a 'shield'. Although the High Court appeared to give a positive answer to this question in *Waltons Stores v Maher*[45], the NSW Court of Appeal has subsequently

[38] At [103] per Justice Greenwood and [114] per Justice Rares.
[39] At [83] per Justice Greenwood; Justice Rares agreeing at [107].
[40] At [83] per Justice Greenwood; Justice Rares agreeing at [107].
[41] At [83] per Justice Greenwood.
[42] At [103] per Justice Greenwood and [110] and [114] per Justice Rares.
[43] At [98]-[101] per Justice Greenwood.
[44] At [114] per Justice Rares.
[45] (1988) 164 CLR 387.

endorsed the traditional view that promissory estoppel (unlike proprietary estoppel) may only be relied upon to prevent a party from exercising legal rights.[46]

This debate was considered by the Full Court of the Supreme Court in *Commercial & General Corp Pty Ltd v Manassen Holdings Pty Ltd*[47]. Although the appeal succeeded on a point of contractual interpretation, the leading judgment of Justice Livesey discussed in some detail whether promissory estoppel could be used as a 'sword'. He concluded, relying on a number of cases including *Waltons Stores v Maher,* that promissory estoppel could be used as a sword; that is, a party could be estopped from denying that a legal relationship existed.

The current state of the law in Australia appears to be that, in each jurisdiction other than NSW, promissory estoppel is not limited to preventing the enforcement of existing legal rights but can, in substance, facilitate the creation of new rights (by estopping a party from denying the existence of those new rights).

Separately, the Full Court confirmed that the 'detriment' required for promissory estoppel must be something other than the non-fulfilment of the promise giving rise to the estoppel.

Commercial & General Corp Pty Ltd v Manassen Holdings Pty Ltd [2021] SASCFC 40 – construction of a 'bespoke' commercial contract – promissory estoppel as a positive source of rights

This case relates to a contract dispute between a company and its underwriter in the context of a suspended land acquisition. The Full Court of the South Australian Supreme Court considered the proper construction of a complex commercial contract with 'potential difficulties', and set out the general principles of promissory estoppel (particularly whether it could be used as a positive source of rights).

The case is significant for its recognition that promissory estoppel can effectively operate as a positive source of legal rights.[48]

The case also highlights the importance of clear contract drafting. Although courts will consider the commercial purpose of a particular agreement in construing a contract, including what commercial parties objectively intended, where contracts may be inconsistent, complex or contain a 'potential unfairness', courts cannot redraft a commercial contract so as to meet all potential difficulties, and disregard the language actually used by the parties.[49]

Facts

The dispute concerns the construction of an underwriting agreement between Commercial & General Group (C&G Group) (***C&G***) and one of its underwriters Manassen Holdings Pty Ltd (***Manassen***).

On 30 June 2016 the C&G contracted with the South Australian Minister for Transport and Infrastructure for the sale and purchase of land around the 'State Administration Centre' in Adelaide (the ***sale contract***). At this stage, the closing date under the sale contract (***losing***) was expected to be 31 October 2016.

C&G and Manassen entered into the underwriting agreement on 10 September 2016 (the ***agreement***). The commercial purpose of the agreement was to enable C&G to access up to $40 million from Manassen for the settlement of the sale contract. The key provisions of the agreement were as follows:

[46] For a more detailed discussion of this issue, and the competing authorities, see A Silink, 'Can Promissory Estoppel Be an Independent Source of Rights?' (2015) 40(1) *The University of Western Australia Law Review* 39.
[47] [2021] SASCFC 40.
[48] See [181]-[183], where Justice Livesey held that *Ausotel v Franklins, Ashton v Pratt and CPB Contractors Pty Ltd v Rizzani De Eccher Australia Pty Ltd* should be followed in South Australia.
[49] [112].

- on receipt of a funding notice, Manassen could be required by C&G to provide funds to C&G at closing, provided certain conditions precedent were satisfied or waived. Funding would occur through subscription in a unit trust of which C&G was the trustee;
- the conditions precedent of the agreement included that closing would occur by no later than the relevant date, which was defined as either (i) 31 October 2016; or (ii) 30 November 2016, if certain FIRB approval requirements were needed. Manassen had termination rights where the conditions precedent were not met; and
- C&G would pay Manassen a commission consisting of (i) a base commission; and (ii) daily fees. Payment of the daily fee is the subject of this dispute:
    - under clause 1 of Schedule 5, daily fees would be paid where Manassen:

        > Subscribes or *may be required to subscribe* (whether or not it does actually subscribe) for any Preference Unit at any time on or after 1 November 2016. (*emphasis added*)

    - the daily fee would accrue from 1 November 2016 for a maximum of 30 days and would become due and payable by the earlier of closing or the relevant date.

On 11 October 2016 C&G issued a funding notice to Manassen for $40 million.

On 31 October 2016 closing was deferred to 15 November 2016, due to outstanding conditions precedent, including that C&G was not able to find an additional financier. Manassen subsequently wrote to C&G noting that closing had not occurred by 31 October 2016 as required under the agreement and that it reserved all of its rights to terminate the agreement.[50]

On 15 November 2016 closing again did not occur. On 21 November the Minister agreed to extend closing until 13 December 2016. During this time, C&G had made several representations to Manassen, including agreeing that the daily fees would continue to accrue until closing.

Ultimately, there was no closing, and on 14 December 2016 the sale contract was terminated. C&G issued Manassen a termination notice under the underwriting agreement on 22 January 2017, stating that Manassen's funds were no longer required, and paid Manassen the base commission amount but not the daily fees.

Manassen brought proceedings in the Supreme Court of South Australia, seeking payment of $600,000 in daily fees and further submitting that C&G was estopped from denying the payment of daily fees by its representations made to Manassen. C&G's position was that because closing had not occurred, the agreement was no longer enforceable, such that it could not be said Manassen '*may be required*' to subscribe to the funding after 30 October 2016 had passed.

The primary judge found that, on the proper construction of the agreement, Manassen was entitled to the daily fee. His Honour found that the issuing of the funding notice had triggered Manassen's obligations under the agreement, such that, despite 30 October 2016 passing, if closing did occur Manassen could still be required to subscribe to the funding and could have waived the conditions precedent if called to subscribe.[51] However, his Honour rejected Manassen's estoppel claim, on the basis that Manassen had not established the requisite detriment.

C&G appealed, on the basis that the primary judge misconstrued the agreement, and Manassen cross-appealed the finding relating to the estoppel claim.

Judgment

The issues before the court were as follows:

- whether, on the proper construction of the underwriting agreement, C&G was required to pay the daily fee; and

[50] [34].
[51] [82] and [92].

- whether C&G was estopped by its representations from not paying the daily fee.

The majority (Justices Livesey and Stanley agreeing in a separate judgment) allowed the appeal, favouring the construction of the agreement that 'produced the more business like outcome'.[52] They agreed that after 31 October 2016 C&G had no enforceable rights to 'require' Manassen to provide the funding.[53] Although a funding notice had been issued and Manassen could elect to eg waive the conditions precedent or its termination rights, such funding would occur at Manassen's own discretion. The majority held that this construction ran counter to what it considered was the commercial intention of the daily fees concept:[54]

> It is inherently unlikely that these commercial parties intended that the daily fee should be paid where it remained entirely within the capacity of one party as to whether it would proceed and, in that setting, potentially retain both the right not to proceed and the right to receive a substantial daily fee. That seems an unbusinesslike construction.

Further, although finding that promissory estoppel was available as a positive source of rights for Manassen, the primary judge was correct in finding that Manassen had not established it had suffered detriment in relying on C&G's representations. Although the consideration of the daily fees was, for Manassen, effectively 'holding' funds out in case subscription was required, Manassen could not show it would have earned a higher rate of return or any relevant investment opportunities by which it could have earned more than it did than keeping the funds available in its bank account.[55] Mere non-fulfilment of C&G's representation to pay the daily fees was insufficient to constitute detriment.[56]

Construction of a commercial contract

The majority considered that the commercial purpose of the daily fee was to compensate the plaintiffs for being required to keep the funds available for the purposes of the sale contract. However, considering the actual words used by the parties, the concept of 'Relevant Date' under theagreement was distinct from closing under the sale contract. The effect of this drafting was that the daily fee would only accrue if the relevant date were 30 November 2016 (ie where FIRB approval was required), and that the relevant date could pass by even if closing were to occur later.[57]

This did occur, and after 30 October 2016, the majority held, Manassen was not 'required' to keep the funds available. Although Manassen could chose to waive its termination rights or elect to proceed with the subscription despite the failure of the conditions precedent, it cannot be said that this comes within the words '*may be required to be subscribe*' in the agreement, as C&G did not have an enforceable right to require Manassen to provide the funds under the agreement.[58]

The majority noted, in support of this analysis, that it was unlikely the commercial parties had intended that Manassen could both receive the daily fee payment and retain the right to terminate the agreement.[59] Although this may expose a potential unfairness, the majority noted that the court could not redraft a commercial contract so as to meet all potential difficulties but disregard the language actually used by the parties.[60]

Justice Nicholson, in dissent, disagreed with this reasoning, on the basis that, notwithstanding the conditions precent had not been met, the agreement and the funding notice remained extant as long as closing could still occur and Manassen be called to provide funding. His Honour noted that Manassen had expressly reserved all rights, and both parties continued to conduct themselves on the basis that 'the

[52] [3].
[53] [4], [82]ff, [95], [98].
[54] [94].
[55] [133].
[56] [142]ff.
[57] [111].
[58] [98].
[59] [94].
[60] [112].

Agreement remained on foot with the possibility that [the sale contract] would settle with the underwriting assistance of [Manassen].' His Honour held that this view was not derogated by the fact that Manassen had the choice of whether or not to proceed with the agreement, and agreed with the primary judge's construction of the agreement.

Interestingly, his Honour also noted an apparent error in the drafting of the provisions relating to payments of commissions in Schedule 5, clause 1:

> *by the earlier of the following dates:*
>
> *(c) the date of Closing; and*
>
> *(d) the Relevant Date.*

His Honour noted that had the clause read 'later of the following dates', a number of construction concerns may have been resolved consistently with a sensible and businesslike operation of the agreement in favour of Manassen's contention.

Promissory estoppel

The majority also addressed several issues raised by both parties relating to promissory estoppel:[61]

- Promissory estoppel can, in appropriate circumstances, provide a positive source of legal rights.[62] After canvassing the relevant authorities, Justice Livesey held that:

> [182] In my view, whilst an estoppel does not create a legal relationship or generate any new cause of action a court of equity may, in appropriate circumstances, preclude a party from denying that a legal a relationship has arisen. In that type of case, the parties become bound to the postulated legal relationship, such as an intended contract or lease, and their obligations are then governed by reference to that postulated relationship.
>
> [183] In particular, in my opinion, it was open in this case to find that, assuming that a sufficiently identifiable postulated legal relationship existed on the evidence, the recognition of a promissory estoppel did not involve creating legal rights in any abstract sense. Rather, the estoppel would simply preclude a party from denying that it is bound by that postulated legal relationship. It is no bar to recognition of the promissory estoppel that it might be said to have a positive, rather than merely negative, effect: at bottom, the estoppel precludes the unconscionable or unjust abandonment of the assumption which the defendant induced the plaintiffs to make. The approach taken in *Austotel v Franklins, Ashton v Pratt and CPB Contractors Pty Ltd v Rizzani De Eccher Australia Pty Ltd* should be followed in South Australia.

- Non-fulfillment of a representation is not alone a sufficient detriment for the purposes of a promissory estoppel claim. The correct approach is to first ascertain the plaintiff's reliance and consequential detriment, and to do so otherwise '*converts the claim to a contractual claim [for lost expectations], rather than a detrimental reliance claim*'.[63] To show the requisite detrimental reliance, Manassen was required to prove any valuable alternative transaction and/or prove the precise amount it had received holding the funds in a bank account.
- A representation that is insufficient to give rise to a contract will not necessarily be insufficient to found a promissory estoppel.[64] The primary judge had held that the representations made by C&G to Manassen on 30 November 2016, relating to daily fees continuing to accrue, were insufficient to amount to a binding agreement but did suffice to found a promissory estoppel. The majority agreed with this analysis, adopting the authorities that recognised '*a promise may be clear and defined, even if it cannot be precisely defined*'[65] – a representation can be sufficiently

[61] [134]ff.
[62] [166], [174]–[185].
[63] [142]ff.
[64] [189].
[65] [189]–[198].

clear and unambiguous to found a promissory estoppel even it were difficult to construe with precision or capable of more than one reasonable meaning.

Termination

Courts provide guidance on when 'innocent' parties may terminate a contract.

A party may terminate a contract under a contractual right, or if the other party:

- breaches a condition (or an 'essential term'); or
- commits a sufficiently serious breach of an 'intermediate term'.

Although these principles are simple to state, they can lead to considerable uncertainty in practice, both in characterising a term (as a condition, intermediate term or warranty); and, in the case of an intermediate term, evaluating the severity of the breach.

The great risk faced by a party terminating a contract is that if a court ultimately determines there was no right to terminate, then the act of termination will usually itself be a repudiation of the contract. One method for reducing this risk is to serve a notice on the other party requiring performance of the relevant obligation. The advantage of this method was illustrated by a decision of the NSW Court of Appeal in *Cromarty Resources Pty Ltd v Thalanga Copper Mines Pty Ltd* [66].

In *Cromarty,* a party consistently paid royalties later than the time required by the contract. Although the judge at first instance considered the payment obligation to be an essential term, the NSW Court of Appeal disagreed and held that it was an intermediate term. The issue for the court, therefore, was whether the breaches were sufficiently serious to enable the 'innocent' party to terminate. The court held that they were, largely because of the breaching party's failure to comply with a notice requiring payment of the outstanding amounts within a reasonable time. The court explained that serving a notice did not convert the payment obligation into an essential term, but that the failure to comply with the notice:

> *conveyed to the reasonable person in* [the innocent party's] *position that* [the party in breach] *did not intend to perform its existing contractual obligations with respect to the payment of royalties and that it was only prepared to pay royalties on a basis that was not the subject of any agreement between the parties and which was substantially inconsistent with its existing obligations.*[67]

The failure to comply with the notice was therefore repudiatory conduct that entitled the innocent party to terminate. The court also noted that a further advantage of serving such a notice is that it may prevent a party from obtaining equitable relief preventing termination of an agreement.

Parties will often include termination provisions in their agreements, to avoid the uncertainty as to whether there is a right at law to terminate. These provisions can, however, generate their own uncertainty. For example, in *Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111*[68] there was a dispute as to:

- whether certain breaches of the agreement (including breaches of an implied term) constituted 'gross misconduct'; and
- whether provisions concerning post-termination rights applied both to termination under the contract and termination for fundamental breach.

The court held that some of the breaches did constitute gross misconduct and that the owners corporation was therefore entitled to terminate the agreement. Of particular interest, however, was the court's finding that:

[66] [2021] NSWCA 284.
[67] Per Justice Meagher (with whom President Bell and Justice Payne agreed) at [76].
[68] [2021] NSWCA 162.

- the conduct of the party in breach was repudiatory (which, in the absence of a termination clause, would have entitled the other party to terminate the contract); but
- the scope of the contractual right to terminate was so broad (and most likely covered any conduct that was repudiatory) that it constituted an exclusive code for terminating the contract.

In relation to this second point, it is not clear whether the court was referred to the judgment of the Full Court of the Federal Court in *Neptune Hospitality Pty Ltd v Ozmen Entertainment Pty Ltd*[69], discussed in the 2020 *Contract Law Update*.[70] In that case, the court noted the presumption (which can be ousted by clear language) that common law termination rights continue to exist when there are also contractual rights of termination. It is possible that the NSW Court of Appeal would have decided in any case that the language in this agreement was clear enough to oust that presumption.

As a practical matter, these difficulties can be avoided if the agreement expressly states whether contractual rights to terminate are intended to operate concurrently with, or to the exclusion of, common law termination rights.

Another common issue that can be avoided by appropriate drafting is whether an 'innocent' party is entitled to a refund of instalment payments when a contract is terminated. In *Scott Fury trading as Fury Custom Boats v Nasso*[71] the Western Australian Court of Appeal considered this issue in the context of an agreement to build a boat for a fixed price. The court concluded that the purchaser was entitled to a refund of his instalments because (among other reasons) they could not be characterised as payments for work progressively completed and the purchaser did not receive a substantial part of the benefit expected under the contract.

***Cromarty Resources Pty Ltd v Thalanga Copper Mines Pty Ltd* [2021] NSWCA 284 – termination of agreement following late payment of royalties**

In this case, the Supreme Court considered the calculation of a royalty under an asset Sale agreement (the ***agreement***), where the royalty was to be calculated as a percentage of 'net sales realisation' amount. It then considered whether a breach of the time stipulated for making a payment justified termination and non-payment of the royalty amount.

The court held that a royalty, calculated as a percentage of the 'net sales realisation' amount, should be based on the 'net sales realisation', which does not include a deduction of the expenses necessary to realise the sales. In finding this, the court had regard to the definitions in the agreement.

The court further held that, although the obligation to pay royalties should not be considered an essential term, such as would justify termination of the agreement, termination was permitted following failure to comply with a notice.

This case demonstrates the manner in which a contract may be terminated for breach of a non-essential term

Facts

The respondent, Thalanga Copper Mines Pty Ltd, agreed to sell interests in certain mining exploration permits and mining leases in central Queensland (the ***tenements***) to Kagara Copper Pty Ltd in May 2006 (the ***agreement***).

Clause 13.1 of the agreement stipulated that Kagara Copper was to pay a 4% royalty to Thalagna within '15 Business Days after the end of the month of actual sales'.

[69] [2020] NSWCA 33.
[70] In the section 'Termination, relief against forfeiture and penalties'.
[71] [2021] WASCA 171.

On 24 March 2015 the appellant, Cromarty Resources Pty Ltd, a wholly owned subsidiary of the second appellant, Red River Resources Ltd, acquired these interests from Kagara Copper under a deed of covenant, assignment and release. Under this deed, Cromarty assumed all of the obligations Kagara had been subject to under the agreement.

Cromarty began producing ore from the tenements in mid-2017. Cromarty paid royalties to Thalanga in the manner stipulated by the agreement for all sales up until 30 June 2018. However, Cromarty then ceased making regular payments. In late October 2018 Cromarty proposed that, going forward, the payments be made in relation to 'quarterly' rather than 'monthly' sales.

There was minimal negotiation in relation to the payment date, and Thalanga's solicitors gave notice demanding payment by 13 December 2018. On 28 December 2018 Thalanga's solicitors gave written notice of intention to terminate the agreement. Cromarty's solicitors accepted that the agreement had been terminated in a letter dated 8 January 2019.

The key issues on appeal were:

1. **The timing of payment and the calculation of net sales realisation**
    - whether the amount that was royalty was due 15 business days after the end of a month during which an 'actual sale' had occurred, or at the end of three months, when the actual sales price was known; and
    - whether the 'net sales realisation' amount, to which the 4% royalty rate was applied, was to be determined after deducting sales realisation expenses, including insurance and sea freight.
2. **Termination**
    - whether Clause 13.1 was an essential term; and whether Thalanga was entitled to terminate the asset sale agreement on 28 December 2018.
3. **The quantum of the judgment sum, which the primary judge found was the equivalent of:**
    - the sum of the unpaid royalties for actual sales that had occurred before 28 December 2018; and
    - the net value of royalty payments made in relation to sales after the termination date, which Thalanga would have received for the asset sale agreement had it not been terminated as a result of Cromarty's wrongful conduct.

Judgment

The timing of payment and calculation of the net sales realisation, due for 'actual sales'

Cromarty argued that the 'actual sale' could only be determined at the end of three months, after the actual sales price was known. The court dismissed this argument. It had regard to the 'ordinary language' in the agreement – in particular, clause 13.1(a), which provided that the royalty is to be paid 'within 15 Business Days' after the end of the month 'actual sales'.

Termination

The court found that the payment of the royalty amount was not an essential term, such as to justify Thalanga's termination for breach. Rather, the court construed it as an 'intermediate' term with 'greater flexibility'.

However, while the ongoing non-payment was not enough to repudiate the contract, Thalanga's provision of notices to complete 'operate[d] as evidence that [Thalanga] consider[ed] that a reasonable time for performance ha[d] elapsed'. Consequently, Cromarty's continuing non-payment, and lack of response to Thalanga's demand to pay by 13 December 2018, 'evinc[ed] an unwillingness or an inability to render substantial performance of the contract', justifying Thalanga's termination.

The quantum of the judgment sum

The court agreed that the judgment sum should include the sum of unpaid royalties made for actual sales up until the time the agreement was terminated, in addition to the value of royalty payments related to sales made after the termination date.

***Australia City Properties Management Pty Ltd v The Owners – Strata Plan No 65111* [2021] NSWCA 162 – termination – what constitutes gross misconduct – repudiation of the contract – implied terms – construction of unusual terms**

In this case, the NSW Court of Appeal considered a caretaker agreement; and whether there was an implied term that the caretaker not use its position to obtain an unauthorised benefit, whether breach of that term constituted gross misconduct, and whether the agreement had been validly terminated.

The court also considered the requirements under the agreement following termination, and whether failure to follow that procedure amounted to a repudiation of the contract by the owners corporation, which then entitled the caretaker to loss of bargain damages.

The court considered the duration of the agreement under the relevant statutory regime, and whether variations to the original agreement created a new agreement.

The court held that an implied term in the agreement had been breached in circumstances involving deliberate deception, which amounted to gross misconduct. The contract had been validly terminated by the owners corporation. A failure to follow the process after termination did not amount to repudiation. Variations to the contract in this particular case had the effect of creating a new and different contract (for the purposes of the relevant statutory regime). The court must give effect to the language of the contract, particularly where this does not have an arbitrary or capricious result.

This case illustrates the difficulties in construing termination clauses where there are multiple breaches of differing seriousness

Facts

In 2001 Australia City Properties Management Pty Ltd (***ACPM***) entered into an agreement with the Owners of Strata Plan No 65111 (the ***OC***) to provide caretaking services for an apartment building in the CBD. Under the agreement, ACPM also owned the caretaker's lot in the apartment building (Lot 179).

Under clause 9.3 of the agreement, the OC could terminate the agreement for gross misconduct or gross negligence by ACPM. Clause 10 provided that if the OC terminated under clause 9, it must grant ACPM the right to sell its interest in the agreement and Lot 179. Clause 18.2 prohibited directors and shareholders of ACPM from nominating themselves for election to the strata committee of the OC.

In 2010 and 2015 the parties entered into deeds of variation that extended the term of the agreement to 2041.

Under the relevant statutory regime, new caretaker agreements were limited to a term of 10 years.

On 17 August 2019 the OC terminated the agreement under 9.3 because, it claimed:

- ACPM had not paid for electricity used on Lot 179, thereby breaching an implied term in the agreement that it would not use its position to obtain an unauthorised benefit from the OC. This breach was compounded because ACPM had lied to the OC about who paid for the electricity (the ***Electricity breach***);
- ACPM had failed to properly inform the Strata Committee that there were problems with the fire alarm system (the ***Fire Safety breach***); and
- ACPM had offered its directors for election as office bearers of the executive committee (the clause 18.2 issue).

Following termination, the OC took possession of Lot 179 and nominated itself purchaser of Lot 179 (and did not purchase rights in the caretaker agreement).

ACPM claimed the OC's termination was invalid, and, that in any case, the OC had repudiated the agreement by failing to follow the process set out in clause 10, which applied regardless of the seriousness of ACPM's breach.

ACPM sought compensation and loss of bargain damages, calculated on the basis that the agreement expired in 2041 because the statutory regime did not apply to an existing agreement.

The primary judge held that:

- the agreement was validly terminated by the OC under clause 9.3 because both the electricity breach and fire safety breach amounted to gross misconduct;
- ACPM had also breached clause 18.2 but this did not constitute gross misconduct;
- the OC had breached the provisions of clause 10 but this did not amount to repudiation; and
- the 2010 and 2015 deeds of variation caused a new agreement to come into existence and therefore, under the relevant legislation, the term of the agreement was up to 2025.

The OC was ordered to deliver up possession of Lot 179 to ACPM and pay compensation to it for being out of possession; however, ACPM was not entitled to loss of bargain damages.

Both parties appealed the primary judgment.

Judgment

The NSW Court of Appeal allowed ACPM's appeal and dismissed the OC's cross-appeal.

The electricity breach

On proper construction of the agreement, ACPM had no right of reimbursement for electricity expenses incurred regarding Lot 179. The court cited *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266 in considering the requirements for an implied term, and held the prohibition against taking an unauthorised benefit was reasonable and equitable, was necessary to give business efficacy to the agreement, was so obvious it goes without saying, was capable of clear expression and did not contradict any express terms in the contract.

What constitutes gross misconduct is a question of fact considered in the context of the contractual obligations of the caretaker. The court referred to the right of an employer at common law to summarily terminate a contract of employment, as discussed in *Willis Australia Group Services Pty Ltd v Mitchell-Innes* [2015] NSWCA 381. The misuse of electricity, and the deliberate deception, demonstrated such a flagrant disregard for the essential conditions under which ACPM was engaged that it constituted gross misconduct.

The fire safety breach

ACPM's failure to warn the OC promptly that the fire control panel was playing up and needed to be replaced was a breach of the agreement but did not amount to gross misconduct.

Citing *Gooley v Westpac Banking Corporation* (1995) 129 ALR 628, the court observed that for conduct to constitute gross negligence in the context of termination provisions, it would have to amount to an act or omission that demonstrated an inability to exercise the judgment necessary to carry out important functions conferred on the caretaker. Referring to *Rankin v Marine Power International Pty Ltd* [2001] VSC 150, the court said gross misconduct amounted to more than ill-advised conduct or an omission to act as a result of an error of judgment.

The clause 18.2 issue

The court considered clause 18.2 in the context of the agreement as a whole, and observed its purpose was to ensure that instruction as to and supervision of the caretaker’s activities be conducted by persons independent of ACPM. The court noted this purpose is undermined if persons associated with ACPM are

able to sit on the Strata Committee and that, in those circumstances, a breach of clause 18.2 could not be described as inconsequential.

ACPM's breach of 18.2 amounted to gross misconduct enlivening a right to termination under clause 9.3.

Repudiation by OC

The OC had validly terminated the agreement under clause 9.3, and although the it had failed to comply with its obligations under clause 10, this did not constitute a repudiation of the contract. It had not been established that the OC was *not* willing to comply with the terms of clause 10 once the correct interpretation of that clause was established.

Damages and repudiation by ACPM

Even if the contract were validly terminated, ACPM sought damages for the failure of OC to comply with clause 10 following termination.

OC argued that clause 10 did not apply where ACPM had repudiated the contract and OC had accepted that repudiation. The court disagreed, and held that the regime in clause 10 still applied in those circumstances.

ACPM was therefore owed compensation for loss of possession of Lot 179 and loss of profits. The quantum of profits depended in part on the application of legislation limiting the duration of caretaker agreements. The court held that the legislation did apply, because of the deeds of variation entered into after the legislation, so the effective expiry date of the agreement was 2025.

***Scott Fury trading as Fury Custom Boats v Nasso* [2021] WASCA 171 – contractual interpretation – whether a contract is divisible – whether there had been a total failure of consideration under the contract.**

In this case, the Western Australian Court of Appeal considered whether a contract between Mr Nasso (the ***purchaser***) and Mr Fury (the ***seller***) for the construction of a custom fishing boat should be characterised as:

- a divisible contract, where a right to payment was owed on fulfillment of certain milestones in the construction of a custom boat; or
- an entire contract, where a right to retain payment was contingent on the supply of a completed custom boat

The court upheld the trial judge's finding that the contract should be characterised as an 'entire contract' for the supply of a custom boat. Mr Fury's failure to provide a completed boat for the price agreed between the parties entitled Mr Nasso to a refund of all instalment payments made under the contract.

This case demonstrates that a construction contract will not necessarily be considered divisible by simply stipulating that payment is owed on specific dates. Accordingly, parties looking to structure a contract on a divisible basis should make this intention clear and consistent.

Facts

Mr Nasso entered into a contract on 6 September 2014 with Mr Fury, a boat maker, for the construction of a custom dual console fishing boat for $275,400. Before entering into the written contract, it was agreed that Mr Fury would pay for an architect to prepare the boat's designs. It was also agreed that Mr Fury would retain the rights in those designs for future use in other projects.

Mr Fury commenced construction of the boat in November 2014 and provided periodic updates on progress to Mr Nasso. By April 2015 Mr Nasso had paid $115,400 to Mr Fury, being the deposit and first instalment payment stipulated under the contract. By this stage, Mr Nasso had expressed concerns to Mr Fury that it appeared the boat was not being built to agreed specifications. Despite this, Mr Fury

continued to depart from agreed specifications and completed construction of the custom boat in early 2016.

Mr Fury then demanded that Mr Nasso pay an additional $45,000 for the boat as constructed for additional costs accrued for improvements outside of specified designs. Mr Nasso refused to pay the additional sum and commenced proceedings in the Supreme Court of Western Australia to recover $115,400 in instalment payments. At first instance, the trial judge found that there had been been a total failure of consideration, entitling Mr Nasso to recover all money paid under the contract, including the deposit payment.

Judgment

Mr Fury appealed the decision on the grounds that the trial judge erred in finding that:

- Mr Fury's right to retain the instalment payments were conditional upon delivering the completed boat at the agreed price (the ***first ground***);
- there had been a total failure of consideration (the ***second ground***); and
- in light of the second ground, Mr Nasso was entitled to recover the deposit payment (the ***third ground***)

Justice Morrison (with whom Justices Vaughan and Buss agreed) found that Mr Fury had failed on all three points and the appeal should be dismissed.

Regarding the first ground of appeal, Justice Morrison considered the terms of contract did not support Mr Fury's interpretation that the contract was severable and therefore entitled him to payment for work progressively done. His Honour noted that the payment schedule, although broken down into stages, should be interpreted in the context of the contract to be a reflection of the timing of payments, rather than a perceived value of the construction that may have occurred during each relevant period. His Honour also referenced the fact that the contract stipulated the ourchaser had no right to possession of the boat until the entire purchase price was paid as evidence that the entire contract was for the purchase of a completed custom boat.

Regarding the second ground of appeal, his Honour rejected Mr Fury's argument that Mr Nasso had retained any substantive benefit under the contract. Mr Fury argued that Mr Nasso had retained a benefit via the opportunity to 'workshop' the custom design that could otherwise be used in the construction of a boat in the future. The court found that, on no reasonable view, could it be said that the opportunity to participate in the design represented a substantial benefit contemplated under the contract.

On the third ground of appeal, Mr Fury contested that a reference to a 'non-refundable' deposit referred to in the 'formation' terms of the contract should be interpreted as non-refundable in all circumstances. His Honour found that the reference to the deposit being non-refundable, in context, only applied where the purchaser withdrew from the contract within the 21-day 'cooling-off' period stipulated in the formation terms. His Honour was aided in drawing this conclusion by the fact that other references to the deposit in the contract were not expressed as a 'non-refundable' deposit.

Damages and privity

Corporate groups can miss out on damages if the correct entities are not parties to the contract.

It is a fundamental principle of contract law that, subject to some limited exceptions, only parties to a contract can sue under the contract. A consequence of this principle is that, if a breach of contract causes loss to third parties, those third parties usually cannot recover damages under the contract.

This basic principle can cause difficulties where one party in a corporate group incurs losses under a contract entered into by another party. This problem commonly arises where a corporate group prepares consolidated accounts, with one company in the group responsible for incurring expenses on behalf of other companies in the group (even where the contracts were entered into by those other companies). Another context where this problem can arise, illustrated by the NSW Court of Appeal decision in *Central Coast Council v Norcross Pictorial Calendars Pty Ltd*[72] , is where a party to a contract is entitled to nominate another group member to exercise rights under that contract.

In *Norcross*, a developer entered into a contract with a local council under which the developer:

- developed a car park on land owned by the council;
- was given an option allowing the developer, or its nominee, to purchase adjoining land for nominal consideration; and
- was indemnified by the council against loss resulting from the adjoining land being contaminated.

The developer nominated a related company to purchase the adjoining land, which was later found to be contaminated with asbestos and other substances. The nominee incurred expenses remediating the contamination. The question for the court was whether the developer or nominee could recover these expenses.

At first instance, the judge held that the nominee was entitled to recover its losses under a clause in the agreement that permitted 'successors' to enforce the agreement. The Court of Appeal disagreed that the nominee was a 'successor' (because, for example, the original developer retained its obligations under the agreement to build the car park).

The Court of Appeal therefore needed to consider an alternative argument: could the developer (as party to the contract) recover:

- its own losses caused by the contamination, being either the reduced value of its shareholding in the nominee or reduction in dividends that it would otherwise have received; or
- the nominee's losses, either on the basis that the developer held the benefit of the indemnity on trust for its nominee or on the so-called '*Linden Gardens'* principle.

The court held that the developer could not recover because:

a. as a matter of construction, the indemnity did not extend to losses of the type claimed by the developer (reduction in dividends or in value of the shareholding). The court also concluded, in any case, that the existence of such loss had not been proved; and
b. the parties did not contemplate that work on the adjacent land would be carried out by a corporation other than the developer (which meant there was no trust and that the *Linden Gardens* principle, even if it applied in Australia, would not be relevant).

In relation to the first issue, the court accepted that, in principle, a shareholder could recover such losses if they fell within the language of the indemnity. The court rejected an argument that the 'reflective loss' principle necessarily prevented a shareholder recovering these losses, in circumstances where (as here) the company itself could not recover the loss (so there would be no double recovery).

On the second issue, the developer argued that the *Linden Gardens* principle entitled a party to recover losses suffered by a third party where:

- the object of a transaction was to benefit a third party; and
- it was anticipated that the effect of a breach would be to cause loss to that third party.

The court held that this principle is not yet part of the law of Australia and that it would be for the High Court to determine whether it should be accepted . In any case, the argument failed on the facts, because it was not contemplated that a third party would carry out work on the project.

[72] [2021] NSWCA 75.

This case illustrates the importance of ensuring that the entities in a corporate group that might suffer a loss from a breach of contract are parties to the relevant contract. If that is not possible, however, then appropriate drafting (of indemnities and 'on trust' clauses) might still enable a corporate group to recover its losses.

It is often said that an 'innocent' party has an obligation to mitigate its loss. There is an academic debate as to whether this 'obligation' is, indeed, a separate obligation, or whether it should be seen as an aspect of causation. In *Housman v Camuglia*[73] Justice Leeming (with whom President Bell and Justice White agreed) considered whether this academic debate might have some practical consequences.

The issue arose because the respondent argued that the appellants did not properly particularise the steps that allegedly should have been taken to mitigate the loss. If the duty to mitigate is an independent obligation, then the alleged mitigatory steps needed to be pleaded and the failure to do so would have been fatal to the argument. If the 'duty' to mitigate is, in fact, just one matter to be considered as part of the broader issue of causation, then it is less clear whether it needs to be properly pleaded – particularly having regard to those provisions of the civil liability legislation that impose on the plaintiff the burden of proving 'any fact relevant to the issue of causation'.[74]

The court found that there had not, in fact, been any failure to mitigate. It was therefore not necessary to resolve these competing views of mitigation. The discussion by Justice Leeming does, however, operate as a reminder of the importance of properly pleading and particularising any alleged failure to mitigate. Until the High Court finally determines whether or not mitigation is a part of causation, it might be safer to plead any failure to mitigate both as part of a denial of causation and as an independent allegation.

Central Coast Council v Norcross Pictorial Calendars Pty Ltd [2021] NSWCA 75 – privity of contact and recovery of subsidiary company's loss – *Linden Gardens* principle and suing for a third party's loss directly – construction of indemnities

In this case, the NSW Court of Appeal considered whether a developer that transferred land to its subsidiary could claim for the subsidiary's loss after the land was found to be contaminated, in circumstances where the original landowner had agreed to indemnify the developer but not the subsidiary.

The court held that the subsidiary was not party to the agreement, so could not itself claim for damages. On the other hand, the court held that the company could not claim for the subsidiary's losses, because the indemnity did not extend to cover it and because the subsidiary's damages did not form part of the company's loss.

Under the doctrine of privity, subject to limited exceptions, only a party to a contract can sue under it. This case discusses some possible exceptions to that principle, and is a stark reminder of the importance of considering privity issues when assets or rights are transferred within a group of companies.

Facts

In 2002 NPC and the Central Coast Council entered into a joint venture agreement, under which NPC was to develop a car park on council land, and a residential and commercial building on adjoining council land (***PTL land***)

[73] [2021] NSWCA 106. In his judgment, Justice Leeming referred to the article Courtney, Wayne 'Contract Damages and the Promisee's Role in its own Loss' (2019) 42(2) *Melbourne University Law Review* 406, which discusses this issue (and its significance) in more detail.
[74] The provision considered by the NSWCA was s5E of the Civil Liability Act.

As part of the JV agreement, NPC and the Council entered into a separate option agreement, permitting NPC or its nominee to purchase the PTL land for nominal consideration. The option could be exercised between three months and three years after commencement of the works under the JV agreement.

Under the JV agreement:

- clause 4.1 required the Council to grant easements over the car park land requested by NPC acting reasonably;
- clause 7.1 provided the Council warranted that the PTL land was free from contamination; and
- clause 7.2 provided the Council indemnified NPC against 'any loss, claim, liability, cost or expenses suffered or incurred by NPC in respect of … any Contamination existing on the [PTL Land]'.

Clause 19.9 of the JV agreement provided:

> *The **obligations imposed and the rights conferred on the parties under this Agreement are binding upon any successor to a party** and such successor must upon such succession assume all rights [conferred] and [obligations imposed] by the provisions of this Agreement, mutatis mutandis, as if such successor were named in this Agreement as a party, **but this clause does not permit the obligations and rights to be transferred or otherwise dealt with or disposed of by any of the parties** … **otherwise than in accordance with the terms and conditions of this Agreement.*** [emphasis added]

In 2005 NPC's wholly owned subsidiary (***PTL***) exercised the option as NPC's nominee.

In 2015 PTL commenced construction on the PTL land. It requested an easement for electricity over the Council's car park land, which the Council did not grant. PTL also discovered that the PTL land was contaminated, and incurred remediation costs.

At trial, the judge held that PTL, having exercised the option, was NPC's 'successor' under JV agreement clause 19.9 and was entitled to recover its losses from the Council. PTL was awarded approximately $285,000 for the Council's failure to provide an easement and $630,000 for the Council's failure to indemnify PTL for its remediation costs.

The Council appealed, claiming the trial judge erred in finding PTL was a 'successor' to NPC under the JV agreement and therefore able to sue under it. NPC cross-appealed, claiming that if PTL were not a successor, then NPC itself was entitled to damages under the JV agreement for the Council's breaches.

Judgment

The Council's Appeal

The court held that the trial judge erred in holding that PTL was NPC's 'successor' under clause 19.9 of the JV agreement. The court considered that PTL had not succeeded to NPC's rights under the JV Agreement but, rather, that PTL's rights to the PTL land came from the option agreement. The court noted:

- the JV agreement specifically contemplated NPC performing work;
- the option agreement was standalone to the JV agreement, and it would be unusual if a nomination under the option agreement had the effect of conferring all rights and obligations under the JV agreement onto the nominee; and
- the option was exercisable three months after commencement – on NPC's construction, all of NPC's rights and obligations under the JV agreement could be transferred to a party unknown to the Council, after work had only just commenced. The court considered no reasonable businessperson in the Council's position would have contemplated that result.

Accordingly, PTL was not a successor under the JV agreement and could not sue for its breach.

NPC's cross-appeal

In its cross-appeal, NPC sought, itself, to claim damages for the Council's breach of the JV agreement. NPC argued its shares in PTL had diminished in value, and that loss was equal to PTL's expenditure in remediating the PTL land, either because:

- PTL would have paid an amount of money equal to its claimed damages as a dividend to NPC; or
- the value of NPC's shareholding in PTL had decreased equal to PTL's claimed damages.

In the alternative, NPC claimed it could recover PTL's loss directly, under the principle in *Linden Gardens.*[75]

Reflective loss principle

Council argued that the 'reflective loss principle', discussed by the English Court of Appeal in *Prudential Assurance Co Ltd v Newman Industries Ltd (No 2)* [1982] Ch 204, applied to prevent NPC recovering its loss. The principle is that where loss is suffered by a company as a result of a wrong where a shareholder and the company have a cause of action, the shareholder cannot claim for the company's losses. The court noted various claimed sources for the principle, including:

- preventing double-recovery for the same loss;
- that a shareholder does not suffer a loss distinct from the company, and is barred from claiming the company's loss under the rule in *Foss v Harbottle* (1843) 2 Hare 461;
- the maintenance capital – if a shareholder is permitted to recover for what a company could itself have claimed for, this represents a depletion of the company's capital in favour of the shareholder.

The court considered that, whatever its rationale, the reflective loss principle did not apply in this case. Only NPC, and not PTL, could claim under the JV agreement. There was no question of double-recovery, no outflanking of the rule in *Foss v Harbottle* or reduction in company capital, as PTL could not claim for damages, and NPC was not seeking to sue under PTL's cause of action but, rather, for its own.

Construction of the indemnity in the JV agreement and loss

The court considered that the indemnity in clause 7.2 of the JV agreement, while broad, did not extend to losses indirectly suffered by NPC as a result of its subsidiary incurring remediation costs. The indemnity was to be read in the context of the JV agreement as a whole, and that agreement did not contemplate that anyone other than NPC would undertake the project.

Moreover, the court considered that NPC had not, in any case, proved its loss was equal to PTL's remediation costs. The director of NPC and PTL claimed that PTL was intended to be wound up and the surplus proceeds of the project transferred to NPC, but the evidence did not establish this was ever done.

As an alternative, it may have been that PTL was a cashbox with no liabilities, holding only the surplus of the development, such that any loss to it would correspond to an equal reduction in the value of its shares. But NPC led no evidence of this, despite it being a simple matter to do so. No other evidence of loss was put forward.

Linden Gardens

As an alternative to claiming for the reduction in PTL's share price, NPC argued it could claim directly for PTL's loss.

NPC relied on a line of authority following *Linden Gardens*, in which English courts have held that where parties to a building contract contemplate developed property being transferred to a third party, a builder may, in some circumstances, be liable to a developer directly for loss suffered by a new owner.

[75] *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd; St Martins Property Corporation Ltd v Sir Robert McAlpine Ltd* [1994] 1 AC 85.

The principle in *Linden Gardens* is said to avoid a 'legal black hole' that arises when a contract is breached, but no one can be compensated – the old owner suffers no loss themselves, while the new owner who does suffer loss cannot claim for it because they are not party to the contract.

In the present case, the court noted that in Australia it is well established that:

- if a contract imposes an obligation on one party to benefit a third party, the other party to the contract can seek an order for specific performance of that obligation (in this case, because the indemnity was for NPC's benefit, not PTL's, NPC could not obtain such an order); and
- if a party holds a contractual promise on trust for the benefit of a third party, the third party can sue the promisor (joining the promisee as a defendant to the action).

However, the court considered that the position in *Linden Gardens* has not been accepted as part of the law of Australia.

In any event, the court considered that the circumstances of this case were not similar to *Linden Gardens* because the parties did not contemplate that the development of the PTL land would be undertaken by anyone other than NPC. The court considered that it was therefore unnecessary to consider whether *Linden Gardens* represents the law of Australia, and noted that it would be inappropriate for an intermediate appellate court to further extend the principle to the present facts.

Accordingly, NPC was not entitled to damages.

***Housman v Camuglia* [2021] NSWCA 106 – consequential loss – failure to mitigate**

In this case, the NSW Court of Appeal considered whether the respondent was entitled to lost rental income because of damages suffered to the stairway of her apartment building.

The court held that, despite there being no safety concern, it was reasonable for the respondent not to seek to let out the units until a permanent solution was installed.

This case illustrates that the reasonableness of alleged mitigating steps can be assessed on lay, and not necessarily expert, evidence. It also contains an interesting discussion of the relationship between mitigation and causation

Facts

Mr Housman and Ms Alda hired Pacific Plus Constructions Pty Ltd (the ***appellants***) for substantial building and excavation works on their property. These works caused damage to the stairway of Ms Camuglia's apartment building. A temporary solution was installed. Notwithstanding an engineering report that indicated this temporary solution was safe, Ms Camuglia did not seek to let the units.

Ms Camuglia commenced proceedings in the District Court, and successfully obtained damages for rectification costs and loss of rental revenue. The trial judge also awarded indemnity costs against the appellants for rejecting Ms Camuglia's Calderbank offer.

Judgment

The primary issue for the court was whether Ms Camuglia was entitled to consequential loss. Justice Leeming (with President Bell and Justice White agreeing) dismissed the appeal, stating that:

- it was not unreasonable for Ms Camuglia to wait for a permanent solution to be constructed before letting the property, especially when there was a reasonable expectation that it would soon be installed;
- it was reasonable for Ms Camuglia not to seek to let the property, based on her leasing manager's opinion that it was incapable of being advertised for let;
- the perception that Ms Camuglia and her leasing manager formed of the superficial appearance of the stairway's safety was critical in assessing the reasonableness of the decision not to re-let the units; and

- it was not reasonable to engage in short-term leasing because it faced the same difficulties as above and was also unlawful under local council rules.

Separately, the court said that the appellants had failed to particularise their claim that Ms Camuglia should have mitigated her loss by re-letting the units. It was, therefore, arguably not open for the appellants to make this argument on appeal. While it was unnecessary for the court to consider this point further, it said that the present case is an example when the taxonomy matters between treating mitigation as either separate to or nested within causation. This issue therefore remains unresolved.

Another issue that arose in preparing for the appeal was whether the appellant required special leave of the court before appealing the cost order made against them. After a detailed exploration of the history, the court said (at [83]) 'that where there is a substantial ground of appeal as a right, then even if that ground fails, the appellant may nonetheless challenge the cost order as a right.' The court, however, refused to vary the cost order because Ms Camuglia's Calderbank offer was more advantageous than the ultimate judgment.

Limitation periods

High Court confirms ability of parties to contract out of standard limitation periods.

Legislation in each state and territory imposes limitation periods for breach of contract claims. For example, section 10 of the *Limitation of Actions Act 1974* (Qld) states:

> *Actions of contract and tort and certain other actions*
>
> *(1) The following actions shall not be brought after the expiration of 6 years from the date on which the cause of action arose –*
>
> *(a) ... an action founded on simple contract ..."*

In *Price v Spoor*[76] the High Court considered whether it was possible for parties to contract out of limitation periods. The resolution of this question required consideration of two issues:

a) do limitation periods extinguish causes of action (or remove the jurisdiction of courts to hear them), or do they merely create a defence that must be pleaded to be relied upon; and
b) if limitation periods merely create a defence that must be pleaded, will courts enforce an agreement not to plead a limitation period?

In relation to the first issue, the court followed earlier authority and held that, in their usual form, limitation periods do not extinguish causes of action or remove the jurisdiction of courts to hear them. A court will therefore not enforce a limitation period unless it is pleaded by the party seeking to rely on it.

On the second issue, the court applied the general principle that parties may waive a statutory right conferred on them, unless it would be contrary to the statute to do so. A statute may prevent waiver expressly or by implication.

In determining whether a statue impliedly prevents rights being waived, a court will consider whether the statutory rights are conferred in the public interest or for the benefit of a particular individual. The appellant argued that limitation periods are imposed because of the public interest in the finality of litigation. However, the court, applying the reasoning of a judgment of Chief Justice Mason in 1990[77], held that in so far as limitation periods give defendants a right to plead a defence, rather than imposing a jurisdictional restriction, their purpose should be understood as conferring benefits on individuals.

[76] [2021] HCA 20.
[77] *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 405–6.

The court therefore concluded that the parties could (and, in fact, did) contract out of the relevant limitation periods. It is possible, however, that a court would reach a different conclusion about differently worded limitation periods. It was also not necessary for the court in this case to consider whether terms excluding limitation periods would infringe legislative prohibitions on 'unfair' contract terms.

Price v Spoor [2021] HCA 20 – exclusion by agreement of limitation defence

In this case, the High Court upheld the ability of parties to agree that they will not plead limitation defences.

This case illustrates that rights conferred by statute may be waived if it is not contrary to the statute to do so.

Facts

The mortgagees brought proceedings against the mortgagor for monies under the mortgage. The mortgagor claimed that the mortgagees were statute-barred from bringing their action under the *Limitations of Actions Act 1974* (Qld). In reply, the mortgagees relied on clause 24 of the mortgage:

> The Mortgagor covenants with the Mortgage[e] that the provisions of all statutes now or hereafter in force whereby or in consequence whereof any o[r] all of the power rights and remedies of the Mortgagee and the obligations of the Mortgagor hereunder may be curtailed, suspended, postponed, defeated or extinguished shall not apply hereto and are expressly excluded insofar as this can be lawfully done.

The mortgagees asserted that the effect of clause 24 was to preclude the mortgagor from relying on the limitation defence.

Judgment

The court said that where a statute confers a right on a person, that person may waive that right unless it would be contrary to the statute to do so. The court unanimously dismissed the mortgagor's appeal, albeit in three separately delivered judgments. Each judgment considered three questions:

1. whether clause 24 excluded the mortgagor from relying on the limitation defence?

Despite the 'obvious shortcomings' and 'clumsiness' of clause 24, the court adopted a business-like approach to interpretation; determined objectively by reference to its text, context and purpose, to determine the rights and liabilities of the parties. The court noted that throughout the mortgage agreement, both parties had agreed to broad covenants that had the effect of waiving both their rights regarding certain subject matters. Ultimately, the court interpreted clause 24 as intending to exclude the mortgagor from relying on a limitation defence.

2. whether the rights conferred by the Limitations of Actions Act were created for the benefit of the individual or the state?

The court said that the limitation provisions were not designed to restrict the jurisdiction of the court. Instead, it was created to bar the remedy, not the right, that attaches to an individual that must be pleaded. As a result, the court concluded that the limitation provisions were conferred for the individual and were capable of being waived by the individual.

3. whether it would be contrary to the Limitations of Actions Act to waive the mortgagor's right to plead a limitation defence?

The court noted that there were no express prohibitions against contracting out of the limitations defence, and reading the statute as a whole did not indicate anything to the contrary.

Our team would welcome a discussion if you've any queries or comments.

Malcom Stephens
Partner
View profile

Andrew Maher
Partner
View profile

Nicky O'Leary
Partner
View profile

Richard Lilly
Partner
View profile