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Allens Contract Law Update 2018

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Introduction

Our first *Contract Law Update* (in 2012) described its form and purpose as a summary of *important contract law decisions by Australian appellate courts*. For the first time, the 2018 *Update* covers a foreign judgment, that of the Supreme Court of the United Kingdom in *Rock Advertising Limited v MWB Business Exchange Centres Limited*[1] . We have included this judgment in 'Variation and novation of contracts' because it considered an important issue for commercial lawyers: can parties to a contract specify the process by which any subsequent amendments must be made? That case also touched on, but did not determine, another fundamental issue in contract law: whether a variation to a contract that favours only one party (such as permitting late payment) is legally binding, given the apparent absence of consideration.

As was the case in 2017, Australian appellate courts in 2018 did not need to consider any fundamental, contentious principles of contract law. They did, however, provide useful guidance on how to approach a number of commonly arising issues. For example, many commercial contracts fade into irrelevance without expiring or being formally terminated.

The status of these contracts, and the doctrine of abandonment, were considered by the Western Australian Court of Appeal in *Tonner v Delaporte*[2] and by the New South Wales Court of Appeal in *Técnicas v Reunidas SA v Andrew*[3]. (Both these cases are considered in 'Abandonment and frustration'.) The latter case linked the doctrine of abandonment with the process by which courts infer an agreement (including, in that case, an agreement to terminate a contract). The process for inferring terms, and the related (but different) requirements for implying terms, were considered by the Victorian Court of Appeal in *Uren v Uren*[4], one of the cases discussed in 'Terms and interpretation of contract'.

In last year's *Update*, we summarised the decision of the Queensland Court of Appeal in *Principal Properties Pty Ltd v Brisbane Broncos Leagues Club Limited*[5], in which the court overturned the trial judge's finding that a plaintiff suffered no loss, and instead found that the plaintiff suffered a 'loss of opportunity'.

1 *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 2.

2 [2018] WACA 115.
3 [2018] NSWCA 192.
4 [2018] VSCA 141.
5 [2017] QCA 254.

In 2018, the NSW Court of Appeal similarly applied the loss of opportunity principle to overturn a trial judge's conclusion that the plaintiff did not suffer a loss[6]. The circumstances in which loss of opportunity damages might be available, notwithstanding that a plaintiff was more likely than not to suffer a loss, is an area of the law that is very complex and in which, according to the dissenting judge in *Mal Owen*, the High Court authorities are difficult to reconcile. There will hopefully be an opportunity in coming years for the High Court to clarify the relevant principles.

Other cases covered in this year's *Update* cover a miscellany of contract law issues, including: the difference between novation and nomination; an allegation that consideration under a contract was 'illusory'; the requirements for incorporating provisions of a different legal system; whether contractually agreed remedies limit common law remedies; the doctrine of frustration; and the consequences of intending to perform a contract in an allegedly illegal manner.

Finally, we would like to thank all the lawyers at Allens who made time to prepare case summaries for this *Update*, despite 2018 being such a busy year for the firm.

6 *Mal Owen Consulting Pty Ltd v Ashcroft* [2018] NSWCA 135, summarised in 'Damages and illegality'.

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Chapter 1: Variation and novation of contracts

Commercial agreements frequently contain clauses that state, for example:

> *This agreement may only be amended by an agreement in writing signed by both parties*

If the parties subsequently purport to vary the contract orally, is that later variation effective?

The answer to this question, in Australia, is not clear. One reason for the uncertainty is that the principle of freedom of contract can be relied on both to support and reject the effectiveness of such clauses. On the one hand, freedom of contract should give the parties the right to decide how a contract might be amended. Conversely, freedom of contract also allows parties subsequently to vary an earlier agreement (including an earlier agreement as to how an agreement should be varied).

The Supreme Court of the United Kingdom recently considered this issue and came down firmly on the side of enforcing such clauses, subject to any estoppel[7]. The law in Australia may, however, be different. Justice McDougall in *Cenric Group v TWT Property Group*[8] held that such clauses are ineffective in Australia and, referring to the decision of the Supreme Court in *Rock Advertising*, commented that he did not *'find the divergent reasons given by their Lordships to be particularly persuasive'*. The decision of the Supreme Court of the United Kingdom would also appear to be inconsistent with the decision of the New South Wales Court of Appeal in *Hawcroft General Trading Co Pty Ltd v Hawcroft*[9], in which the court held that a clause providing that a deed may only be amended by another deed was not effective to prevent a subsequent amendment by an agreement that was not a deed[10].

7 *Rock Advertising Limited v MWB Business Exchange Centres Limited* [2018] UKSC 2.

8 [2018] NSWSC 1570.

9 [2017] NSWCA 91.

10 This decision was handed down before the decision of the Supreme Court in *Rock Advertising*, but after the decision of the English Court of Appeal (which had held that such clauses were ineffective, but was overruled by the Supreme Court).

Even if such clauses are currently considered ineffective under Australian law (subject to any future High Court consideration), such clauses should, arguably, tend against inferences that:

- a person who purported orally to vary a contract had authority to do so; or
- there was the requisite intention to vary legal relations.

This might go some way to preserving the main benefit of such clauses, which is to prevent future allegations that an agreement was varied in the course of a conversation between employees of the respective parties.

It is reasonably common, in the course of commercial relationships, for parties to change the identity of the particular entity that is completing a transaction. It is important to bear in mind that such a change can be characterised as either a novation of the contract or a mere 'nomination'. In *Fu Tian Fortune Pty Ltd v Park Cho Pty Ltd*[11] the New South Wales Court of Appeal considered the requirements for such a novation, and the effect of such a novation on the parties' liabilities for conduct before and after the date of novation. In practice, it is better to deal with these matters expressly, rather than leaving to it to a court to infer the parties' intention.

11 [2018] NSWCA 282.

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Fu Tian Fortune Pty Ltd v Park Cho Pty Ltd [2018] NSWCA 282

> Novation or nomination?

In this case, the Court of Appeal of the Supreme Court of New South Wales considered whether a contract for the sale of land had been novated to a new purchaser, or whether the new purchaser was merely a 'nominee' of the original purchaser.

The court held that there was an effective novation.

This case illustrates the difference between a 'novation', which gives rise to a new contract, and a 'nomination', which does not.

Facts

Park Cho Pty Ltd and De Fung Zhang entered into a contract for the sale and purchase of commercial property, due for completion on 29 April 2016.

On 5 April 2016, the following exchange of email correspondence took place between Park Cho's and Mr Zhang's solicitors:

- Mr Zhang's solicitors requested that the purchaser's name should be, 'as previously agreed', amended to Fu Tian Fortune Pty Ltd.
- Park Cho's solicitors confirmed by way of reply email, stating that 'as far as the change of entity is concerned there are no issues...'.

The contract expressly contemplated the possibility that Mr Zhang might direct a form of transfer to a third party. However, this right required an express written direction from Mr Zhang.

Completion did not take place. The subsequent notice to complete and notice to terminate were both addressed to Fortune.

One year later, Fortune commenced proceedings seeking an order of specific performance, or, in the alternative, claims by Mr Zhang (later joined) and Fortune to recover the deposit paid.

Judgment

Justice Barrett had regard to, and drew inferences from, the relevant conduct and dealings of the parties.

Intent was the first essential component of novation, demonstrated here by each party's solicitor 'although using inapt language, obviously [intending] to refer to some legally meaningful result'.

Also essential was Park Cho agreeing to accept the promise of Fortune performing the contract in the place of Mr Zhang, which constituted the vendor satisfactorily discharging the original purchaser.

It was therefore found that an immediately binding contract was created, on the basis that a reasonable person in the position of the other party would believe that the novation had taken effect, based on the commercial context and surrounding circumstances.

Rock Advertising Limited (Respondent) v MWB Business Exchange Centres Limited (Appellant) [2018] UKSC 24

> Is an oral variation to a contract effective if the contract only permitted variation by a signed, written agreement?

In this case, the Supreme Court of the United Kingdom considered the effectiveness of a purported oral variation to a contract where the contract only permitted variation by signed, written agreement.

The court held that the express provision permitting variation only by signed, written agreement should be strictly enforced and, accordingly, the contract had not been varied.

Unlike this recent UK decision, courts in Australia have been more willing to give effect to oral variations, as opposed to strictly enforcing the terms of a no oral variation clause. However, it will be interesting to see if the recent, and somewhat definitive, statements from the UK Supreme Court will influence future cases in Australia.

Facts

A licensor agreed to grant a contractual licence of a premises to a licensee for 12 months on certain payment terms. The licensee was falling behind with the payments, and so its director sought orally to amend the payment schedule with the licensor's credit controller.

Relevantly, the agreement between the parties contained a clause saying, 'All variations to this Licence must be agreed, set out in writing and signed on behalf of both parties before they take effect' (referred to as a 'no oral variation' clause or 'no oral modification' clause).

The key question for consideration on this issue was whether the purported oral agreement between the licensee and licensor was effective in law.

Judgment

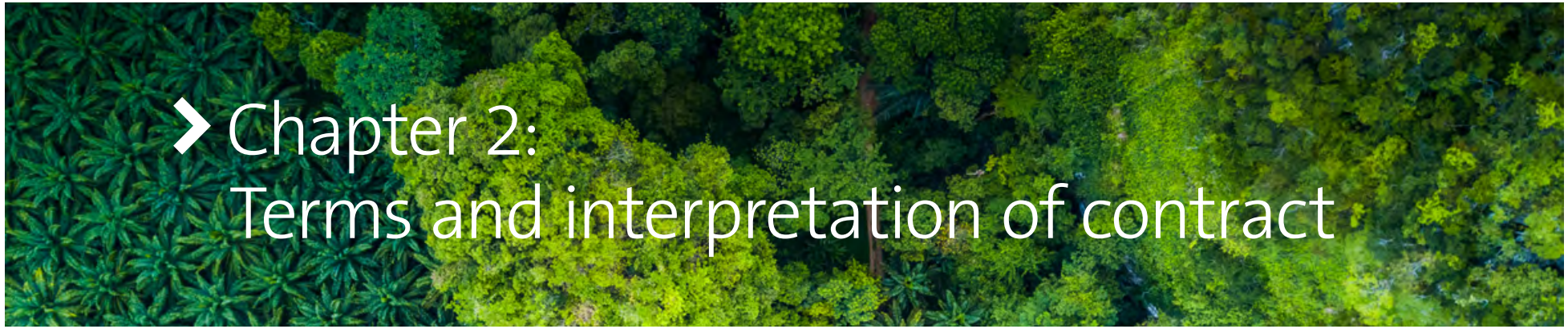
The UK Supreme Court decided the law should, and does, give effect to a contractual provision requiring specified formalities to be observed for a variation to be effective, despite earlier and international decisions suggesting such clauses are contrary to basic contractual principles. Consequently, the court held that the purported oral variation to the licence payment schedule was ineffective.

One of the underlying reasons for this decision was the fear that without 'no oral variation' clauses being effective, substantial business disruption is likely to occur. The protection against this problem is present in various international contract codes, including the Vienna Convention on Contracts for the International Sale of Goods, where 'no oral variation' clauses are enforced.

The UK Supreme Court did acknowledge that there is scope for the doctrine of estoppel to apply, but went on to explain that estoppel cannot easily be used to destroy the certainty created by a 'no oral variation' clause.

Australian position

The current position in relation to a 'no oral variation' clause in Australia is not as certain as the new UK position. The position in Australia is that 'no oral variation' clauses will generally not be effective to prevent oral variations (see *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd* (2003) 128 FCR 1 at [215] – [223] and *Cenric Group v TWT Property Group* [2018] NSWSC 1570).



Chapter 2: Terms and interpretation of contract

The first step in resolving a contractual dispute is to determine the terms of the contract. In most cases, this is a relatively simple task. For example, most commercial contracts will be recorded in a written agreement signed by the parties. In other cases, however, there may be a dispute between the parties as to the terms of the contract and whether particular terms should be inferred or implied. In *Uren v Uren*[12], the Victorian Court of Appeal discussed the difference between inferring and implying terms into a contract. Inferred terms are those terms that a court infers were agreed between the parties (without necessarily requiring a formal offer and acceptance), whereas implied terms may be part of a contract without having been agreed by the parties. As shown by this case, some terms may be both inferred and implied.

The inference of contractual terms was also discussed by the New South Wales Court of Appeal in *Tecnicas Reunidas SA v Andrew*[13], in the context of an inferred agreement to abandon a contract. That case is discussed in more detail in the 'Frustration and Abandonment' chapter of this *Update*.

Even if the terms of a putative contract can be identified, a court may still decide that there is no binding contract if no consideration passes between the parties. The requirement for adequate consideration, and whether alleged consideration might be 'illusory', was discussed by the New South Wales Court of Appeal in *LSKF Holdings Pty Ltd v Shield Lifestone Holdings Pty Ltd*[14], in which case it was argued that consideration provided under a contract was, for commercial reasons, illusory. The court rejected the argument and, consistently with earlier authorities, confirmed the low threshold for showing that consideration has passed under a contract.

12 [2018] VSCA 141.

13 [2018] NSWCA 192.

14 [2018] NSWCA 129.

Parties will sometimes seek to incorporate into their agreement provisions from a different legal system or an international code. Disputes can arise as to whether the purported incorporation has been successful and, if so, the extent of the incorporation of those terms. In *Anthony Wayne Elkerton and Ronald John Dean-Willcocks in their capacity as administrators of South Head & District Synagogue (Sydney) (In Liquidation) (Controllers Appointed) v Rabbi Benzion Milecki*[15], it was argued that a contract between a rabbi and a corporation incorporated terms of Orthodox Jewish law. The court held that, on the facts of the particular case, the relevant provisions of Orthodox Jewish law had not been incorporated into the contract. The court did confirm, however, that such incorporation can be effective, provided that it is sufficiently clear and certain what terms are being incorporated into the contract.

There has been a debate in recent years over the extent to which, once the terms of the contract have been identified, surrounding circumstances can be considered when interpreting that contract. In *Lopes v Taranto*[16], the Victorian Court of Appeal held that surrounding circumstances should be considered when construing a contract, whether or not there is any ambiguity on the face of the contract.

15 [2018] NSWCA 141.

16 [2018] VSCA 288.

Anthony Wayne Elkerton and Ronald John Dean Willcocks in their capacity as Administrators of South Head & District Synagogue (Sydney) (In Liquidation) (Controllers Appointed) v Rabbi Benzion Milecki [2018] NSWCA 141

› Contractual interpretation› whether the principle of Orthodox Jewish law providing the rabbi with life tenure expressly incorporated as a term of contract with company › whether such a term to be implied

In this case, the New South Wales Court of Appeal considered the incorporation of Orthodox Jewish law into the contractual relationship between Rabbi Benzion Milecki and South Head & District Synagogue (Sydney) Ltd.

The court held that the terms of engagement between the rabbi and the synagogue were not sufficient to incorporate the Orthodox Jewish concept of *Hazakah* (life tenure for rabbinical appointments) and the synagogue was therefore entitled to terminate the rabbi's engagement in accordance with Australian law.

This case affirms the common law position that a contract, governed by one law, may incorporate provisions from a different law or code. However, it must be clear and certain what is being incorporated.

Facts

In 1985, the rabbi was appointed Chief Rabbi of the Synagogue.

In 1999, the rabbi and the synagogue entered into contractual terms of engagement for the rabbi's appointment. Clause 2 provided 'The relationship between the Rabbi and the congregation shall be defined in accordance with Halacha [Orthodox Jewish law]'.

The terms were silent as to the duration of the rabbi's engagement or the circumstances in which it may be terminated. The synagogue went into liquidation, following which its administrators purported to terminate the contract.

The rabbi claimed that *Hazakah*, an aspect of *Halacha*, was incorporated into the terms of engagement. *Hazakah* provides that a rabbi's appointment is for life and cannot be terminated except in circumstances prescribed by Orthodox Jewish law.

The trial judge held that *Hazakah* was incorporated – or, alternatively, implied – as a term of the contract. The synagogue appealed to the Supreme Court of Appeal.

Judgment

The court held that the appeal be allowed for the following reasons:

- the reference to 'congregation' in clause 2 did not refer to the 'Synagogue', and was in the nature of a recital and not intended to give rise to legal obligations. It was, instead, a general statement confirming the religious subject matter of the contractual relationship;
- the court further held that even if clause 2 were intended to expressly incorporate *Halacha*, it was not sufficiently clear and certain which subsets of *Halacha* would be incorporated into the terms of engagement between a rabbi and congregation;
- the court held that there was no implication of *Hazakah* in the terms of engagement, after considering each of the following bases for implication of terms into contracts:
  - there was no implication from the express terms of the contract;
  - this is not a term 'implied into contracts between a Rabbi and his congregation as a matter of Australian law';
  - there was no implication from custom or usage, as there was no evidence to suggest that contracts 'made in Australia between an Orthodox Jewish Rabbi and his congregation ... are taken to provide as part of that bargain that the Rabbi have life tenure'; and
  - the term is not implied as necessary, because it is not necessary to give the contract business efficacy. The court held that 'it is not obvious that such an onerous and unusual financial obligation would be included'.

Lopes v Taranto [2018] VSCA 288

› Admissibility of evidence of surrounding circumstances

In this case, the Victorian Court of Appeal considered, among other things, the meaning of the words 'lent or agreed to be lent' in a deed of loan, and found that evidence of the relevant surrounding circumstances could be used to construe these words, regardless of whether there was ambiguity in the language.

This issue was considered as part of a broader question: whether there was an 'estoppel by deed' such that the borrower was liable to repay the loan to the lender or, if it failed to do so, the guarantors of the loan were liable to the lender.

This decision provides further support for the view that evidence of surrounding circumstances may be used to construe contracts, regardless of whether the contractual language is ambiguous.

Facts

This case involved two main transactions. The first was a 'deed of loan', which:

- was executed on 24 May 2011 between Picarock Pty Ltd, as borrower, and the respondent's uncle, Mr Taranto, as lender; and
- contained a clause that said: in consideration of the specified amount ($2.2 million) 'lent or agreed to be lent' to Picarock, Picarock will repay the 'loan'.

The second concerned two guarantees executed on 20 May 2011 by each of the applicants, Mr and Mrs Lopes, who were the guarantors. The guarantees were in different terms.

- Mr Lopes's guarantee referred to an amount of $2.2 million as the 'loan', and made reference to a 'principal instrument', which was accepted to be a reference to the deed of loan of 24 May 2011.
- Mrs Lopes's guarantee made reference to Picarock as 'the Debtor' and to loans being made to it by 'Taranto'.

Picarock was deregistered in May 2015 without having repaid the amount of $2.2 million. On 4 August 2016, the respondent sent to Mr and Mrs Lopes (via their solicitors) a letter that outlined when portions of the $2.2 million sum were provided by Mr Taranto to Picarock between 2002 and 2004. The letter also enclosed an email sent by Mr Lopes to the respondent's solicitor on 12 May 2011, which forwarded a breakdown of the payments made by Mr Taranto, totalling $2.2 million. There was also an email of 11 May 2011 sent by Mr Lopes to the respondent's solicitor, which referred to 'the loan repayment to [Mr Taranto].'

At first instance, the trial judge found that Mr and Mrs Lopes were liable to pay $2.2 million in accordance with their guarantees. Integral to this was a finding that Picarock was initially liable to repay this sum as lender; there was an 'estoppel by deed' as between Picarock and Mr Taranto such that the deed of loan gave rise to a 'solemn and unambiguous' engagement to be treated as binding. The trial judge had regard to the surrounding circumstances and May 2011 emails in concluding that it was clear the $2.2 million sum was the subject of the 'deed of loan'.

Judgment

In a judgment of the court (comprising Justices Kyrou, McLeish and Hargrave), the Lopeses' application for leave to appeal was granted, but the appeal was dismissed. The two main aspects of the decision are outlined below.

Whether 'estoppel by deed' issue raised at first instance

First, the court dismissed the Lopeses' claim that the 'estoppel by deed' issue was not canvassed at first instance – it was clear that the Lopeses had accepted at first instance that there was an issue of 'estoppel by deed' as between Picarock and Mr Taranto. This was significant, as it determined Picarock's liability to repay under the 'deed of loan', which was the key obligation secured by the Lopeses' guarantees.

Application of 'estoppel by deed'

The court found there was an estoppel that bound Picarock to repay the loan under the deed of loan. This estoppel arose from the fact that the words 'lent or agreed to be lent' in the deed of loan was a 'sufficiently unambiguous' reference to the $2.2 million loan, having regard to the surrounding circumstances' evidence – in particular, the emails of 11 and 12 May 2011.

In reaching this conclusion, the court (at [65]-[66]) seemed to approve of the decision in *Eureka Operations Pty Ltd v Viva Energy Australia Ltd* [2016] VSCA 95, which considered that there was no need to establish ambiguity in the text before undertaking a wider inquiry into 'the circumstances the contract addresses and its commercial purpose or objects' (*Eureka*, [46]). It also cited the High Court's decision in *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 91 ALJR 486, which referred to a 'reasonable businessperson [being] placed in the position of the parties' when determining a contract's meaning (*Ecosse*, 491).

These passages led the court to conclude that in every case, regardless of whether there is ambiguity in the contract's language, consideration should be given to 'objective evidence of facts known to both parties as to commercial purpose' (at [71]). Accordingly, the 11 and 12 May 2011 emails indicated that the purpose of the deed of loan was for Picarock to repay the sum of $2.2 million that had been loaned to it by Mr Taranto in portions. The phrase 'lent or agreed to be lent' really just meant the amount 'lent' before the deed was entered into, being the $2.2 million sum.

Having found that there was an 'estoppel by deed' as between Picarock and Mr Taranto, this meant that the Lopeses were liable under the guarantees for Picarock's indebtedness.

LSKF Holdings Pty Ltd v Shield Lifestone Holdings Pty Ltd [2018] NSWCA 129

› Whether agreement void on account of illusory or uncertain consideration

In this case, the New South Wales Court of Appeal considered whether a shareholder agreement was void because the consideration (an obligation to provide funding if requested by the board) was illusory or uncertain.

The court held that the agreement was not void. The discretionary promise to provide funding was not too uncertain and did not constitute an illusory obligation.

The case illustrates the low threshold for showing that a contract is supported by consideration.

Facts

In March 2016, the first respondent, Shield Lifestone Holdings Pty Ltd (***SLH***), acquired 50 per cent of the shares in the second respondent, Litestone Holdings Pty Ltd. The remaining 50 per cent of shares in Litestone were held by the appellant, LSKF Holdings Ltd.

Litestone had two directors: Mr Kryiakouleas, who was the sole director and shareholder of LSKF; and Mr Ye, who was the sole director and shareholder of SLH.

Around April 2017, a written shareholders' agreement was entered into between SLH and LKSF. The terms of the shareholders' agreement included an obligation on SLH to provide loans to Litestone on request by the board. As a practical matter, such requests could therefore only be made with the agreement of Mr Ye.

Proceedings were commenced in 2017. A large factual issue in the proceedings was whether Mr Ye had acted in good faith in failing to consent to further borrowing requests that Mr Kyriakouleas considered should be made. The issues in dispute were resolved at a mediation, with the exception of the question as to whether the shareholders' agreement was void due to the absence of consideration, and uncertainty. The primary judge found that the shareholders' agreement neither lacked consideration nor was uncertain. LSKF appealed this decision.

Judgment

The court considered authorities on what constitutes an illusory promise. It was not doubted that the basic legal principle is that a contract that reserves a party an unfettered discretion or option whether to carry out what appears to be a promise is void.

The court held that the critical question in deciding whether a promise is illusory is whether it is enforceable. The promise does not need to be specifically enforceable. It only needs to be shown that a party has a remedy for the breach of the promise. In this case, the promise to provide funding was enforceable because:

- SLH's promise to fund was enforceable, in the sense that it would give rise to a right for damages if breached. It did not matter that it was 'probably not' specifically enforceable; and
- Mr Ye was not free to act self-interestedly. Mr Ye was obliged in equity and under the *Corporations Act 2001* (Cth) to act in good faith and the best interests of Litestone. These obligations were enforceable.

Similar reasons led Justice Leeming to conclude that the promise to provide funding was not too uncertain (ie because it was enforceable). The fact that interest-free finance was repayable upon short notice and on reasonable grounds lessened the value of the promise, but did not render it uncertain. This was because a power to recall a loan for a reason that is reasonable is enforceable.

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Uren v Uren [2018] VSCA 141

› Inferred and implied terms in an undocumented partnership agreement

In this case, the Court of Appeal of the Supreme Court of Victoria considered a dispute between two brothers over distributions on partnership dissolution in the case of an undocumented partnership agreement.

The court upheld the decision of the trial judge in finding that terms for remuneration for labour contributions to the partnership and for payment of compound annual interest on capital contributions were included in the partnership agreement by way of inference or, failing that, by way of implication.

This case provides a helpful application of the legal principles for inferring or implying terms in an undocumented agreement.

Facts

Noel and Bruce Uren were brothers. Noel was a farmer and Bruce a 'very successful finance broker'. They established an undocumented partnership in 1974, to conduct a cattle farm known as 'Walkerville', which they owned in equal shares as owners in common.

In about 1988, Bruce and Noel considered purchasing a neighbouring property to Walkerville, and it was agreed that if Noel contributed money towards that purchase, that contribution would attract interest. That purchase did not eventuate.

In 1993, following the sale of another property they owned in shares of 75 per cent (Noel) and 25 per cent (Bruce), Noel and Bruce contributed their respective sale proceeds (Noel $205,000 and Bruce $63,000) to the Walkerville partnership.

Noel lived on Walkerville from 1994 and was responsible for its day-to-day operation. He did not pay for accommodation at Walkerville or any expenses, including food, power, fuel, rates and insurance. He did not have a family to support and lived frugally. He drew from the partnership's account only amounts necessary for basic living expenses. These 'drawings' were debited to his capital account by Bruce or accountants. Bruce lived and worked in various Victorian cities, and was responsible for the finances and accounts of the partnership.

Partnership profits were to be split equally, but the partnership consistently made losses and Bruce used the partnership 'for his own personal gain as a tax minimisation opportunity'.

Neither Noel nor Bruce was paid any remuneration by the partnership.

Noel was dependent on Bruce in various ways, including his material needs and for financial advice and guidance. Bruce 'held himself out as Noel's guardian', and there was an 'obvious imbalance between their education and worldly sophistication'. Bruce was also Noel's only surviving family member.

On 30 June 1999, Bruce's finance company, Exclusive Finance & Leasing Pty Ltd (***EFL***), entered into a loan agreement with Bruce and Noel, under which EFL was entitled to compound interest on loans made to the partnership. The partnership obtained loan finance from Rural Bank, RMBL Investments Ltd and EFL.

In 2001, 2005 and 2007, Bruce completed loan applications to RMBL Investments on behalf of the partnership, in which he falsely stated that Noel had an annual income of between $60,000 and $100,000. Between 2008 and 2012, Bruce caused tax returns to be prepared for Noel that falsely stated Noel was employed by EFL at an annual salary of $60,000.

Noel failed to seek wages for 40 years and signed tax returns that did not disclose a wage payable to him. Noel provided evidence that Bruce did not give him adequate time to read the tax returns that were prepared for him before he was required to sign them.

In 2013, Noel sought advice from his accountant about the partnership's 2012 tax return. His accountant queried with the partnership's accountant 'why [Noel's] contributions to the partnership in both cash and labour were not reflected in the partnership accounts'.

Following a falling-out between the parties in 2013, on 10 June 2015 Bruce commenced a proceeding seeking a partnership dissolution declaration with effect from 30 June 2015. He also sought orders for the sale of partnership assets, the application of proceeds of sale and the adjustment of entitlements.

The proceeding was settled on 10 August 2015. The parties agreed to the dissolution of the partnership and the sale of partnership assets, including Walkerville. The parties also agreed that an accountant, Mr Munday, be appointed to enquire into and report on their respective entitlements in the partnership from 1 July 1991. An order made by Justice Cameron on 18 August 2015 gave effect to the terms of settlement.

Mr Munday prepared a draft report dated 29 March 2016 and, following further submissions from the parties, a final report dated 18 August 2016. The final Munday report was largely adopted by the parties, with a number of issues remaining for adjudication by the court. The parties filed points of claim and defence and counterclaim in relation to the outstanding issues.

The two relevant issues raised by Noel were:

- whether he was entitled to an adjustment in his favour calculated by reference to unpaid wages as a partnership expense and, if so, in what amount and for what period; and
- whether he was entitled to an adjustment in his favour for interest on capital advanced by him to the partnership and, if so, how much.

On 25 May 2017, Justice Judd upheld Noel's claims for remuneration and interest, relevantly finding that:

- by 1993, the partnership agreement had been amended to include an additional term that Noel would be remunerated at a reasonable rate for his labour as an expense to the partnership; and
- the partnership agreement included a term that each of the partners had an entitlement to be paid compound annual interest on their capital contributions at the Division 7A Australian Taxation Office rate, as set out in the final Munday report.

On 4 and 14 September 2017, Justice Judd made orders to give effect to his decision.

Bruce sought leave to appeal against Justice Judd's orders, particularly the judge's findings in relation to the terms for remuneration and interest.

Judgment

In deciding the appeal, Justices Santamaria, Kyrou and Ashley looked at the principles relating to inferred and implied terms set out in *Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd* [2015] VSCA 190, summarised below:

- there are two 'stages', which may well overlap for ascertainment of relevant terms. Where no formal contract exists, the actual terms of the contract must be inferred (stage one) before any question of implication (stage two) arises;
- the first stage is 'one of inference of actual intention' and entails an inquiry as to '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'. Evidence of the parties' pre-contractual conduct is admissible on the question of whether a particular term is to be inferred; and
- the second stage is 'one of imputation' and entails an inquiry as to 'what, if any, are the terms which are, in all the circumstances, implied in the contract as a matter of presumed or imputed intention'. The conditions for implying a term in fact into a contract (collectively known as the *BP* Test, as originally set down in *BP Refinery (Westernport) Pty Ltd v President, Councillors and Ratepayers of the Shire of Hastings (Victoria)* (1977) 180 CLR 266) are that the term must:
  - be reasonable and equitable;
  - be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;
  - be so obvious that 'it goes without saying';
  - be capable of clear expression; and
  - not contradict any express term of the contract.

Decision on remuneration term

In upholding Justice Judd's decision to find for a remuneration term, the following conclusions of the Court of Appeal are relevant:

- *Grocon* required a court to determine the express or inferred terms to which parties had actually agreed before considering additional implied terms, Justice Judd therefore could not have found the remuneration term was implied if he had already found it was inferred;
- had Justice Judd's determination that the term was inferred been incorrect, he nonetheless applied the BP Test correctly in determining that the term could have also been implied because:
  - his determination that the term was fair and necessary for the reasonable operation of the partnership in substance constituted a finding that the term was 'reasonable and equitable';
  - his determination that 'a durable partnership between the brothers on reasonable terms depended on Noel receiving a reasonable income' constituted a finding that the term was necessary to give business efficacy to the partnership agreement. This finding was not displaced by adjustments for unequal contributions in the *Partnership Act 1958* (Vic), as they did not remedy Noel's position, due to his disproportionately greater contribution of labour; and
  - he did not need to explicitly refer to the fourth and fifth conditions of the *BP* Test, given that in both Grocon and *Narni Pty Ltd v National Australia Bank Ltd* [2001] VSCA 31 the court allowed for 'more simplified' and 'global' applications of the *BP* Test that did not require express consideration of each individual condition. As he specified a remuneration term in detail and concluded that the remuneration term could only be implied if it could not be inferred, he had by implication concluded that the term was capable of clear expression and that there would be no inconsistent express term;
- Justice Judd correctly concluded that the term was to be objectively inferred on the basis of:
  - Noel's greater capital and labour contributions to the partnership, his living expenses being deducted from his capital, and Bruce's full-time work providing him with an income to support himself without depleting his capital in the partnership;
  - Walkerville being an unprofitable enterprise, which had a greater adverse effect on Noel than Bruce;
  - the different sources of funds for capital contributions Noel and Bruce made to the partnership;
  - the imbalance in Noel's and Bruce's levels of education and worldly sophistication; and
  - Noel's dependence on Bruce, and Bruce holding himself out as Noel's guardian;
- the fact that the parties conducted the affairs of the partnership without the payment of remuneration to Noel and that Noel did not complain about this before 2013 was a relevant consideration, but not a determinative one when viewed in the overall context of the matter; and
- while Noel signed tax returns showing no wage payable to him, Bruce did not give Noel time to understand them before signing, so Noel had not acknowledged a term for no remuneration by this conduct.

Decision on interest term

In upholding Justice Judd's decision, the Court of Appeal found that:

- the matters relied upon in inferring the term, being:
  - the inequality in the parties' capital contributions;
  - the fact that Noel had contributed all of his capital;
  - Noel's dependency on Bruce;
  - Bruce's acknowledgement of Noel's dependency;
  - Bruce's assumption of a duty to support Noel;
  - the parties' agreement in 1988 that interest would be paid on capital contributed by Noel to purchase King's Park, which purchase did not eventuate; and
  - the fact that when the issue of payment of interest on EFL's advances arose in 1999, the parties readily agreed that interest should be paid,

were sufficient in justifying that inference and, failing that, were also sufficient to justify the implication of an interest term; and

- the lengthy period over which interest on Noel's capital was to be paid, the opportunity cost to him involved in not being able to deploy that capital in alternative, income-producing activities that would have incurred compound interest, justified Justice Judd's conclusions that payment of simple interest would not have provided a fair return on the capital, and therefore the judge was justified in finding that annual compound interest should be inferred.

Chapter 3: Abandonment and frustration

Most contracts come to an end when their term expires or when they are terminated in accordance with the contract. What happens to a contract that is neither terminated nor expires? In *Tonner v Delaporte*[17], the buyers of a property formed the view that the sellers no longer wished to proceed with the sale. The sellers in turn asserted that the buyers had repudiated the contract. Both parties then proceeded on the basis that the contract was no longer on foot, and the property was sold to a different buyer. The Western Australian Court of Appeal held that the buyer had not repudiated the contract but that the parties had mutually abandoned it. The court held that:

> When the conduct of parties reveals that neither intends that the contract be further performed, the parties will be regarded as having so conducted themselves as to abandon or abrogate the contract. The inference of abandonment may be drawn when an 'inordinate' length of time has been allowed to elapse during which neither party has attempted to perform, or called upon the other to perform, the contract between them.

This decision was referred to by the New South Wales Court of Appeal in *Técnicas v Reunidas SA v Andrew*[18] . One of the issues in that case was whether a retainer between a client and a law firm had come to an end by abandonment. Although the contract of retainer contained a clause permitting the parties to terminate the contract on notice, the court held that the contract had been abandoned. One factor relevant to the court's decision was that, on two occasions, the client had not replied to offers by the law firm to provide assistance. Justice Leeming, with whom Chief Justice Bathurst and Justice White agreed, explained that 'abandonment' should be understood as the discharge of a contract by inferred agreement. That is, abandonment doesn't depend on the parties' actual intentions, but *'is a matter of fact to be inferred from an objective assessment of the conduct of the parties'*[19].

17 [2018] WACA 115.

18 [2018] NSWCA 192.

19 *Justice McColl in Ryder v Frohlich* [2004] NSWCA 472.

A contract may also be brought to an end by 'frustration'. In *Chinatex (Australia) Pty Limited v Bindaree Beef Pty Ltd*[20], Chinatex entered into an agreement to purchase beef from Bindaree Beef, with the intention of on-selling that beef to another company. The contract with the third party ultimately fell through, and Chinatex argued that this frustrated the contract with Bindaree Beef. The court held that frustration occurs when a common assumption of the parties as to the continued existence of a matter, essential to performance, proves inaccurate. In this case, the on-sale by Chinatex was not contemplated by the contract as being a necessary condition of its performance. The fact that it was the premise on which Chinatex entered into the contract was not sufficient to make it a shared or common assumption, for the purpose of the doctrine of frustration.

20 [2018] NSWCA 126.

Allens › ‹ Linklaters

Chinatex (Australia) Pty Limited v Bindaree Beef Pty Limited [2018] NSWCA 126

› Whether an agreement is frustrated by the commercial failure of a third party agreement

In this case, the New South Wales Court of Appeal considered whether an agreement for the processing and sale of beef was frustrated by the commercial failure of the purchaser's separate agreement with a third party, a stranger to the primary agreement.

The court held that although the purchaser had planned to sell the whole of the product to a specific third party, unless the purchaser's ability to on-sell to the third party was commonly assumed between the parties to be an essential condition of their commercial bargain, the contract was not frustrated by the disavowal of the third party.

This case demonstrates the importance of contractual drafting reflecting the commercial imperatives, appetite for risk and necessary contingency planning for both parties. It is preferable that parties identify and agree their key assumptions in writing, rather than rely on perceived common assumptions being held by both parties.

Facts

The case arises from an agreement, termed the Service Kill Agreement (the ***SKA***), between Bindaree Beef Pty Ltd, a NSW abattoir, and Chinatex (Australia) Pty Ltd, an Australian subsidiary of a Chinese state-owned corporation.

The SKA was struck between the parties following earlier negotiations between Bindaree and Shenzhen Lianhua Enterprises Development Co Ltd, a China-based meat wholesaler (***SLED***). Chinatex was substituted as the purchasing party, following Bindaree raising concerns about enforcement risk against SLED, a foreign company.

The key commercial terms of the SKA provided for a weekly process for the three years of its term:

- Chinatex to pay a fixed fee to Bindaree of $405 per head for 900 cattle (or more, at Chinatex's election);
- Bindaree to purchase at auction and process the cattle;
- Chinatex to pay a variable fee to Bindaree, based on the average cost of acquiring and transporting the cattle to the abattoir; and
- after payment of the variable fee, Chinatex was to collect the finished product from Bindaree.

Chinatex planned to on-sell the whole of the product to Australia Uniwell Group Pty Ltd, an Australian subsidiary of SLED. It entered a separate contract with Uniwell to that end.

However, the following events transpired:

- in the scheduled three-and-a-half months between execution of the SKA and commencement of the three-year term, market conditions changed, and Uniwell indicated to Chinatex that it would not accept the product. Chinatex advised Bindaree of this;
- Bindaree communicated to Chinatex that it would comply with the terms of the SKA and expected Chinatex would do likewise;
- Chinatex did not comply with the terms of the SKA for the first six weeks of the term. Bindaree sold the meat product to other purchasers (for a lesser price) and invoiced Chinatex for the difference (though these invoices were unpaid);
- Chinatex established a relationship with Chongqing Hondo Agriculture Group Co, a Chinese beef production company. For the following 14 weeks, Chinatex purchased the beef consistently with the terms of the SKA and on-sold the whole of the product to Hondo; and
- the relationship between Chinatex and Hondo ceased. Chinatex failed to comply with the SKA for the following 19 weeks until Bindaree terminated the contract for breach of a fundamental term.

Allens › ‹ Linklaters

Judgment

Chinatex's appeal against the trial judge's decision in favour of Bindaree was disallowed. Justice Barrett, writing for the court, with Justice's McColl and White agreeing, held that the SKA was not frustrated by the commercial failure of agreements between Chinatex and SLED, Uniwell or Hondo.

Significantly, Justice Barrett's decision applies the formulation of the doctrine of frustration adopted by the House of Lords in *Davis Contractors Ltd v Fareham Urban District Council* and approved in the High Court's decision in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)*: frustration occurs where the parties' common assumption of the continued existence of a thing or state of affairs, essential to performance, proves inaccurate.

The SKA did not contemplate that the on-sale of the total output by Chinatex to SLED (or any other third party) was a necessary condition of its performance. It was irrelevant that Chinatex's commercial rationale for entering into the SKA was premised on the continued willingness of SLED or its associates to purchase the whole of the output, because that assumption was unilateral, not shared or common. Bindaree was not influenced by any corresponding assumption before entry into the SKA and so was entitled to rely on the terms of its bargain.

This case endorses the archetypal mode of interpreting a contract by reference to the understanding of an ordinary businessperson; but emphasises it is to be interpreted by the ordinary businessperson having regard to facts known to both parties.

Allens › ‹ Linklaters

Tonner v Delaporte [2018] WASCA 115

Repudiation and mutual abandonment

In this case, the Western Australian Supreme Court of Appeal considered repudiation and mutual abandonment of a contract for the sale of land.

The court held that the trial judge erred in finding that the buyer had repudiated the contract. Instead, the court found that the buyer had misunderstood that the seller did not want to proceed with the sale. Despite that misunderstanding, as both parties had acted for an 'inordinate' period (20 months) on the basis that the contract was no longer on foot, the court held that the parties had mutually abandoned the contract and ordered that the deposit for the sale be returned to the buyer.

This case emphasises the importance of acting consistently with your legal position in a contractual dispute. Failing to actively seek to enforce a contract for an extended period may result in a finding that the contract was mutually abandoned.

Facts

- Tonner (the buyer) and Delaporte (the seller) entered a contract for the sale and purchase of a property. The buyer paid a deposit of $100,000.
- The buyer and seller also entered a lease agreement under which the buyer agreed to rent the property until the date of settlement.
- Just before the property's settlement, the seller's agent issued a notice to the buyer requesting that they vacate the property. The notice referred to the seller as the 'landlord' and used terms such as 'end to your tenancy'.
- Following receipt of the notice to vacate, the buyer indicated to the seller's agent that they understood the notice as meaning that the seller did not want to settle on the property.
- Following a telephone call with the agent, the buyer emailed the agent restating their understanding and requesting the return of the $100,000 deposit. The trial judge found this email to constitute a repudiation of the contract. That finding was challenged by the buyer on appeal.
- The seller's solicitor then wrote to the buyer, confirming that the buyer had repudiated the contract and that the seller terminated the contract on that basis.
- The buyer never sought to enforce the contract and the seller subsequently attempted to sell the property. The property ultimately sold 20 months after the solicitor's letter was issued, for $500,000 less than the purchase price of the original agreement. The trial judge had awarded damages to the seller based on this difference.

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Judgment

No repudiation

The court disagreed with the trial judge, and found that the buyer's email was not a repudiation but a misunderstanding by the buyer of the nature of the notice to vacate. That misunderstanding was not corrected by the seller.

Mutual abandonment

The court then determined the parties' rights and remedies in light of its conclusion that there was no repudiation, and found that the parties had mutually abandoned the contract. The court referred to the following principles:

- 'When the conduct of parties reveals that neither intends that the contract be further performed, the parties will be regarded as having so conducted themselves as to abandon or abrogate the contract.' (at [114]); and
- 'The inference of abandonment may be drawn when an "inordinate" length of time has been allowed to elapse during which neither party has attempted to perform, or called upon the other to perform, the contract between them.' (at [114]).

The court's finding here was on the grounds that, following the termination letter, the parties had acted on the basis that the contract was no longer on foot – the seller had put the property on the market and the buyers had not attempted to enforce the original contract.

Orders

The court set aside the trial judge's damages award, and ordered that the seller pay the buyer the amount of the deposit because consideration for the payment of the deposit had failed. That is, the contract had ended without being performed and the buyer was not at fault.

Técnicas Reunidas SA v Andrew [2018] NSWCA 192

- Abandonment of contract
- Mutual release of future obligations by inferred agreement

In this case, the NSW Court of Appeal considered the operation of the doctrine of abandonment in the context of an application by a company to restrain its former solicitors' firm from acting against it in arbitral proceedings.

The court held that a contract between the solicitors and the former client had ended by abandonment, even though neither party had purported to terminate the agreement under a termination clause, and there was therefore no continuing duty of loyalty by the solicitors to the client.

This case indicates that a contract can be ended not only by express statement but also by inferred agreement.

Facts

The appellant, Técnicas Reunidas SA, engaged the law firm Pinsent Masons (Australia) for legal advice on a dispute with Downer EDI Engineering Power Pty Ltd. Two Sydney partners of Pinsent Masons gave advice to Técnicas on the matter between June and October 2015.

In March 2016, Downer commenced arbitration proceedings against Técnicas. Técnicas engaged White & Case to act in the matter. In May 2016, Pinsent Masons enquired about the arbitration with Técnicas via email and offered their services to assist. Técnicas responded by informing Pinsent Masons about the engagement of White & Case and by asking for an advice on a minor issue. Pinsent Masons gave the requested advice the following day and offered its support in the matter. In August 2016, Pinsent Masons again offered to assist Técnicas by email. Both emails were not answered by Técnicas.

Around the end of 2017, a number of Norton Rose Fulbright partners with an existing relationship with Downer joined Pinsent Masons' Melbourne office. Following the move, they continued to advise Downer. Pinsent Masons generally announced the change and directly informed Técnicas before the move.

Pinsent Masons put information barriers in place, including restricting access to the electronic files regarding the earlier advice to Técnicas.

Técnicas sought injunctive relief against the partners of Pinsent Masons, to restrain the law firm from representing Downer against its former client Técnicas.

Judgment

The NSW Court of Appeal dismissed Técnicas's appeal. Justice Leeming found, with Chief Justice Bathurst and Justice White agreeing, that there was no proper basis for injunctive relief. The request for injunctive relief was based on three grounds:

- the fiduciary duty of loyalty of a solicitor to their client;
- the protection of confidential information; and
- the court's inherent jurisdiction to protect due administration of justice.

Justice Leeming likened the principles of abandonment of a contract to the established principles of forming a contract. His Honour noted that it is not necessary to identify express offer and acceptance to create a contract; instead, an inferred agreement may be reached, even in the absence of words. The same applies to the abandonment of a contractual relationship. In this case, Técnicas's decision not to reply to two offers of assistance from its former solicitors constituted the inferred agreement to terminate the contractual relationship. Accordingly, by Técnicas's silence, the duty of loyalty ended.

Pinsent Masons' continuing duty to protect confidential information was met by putting well-developed information barriers in place.

Lastly, Justice Leeming clarified that the court's inherent jurisdiction to protect the proper administration of justice is aimed at individuals rather than firms, while Pinsent Masons as a partnership is not a legal person.

Chapter 4: Damages and illegality

If a contract prescribes a remedy for a particular breach of that contract, is that remedy exclusive of other remedies that might otherwise have been available? This issue was considered by the New South Wales Court of Appeal in *Semantic Software Asia Pacific Ltd v Ebbsfleet Pty Ltd*[21] . The three judges in that case each held that the remedy (for breach of a warranty) was not exclusive of other common law remedies (such as a claim in damages). However, they took slightly different approaches. Justice Macfarlan applied the traditional presumption that a party does not intend to abandon any remedies in the absence of clear, express words to the contrary. However, Justice Sackville, with whom Justice White agreed on this point, considered that presumption to be *'of limited assistance'*. Justice Sackville held that the correct approach was to determine the intention of the parties, having regard to the language in the contract, the circumstances addressed by the contract, and the commercial purpose or objects to be secured by it.

A plaintiff seeking damages for a breach of contract must prove, on the balance of probabilities, that its loss was caused by the breach. In some cases, however, the courts will accept that a 'loss' can be a 'loss of opportunity', even if it is more likely than not that the plaintiff did not suffer a loss. It will sometimes be very difficult to determine whether:

- a plaintiff has successfully proved a loss of an opportunity; or
- a plaintiff has failed to prove its loss on the balance of probabilities.

21 [2018] NSWCA 12.

Those difficulties were illustrated by the majority and dissenting judgments in *Mal Owen Consulting Pty Ltd v Ashcroft*[22] . In that case, the delay of a solicitor in pursuing proceedings on behalf of a plaintiff meant that the plaintiff was unable to enforce its judgment against a defendant who had become bankrupt. The trial judge awarded no damages because the plaintiff had failed to prove, on the balance of probabilities, that an amount could have been recovered from the defendant if the proceedings had been run more expeditiously. In the Court of Appeal, the majority (Justice Basten and Justice Barrett) held that the plaintiff was entitled to damages (calculated at 50 per cent of the loss) because they had lost the opportunity to obtain and enforce a judgment against the defendant. Justice Macfarlan, in dissent, agreed with the trial judge (after considering the relevant High Court authorities, which, in his view, were *'difficult to reconcile'*). We may need to wait for further High Court judgments in order to clarify this area of the law.

A plaintiff is only obliged to prove their loss if they are seeking damages for breach of contract. If the plaintiff is claiming the payment of a debt due under a contract, there is no need to prove a loss – a distinction emphasised by the New South Wales Court of Appeal in *Benson v Rational Entertainment Enterprises Ltd*[23].

In *Civil & Allied Technical Construction Pty Ltd v A1 Quality Concrete Tanks Pty Ltd*[24], the Victorian Court of Appeal considered the following, rather speculative, argument: a plaintiff was not entitled to damages because it was intending to perform the contract in an illegal manner, where the alleged illegality was treating employees as independent contractors. In rejecting this argument, the court made a distinction between:

- a contract entered into for the purpose of committing an unlawful act – which will always be unenforceable; and
- illegality in the course of performing a contract – which won't lead to unenforceability unless the illegality goes to the substance of the transaction.

In this case, the illegality did not go to the substance o the transaction and the contract was therefore enforceable.

22 [2018] NSWCA 135.

23 [2018] NSWCA 111.

24 [2018] VSCA 157.

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Benson v Rational Entertainment Enterprises Ltd [2018] NSWCA 111

› Distinction between debt and damages > whether a promisor who has accepted consideration for a promise to benefit a third party may be sued by the third party for unjust enrichment if the promise is unfulfilled

In this case, the New South Wales Court of Appeal reiterated the distinction between debt and damages, and considered whether Justice Gaudron's statement in *Trident v McNiece* – that a promisor who has accepted consideration for a promise to benefit a third party may be sued by the third party for unjust enrichment if the promise is unfulfilled – represents the law in Australia.

The court confirmed that it is not necessary to prove loss when taking action to recover a contractual debt. Further, it held that there is no principle of Australian law that a promisor who has accepted consideration for a promise to benefit a third party may be sued by the third party for unjust enrichment if the promise is unfulfilled.

Facts

The 'Full Tilt Poker' website provided a service for users to play online poker and withdraw their winnings. The withdrawal process was not instant, and so the appellant, Mr Benson (who had an account with Full Tilt but was not affiliated with the site's operator), offered what was described as a 'cash out service'. This service involved other Full Tilt users making transfers from their Full Tilt account to Mr Benson's Full Tilt account. In exchange, and after taking a commission, Mr Benson's company (Intercash Pty Ltd) would transfer money from its bank account to the customer's bank account.

In June 2011, Full Tilt accounts were frozen, under freezing orders made by the United States District Court for the Southern District of New York. The freezing orders were made in the context of allegations of illegal gambling, fraud and money laundering against companies affiliated with Full Tilt.

As a result of the Full Tilt accounts being frozen, Intercash did not make a US$285,000 bank transfer to one of its customers, iBus Media Ltd. The transfer was to correspond to a transfer made by iBus from its Full Tilt account to Mr Benson's Full Tilt account shortly before the issue of the freezing order. iBus brought proceedings against Mr Benson and Intercash in the District Court of New South Wales, which proceedings were subsequently settled, and Mr Benson's liability to pay iBus the amount owed was extinguished.

About a year after the Full Tilt accounts were frozen, entities associated with the US proceedings agreed by settlement deed to make available for withdrawal, within 90 days, all cash balances of non-US players. The first and third respondents in the Court of Appeal, Rational Entertainment Enterprises Ltd and Oldford Group Ltd (both Isle of Man companies), were party to the settlement deed, while the two other respondents were not.

The fourth respondent in the Court of Appeal, Rational FT Enterprises Ltd (also an Isle of Man company), took over the running of the Full Tilt website in 2012. In November 2012, Mr Benson entered into an end-user licence agreement (the ***EULA***) with Rational FT to continue using the site.

Following this, also in November 2012, there was email correspondence between Mr Benson and Rational FT regarding the re-establishment of Mr Benson's Full Tilt account. In the course of that correspondence, Rational FT made clear to Mr Benson that it would not provide him with access to the US$285,000.

Judgment

At trial, Mr Benson made two alternative arguments:

- In November 2012, he had entered into a contract with one or more of the defendants, on terms substantially the same as those that were in place with the previous operator of Full Tilt. On this basis, the defendants were contractually obliged to pay Mr Benson the US$285,000.
- By entering into the US settlement deed, which required the relevant companies to pay out non-US players, and by then failing to pay out the US$285,000, the defendants had been unjustly enriched at Mr Benson's expense.

The arguments on appeal, in relation to those points, are set out below.

Contractual claim

Existence of contract with respondents

The respondents conceded that the EULA was a valid contract between Mr Benson and Rational FT; however, they submitted that the agreement was relatively limited in scope. The court held that, upon proper construction of the EULA, it in fact 'made detailed provision for the deposit, transfer and withdrawal of money'. This included an implied obligation (applying the test from *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 282–3) on Rational FT to pay out former Full Tilt players the balances in their accounts that had been frozen.

The court also held that Rational FT was the only respondent that was a party to the EULA.

'No loss' (debt versus damages)

The respondents also argued that, in Mr Benson's case, his plan was to transfer all funds withdrawn from his Full Tilt account to Intercash, and Intercash would receive commission. They therefore argued that Mr Benson had not suffered a loss, as:

- he would not receive anything if the contract had been performed, and therefore could not recover in damages; and
- to the extent that he would otherwise suffer a loss by being unable to satisfy his liability to pay out the US$285,000, that potential loss had been extinguished by settlement of the NSW District Court proceeding.

Justice Leeming (Justices Beazley and Emmett agreeing) dealt with these arguments swiftly, holding that:

- Mr Benson did not have to show damage because his claim was for a contractual debt, rather than for damages; and
- in any case, he still had a liability to transfer the US$285,000 to Intercash, even if any liability to iBus had been extinguished by settlement of the NSW District Court proceeding. Upon the proper construction of the settlement deed, the liability between Mr Benson and Intercash was unaffected. The ability to satisfy this liability would have been an expectation, the loss of which could potentially sound in damages.

This element of the decision is a reminder of the important procedural differences between recovering a contract debt (or another liquidated sum under the contract) and suing for damages. The recovery of a debt owing is not subject to a requirement for the plaintiff to prove that it has suffered loss or damage. Consequently, rules about remoteness of damage and mitigation of loss are also not relevant.

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Unjust enrichment claim and the status of Trident

Justice Leeming noted that Mr Benson's second claim was 'one of unjust enrichment for moneys had and received'. Mr Benson relied on the following statement of Justice Gaudron in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107, 176:

> In my view it should now be recognized that a promisor who has accepted agreed consideration for a promise to benefit a third party is unjustly enriched at the expense of the third party to the extent that the promise is unfulfilled and the non-fulfilment does not attract proportional legal consequences.

Justice Gaudron was the only member of that court to hold that a third party beneficiary to a contract of insurance could make a claim based on unjust enrichment.

Justice Leeming identified the following points:

- the principle stated by Justice Gaudron 'has no precedential force'. The unjust enrichment claim was not accepted by any other member of the High Court (though it was referred to in a brief, equivocal statement by Justice Deane), and was not pleaded or argued at any stage of proceedings;
- the principle stated by Justice Gaudron has not been followed in subsequent decisions, and does not have academic support. The principle 'is not one recognised by Australian law';
- although *Trident* lacked a ratio decidendi, that does not mean that it completely lacks precedential authority. A court bound by a decision lacking a ratio is bound to apply that decision where the circumstances of the case before it are 'not reasonably distinguishable from those which gave rise to the decision' (citing Justice McHugh's statement in *Re Tyler, Ex parte Foley* (1994) 181 CLR 18, 37, in which his Honour quotes Lord Reid in *Midland Silicones Pty Ltd v Scruttons Ltd* [1962] AC 446, 479); and
- *Trident* does, therefore, bind other Australian courts in relation to the principle that a non-party who is named as a beneficiary in a contract for liability insurance may sue the insurer, notwithstanding that they were not a party and did not provide consideration. (Justice Leeming noted that this has since been extended to include contracts for other types of insurance; and also noted that the point is somewhat moot, given that there is now a statutory basis for non-party beneficiaries to sue, under section 48 of the *Insurance Contracts Act 1984* (Cth)).

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Civil and Allied Technical Construction Pty Ltd v A1 Quality Concrete Tanks Pty Ltd [2018] VSCA 157

> In what circumstances will a contract that is intended to be performed in an illegal manner be enforceable at law?

In this case, the Victorian Court of Appeal considered whether the trial judge, in a hearing on the assessment of damages, erred in refusing Civil and Allied Technical Construction Pty Ltd leave to plead that a construction contract that had been entered into with A1 Quality Concrete Tanks Pty Ltd was unenforceable, due to the illegal manner in which A1 would carry out the contract. The alleged illegal mode of performance was certain 'sham contracting' arrangements concerning four A1 employees.

The Court of Appeal refused leave to appeal on the grounds of illegality.

The court found that a contract does not become unenforceable merely because something illegal is done in the course of its performance. The illegal purpose must go to the substance of the transaction and cannot be a matter that is merely incidental or peripheral to the contract sought to be enforced.

Facts

In 2010, CATCON had entered into negotiations with A1 for the construction of two concrete clarifier tanks on a government project in South Australia. CATCON ultimately determined not to proceed with A1, and a dispute arose between the parties as to whether a contract had been made, which CATCON had repudiated. Proceedings were issued in the County Court and Judge Macnamara entered a judgment in A1's favour, finding that CATCON had repudiated its contract with A1.

An appeal from that judgment was dismissed by the Court of Appeal, and the matter returned to Judge Macnamara for the assessment of damages. In the course of submissions on damages, counsel for CATCON raised two arguments:

- **Illegality** – The court should consider that the contract between the parties was unenforceable, due to the illegal manner in which A1 intended to perform the contract. CATCON's claim was that A1's contractual arrangements with four of its workers (in treating them as independent contractors, rather than employees) would have contravened statutes relating to tax, superannuation and employment conditions and that, consequently, A1 should not be permitted to recover damages suffered as a result of CATCON's repudiation of the contract. This claim was raised on the sixth day of the assessment trial, when CATCON applied to amend its defence to plead the illegality.
- **Time** – A1 would not have been able to execute the contract within the contract period of 12 weeks, and would have inevitably made a loss on the project, such that the damages should be assessed at zero.

Judge Macnamara refused leave to plead the first ground and found against CATCON on the second ground, making cost orders in A1's favour for the amount of $266,863.36. CATCON then sought leave to appeal on the two grounds above.

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Judgment

The Court of Appeal refused leave to appeal regarding CATCON's illegality argument, and affirmed the decision of the trial judge to refuse the amendment.

In relation to CATCON raising the new illegality defence during the hearing for the assessment of damages, the court observed that the matter ought to have been dealt with in the liability trial. The court did not agree with CATCON's proposition that, on the evidence available at trial, the issue of enforceability could not have been brought earlier. It also disapproved of the absence of an affidavit providing an explanation for the late amendment, as espoused by the High Court in *Aon Risk Services Australia Ltd v Australia National University* (2009) 239 CLR 175.

The court also considered CATCON's argument that the court should act on the perceived illegality on the grounds of public policy. After canvassing the relevant authorities, the court found that, while a contract entered into with the object of committing an unlawful act will be unenforceable, a contract does not become unenforceable merely because something illegal is done in the course of its performance. The illegal purpose must go to the substance of the transaction (eg a contract made with the purpose of defrauding the tax office, or the recovery of contractual damages for loss of a business that could not be legally conducted). The illegal purpose cannot be a matter that is merely incidental or peripheral to the contract sought to be enforced. In this case, the relevant contract was for the construction of concrete tanks. A1's arrangements with its workforce were merely peripheral to this purpose, '... in the same way as a myriad of decisions on a commercial building project might breach relevant regulatory requirements'.

Leave to appeal was granted regarding CATCON's submissions on time, and detailed consideration was given to the asserted causes of delay that would have prevented A1 from completing the project within the 12-week contract period. Ultimately, the appeal was dismissed and the trial judge's assessment of damages upheld. The court found that 'CATCON's complaints as to the damages assessment concern matters which call for the exercise of judgment on issues [on] which reasonable minds might differ' and that '[n]o error of the kind warranting intervention by this Court has been demonstrated'.

Allens › ‹ Linklaters

Mal Owen Consulting v Ashcroft [2018] NSWCA 135

› The value of a lost commercial opportunity

In this case, the NSW Court of Appeal considered whether a party was entitled to damages for loss of a commercial opportunity.

The court allowed the appeal, finding that the lost opportunity had 'real value', and awarded the appellant damages.

This case serves as a reminder that damages may be recoverable for loss of opportunity even if the plaintiff cannot prove, on the balance of probabilities, that it would have obtained a favourable outcome had it not lost the opportunity.

Facts

In 2006, Mal Owen Consulting Pty Ltd (the ***appellant***) retained a solicitor, Peter Ashcroft (the ***respondent***), to recover a debt owed to it by a Mr Bouzanis. Although the respondent initiated proceedings in the NSW District Court, he did not pursue those proceedings over the following three years. In 2010, the appellant instructed new solicitors to pursue its claim. Those solicitors commenced fresh proceedings and obtained judgment for a sum of $200,808 against Mr Bouzanis in 2012. Mr Bouzanis unsuccessfully appealed this judgment and was bankrupted in 2013. The appellant was unable to recover a dividend from the bankruptcy.

The appellant subsequently commenced proceedings in the NSW District Court, seeking damages in tort and contract for the loss suffered as a result of the respondent's negligent delay in pursuing the 2006 proceedings. The trial judge dismissed the claim on the grounds that the appellant had not proved on the balance of probabilities that it had suffered a loss. The appellant appealed on the grounds that it did not have to establish financial loss on the balance of probabilities; or, alternatively, the judge erred by failing to find that, on the balance of probability, financial loss had been established.

Judgment

The court allowed the appeal and found in favour of the appellant; however, the two majority judges took different approaches to the case (with Justice Macfarlan dissenting).

Justice Basten distinguished the requirements of causation in tort and the requirements of causation in contract. His Honour held that a claim for breach of a contract promising a valuable opportunity lies without proof of loss. As the lost opportunity had 'real value' for the appellant, it was entitled to damages for the value of that lost opportunity. The calculation of that loss is then undertaken by an assessment of the possibility of a favourable outcome. Taking into account the unlikelihood of the appellant recovering the full amount of the debt even if the respondent had expeditiously prosecuted the 2006 claims, Justice Basten assessed damages at 50 per cent of the debt.

Justice Barrett did not apply separate causation rules as between causes of action pleaded in tort and causes of action pleaded in contract. Under Justice Barrett's two-step analysis, the appellant had to first prove on the balance of probabilities that it had lost an opportunity of 'real value', beyond mere negligible or theoretical value. The second step was to assess the value of that lost opportunity, which turns upon the actual value of the lost opportunity by reference to the degree of probabilities inherent in the appellant obtaining a favourable outcome on the lost opportunity. Justice Barrett similarly assessed damages at 50 per cent of the debt.

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Semantic Software Asia Pacific Ltd v Ebbsfleet Pty Ltd [2018] NSWCA 12

› Is a contractual remedy for breach of contract exclusive of common law remedies?

In this case, the Court of Appeal of New South Wales considered, among other things, when a clause in a contract may operate to exclude other remedies for breach of contract.

The court held that the clause should be construed according to what a reasonable businessperson would understand it to mean. Accordingly, this particular clause did not operate to exclude other remedies available for breach.

When construing a clause, it is necessary to ask what a reasonable businessperson would understand it to mean, by looking at the language used, the circumstances addressed in the contract, and the commercial purpose or objects of the contract. The question to be asked for this clause was: what remedies did the parties intend to be available should a particular promise not be fulfilled?

The presumption that parties to a contract are not intending to exclude remedies for breach was not relied on by the majority. While the presumption likely still remains applicable, this decision shows again that courts today are focused more on the commercial purpose and intent of the parties, rather than traditional rules of interpretation.

Facts

The parties entered into a share subscription agreement. The subscription agreement included a warranty from the director of the issuing company that the issued shares would triple in value within two years and, if the shares failed to do so within the specified time, the director would personally transfer enough shares to the investor to effect the threefold increase in value.

A key question in the appellant decision was whether or not the promise given by the director to transfer the shares operated as an exclusive remedy for a breach of warranty that the shares would increase three times in value.

The appeal also dealt with other, non-contractual, matters, namely:

- in the context of a separate misleading or deceptive claim, reliance on a representation made;
- procedural fairness at the first instance hearing; and
- admissibility of expert evidence.

Judgment

Justice Sackville (with Justice White agreeing) construed the purported exclusive remedy clause by asking what a reasonable businessperson would understand the clause to mean. This inquiry requires:

- looking at the language used by the parties;
- the circumstances addressed by the contract; and
- the commercial purpose or objects of the contract.

In determining whether or not the clause operated to exclude other remedies for breach of contract, it needs to be asked what remedies the parties to the contract intended should be available if that promise were not fulfilled?

On the facts, it was clear the commercial object of the subscription agreement was to raise funds by issuing shares that were warranted to increase threefold in value.

In looking at the language of the clause, the director himself was making a promise to the investor, separate from the promises made between the company and the investor. The director's warranty even required him to put some of his personal shareholding aside as a form of security to satisfy the promise.

However, this warranty was of no value to the investor if particular factual circumstances arose, such as the shares becoming worthless (as was the case here) or if further capital raisings significantly diluted the existing shareholdings.

The commercial object of the contract when considered with the potential worthlessness of the warranty meant the clause was not intended to operate as an exclusive remedy. The director's promise to set aside enough shares and for those shares to be transferred should be construed as security for performance of the director's warranty – not an exclusive remedy.

Justice Macfarlan also determined the clause was not an exclusive remedy, but for different reasons.

His Honour applied the well-established presumption that neither party to a contract intends to abandon remedies for breach of contract. Clear, express words must be used to rebut the presumption. Further, the identification of one remedy for breach is not enough to exclude other remedies.

There was no such express language in this clause, and therefore the clause was not an exclusive remedy for breach.

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