CONTRACT LAW REVIEW 2021

KING&WOOD MALLESONS
金杜律师事务所

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INTRODUCTION

Welcome to the 2021 edition of our Contract Law Review. As in previous years, we have sought to distil the practical lessons and takeaways to be learnt from noteworthy contract law cases that have caught our attention since our 2020 publication.

This year, we saw cases which grappled with issues posed by the changing use of technology, including the formation of contracts online in *Dialogue Consulting Pty Ltd v Instagram*. This case helpfully explores the application of contract formation principles to an online context. In *Wärtsilä Australia Pty Ltd v Primero Group Ltd* we also saw a cautionary tale about the use of cloud technology to share information required to fulfil a contractual obligation – while new technologies may make some aspects of our lives easier they will not always tick all of the right contractual boxes.

We also saw a number of cases emphasise business-like or commercial interpretations of contracts. For example, in *AMA Group Limited v ASSK Investments Pty Limited* and *Sandoz Pty Ltd v H Lundbeck A/S*, interpretations that conflicted with business or commercial common-sense were rejected. And there were a number of cases considering classic contract law issues, such as the complexities of implied terms, including implied terms of cooperation *(Glencore Coal Queensland Pty Ltd v Aurizon Network Pty Ltd* and *Adaz Nominees Pty Ltd v Castleway Pty Ltd),* and the difficulties with resolving mistakes in contract drafting where there is not an obvious resolution *(James Adam Pty Ltd v Fobeza Pty Ltd).*

Finally, while it strictly concerned a question of statutory interpretation rather than contract law, the case of *Price v Spoor* also caught our attention because it has significant implications for what can be achieved through contract drafting. The High Court found in this case that it was open to the parties to contract out of a statutory limitation period, and dismissed arguments that it was, at least in the context of that case, against public policy.

Adaz Nominees Pty Ltd v Castleway Pty Ltd [2020] VSCA 201

What was this case about?

This case deals with the implied term of cooperation, which may exist where necessary to ensure that the parties receive the benefit of the contract, but will not impose a broader obligation that the parties must act in each other's interests.

Summary

TPC Group and Castleway Pty Ltd (**Castleway**) entered into a Property Development and Services Agreement (**PDSA**) in December 2010. Under the PDSA, Castleway provided property development services to TPC Group (made up of several companies owned by the Rado family) and received a "Service Fee" (calculated as a scaled percentage of TPC Group's net profit) and a "Commission" (based on number of projects Castleway introduced) as remuneration. The Commission was payable upon the termination of the PDSA.

The PDSA was terminated on 29 June 2017 following a series of disputes between the two parties. Immediately before termination, one of the companies in TPC Group, Adaz Nominees Pty Ltd (**Adaz Nominees**), made a $20 million charitable donation to the Rado Family Foundation Pty Ltd. This halved TPC Group's net profit for the 2016–17 financial year, resulting in an $8 million reduction of the Service Fee owed to Castleway. Castleway sought to dispute this in the Supreme Court of Victoria.

In the first instance, Justice Robson accepted Castleway's submission that the term "net profit" in the PDSA would be understood by a reasonable businessperson to mean income less expenses incurred in earning that income, and therefore held the charitable donation could not be treated as an expense and taken into account when calculating the net profit.

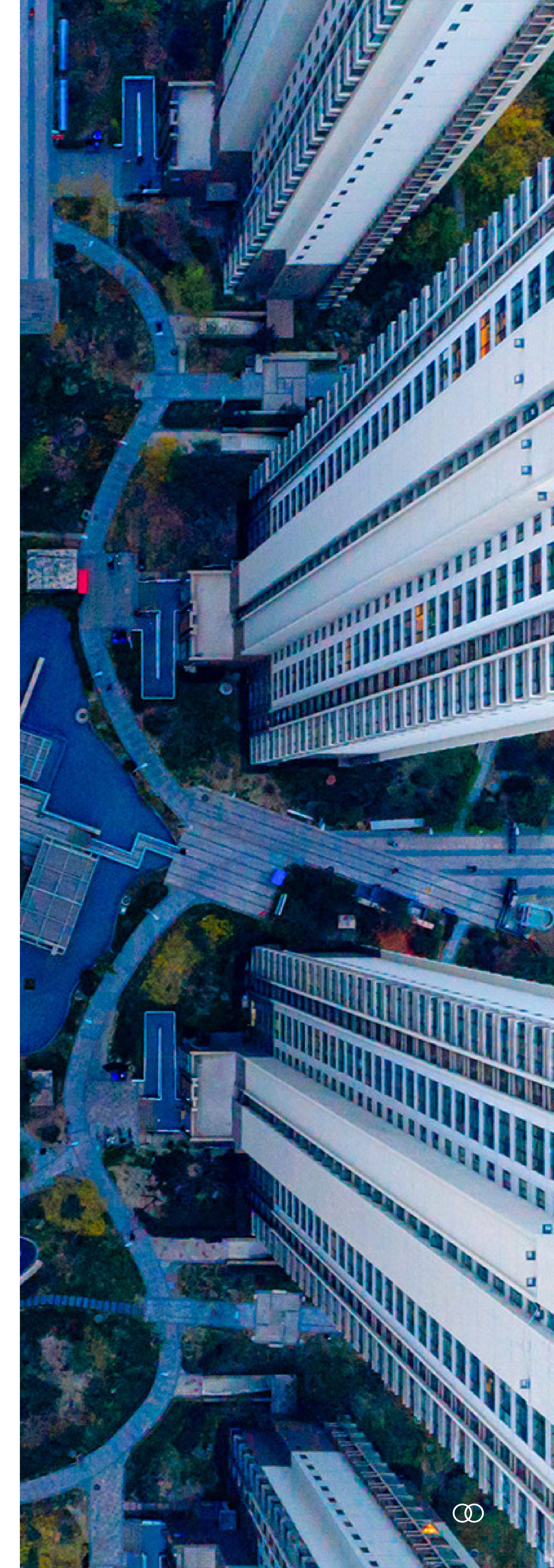
The Court of Appeal disagreed, holding that such an implied term was inappropriate. The express term of the PDSA required the net profit to be based on the total taxable income of TPC Group, and was neither ambiguous or contradictory. Therefore, as charitable donations are deductible from total taxable income, it was correct to include the charitable donation in calculating the net profit.

However, the majority found that there was an implied term of cooperation. After surveying the authorities, Justice Whelan and Acting Justice Riordan determined that such an implied term exists only where it is necessary; that is, "*where, absent the implication, the enjoyment of the rights conferred by the contract would or could be rendered nugatory, worthless, or, perhaps, seriously undermined; or the contract would be deprived of its substance, seriously undermined or drastically devalued*." In those circumstances, it is appropriate to impose the implied term of cooperation to create both the "positive obligation" to do whatever is necessary to enable the parties to benefit from the contract, and a "negative covenant" not to hinder or prevent the fulfillment of contractual promises.

Key takeaways and practice points

An obligation to cooperate may be implied into a contract, but only to the extent that it is necessary to ensure that the parties receive the benefit of the contract. What "the benefit of the contract" means depends on the express terms of the contract, rather than the hopes or desires it represents for one or both of the parties. Terms implied by law cannot contradict the express terms of a contract. For example, the court in this case noted that an implied term could not "in effect, turn a contractual non-exclusive licence into an exclusive one; or require a party to act as if an express contractual right did not exist".

In any case, in any commercial arrangement parties should be clear in their contractual drafting about how remuneration is to be assessed, particularly when one party has unilateral control over that assessment. A party that has to rely upon implied terms to clarify their entitlement to be paid is in a precarious position. In this particular instance, with the benefit of hindsight it would have been sensible to expressly exclude charitable donations, so that the commission payable to TPC Group would have been payable on revenue generated prior to any donations being made.



AMA Group Limited v ASSK Investments Pty Limited [2021] NSWCA 45

What was this case about?

This case concerns the interpretation of a purchaser's obligations under heads of agreement that were labelled "binding". It considers whether parties are bound by an agreement to purchase if the agreed conditions are not met. The Court emphasised the importance of adopting a business-like interpretation of commercial agreements. In this case, the result was that the prospective purchaser was not obliged to complete the sale as relevant conditions, including board approval, were not satisfied.

Summary

AMA Group Limited (**AMA**) (a publicly listed company) and ASSK Investments Pty Limited (**ASSK**) negotiated and signed a Heads of Agreement (**HOA**), in which AMA agreed to purchase crash repair businesses owned by ASSK. Under the terms of the HOA, the parties agreed to *"enter into Business Sale Agreements subject to the terms and conditions set out in"* the HOA. However, there was also provision for AMA to carry out a comprehensive due diligence, and critically clause 7 headed "Conditions Precedent" included the words "*all necessary third party consents, authorisations and approvals being obtained (including the Purchaser's Board approval)*" in clause 7(b). The clause did not specify any time frames within which conditions must be satisfied, or state the consequences of non-fulfilment.

AMA conducted its due diligence whilst the parties negotiated, but ultimately concluded the deal did not meet the requirements for board approval and terminated the HOA. ASSK commenced proceedings to compel AMA to purchase the businesses.

At first instance, the primary judge found that AMA's board approval was not a condition precedent for the sale and ordered specific performance. The primary judge also held that if clause 7(b) was a condition precedent for anything, it was for entry into the Business Sale Agreements as opposed to the sale itself. The consequence of non-fulfilment of the board approval condition was simply that there would be no further Business Sale Agreements, meaning that the sale was governed by the HOA alone. The primary judge rejected the view that if board approval was not obtained, the whole transaction was brought down.

The Court of Appeal disagreed with the primary judge and held that board approval was indeed a condition precedent to AMA's obligation to purchase the businesses, and that the HOA did not in itself effect a sale for a number of reasons. The starting point for this conclusion was the language of the HOA itself. Particular regard was had to the natural and ordinary meaning of the words "*subject to*", as the HOA provided that the parties would enter into the Business Sales Agreements "*subject to*" to the terms of the HOA. The terms of the HOA necessarily included the conditions in clause 7(b). It was considered that there was no work for clause 7(b) to do if it was not a condition precedent of entry into the Business Sale Agreement, and orthodox principles of interpretation require the Court to strive to give all words used in a contract operation and meaning.

The HOA providing for AMA to undertake "*comprehensive due diligence*" was also significant. Due diligence was yet to occur at the time the HOA was executed, and was held to have the fundamental purpose of ascertaining whether the businesses were worth the sale price of $6 million. According to the Court of Appeal, an interpretation in which a publicly listed company commits to a $6 million acquisition without due diligence would "flout business common-sense".

In addition, the HOA did not legislate comprehensively for the sale, as many important details were yet to be determined. For example, the "Material Contracts" and "Key Personnel" were to be identified in the Business Sale Agreements, and the possibility of additional warranties was contemplated. The "Completion Date" was also defined as the date for completion of the Business Sale Agreements. A distinction was also made between an *agreement to sell* and a *sale*, with this distinction being even more pronounced when the agreement to sell is conditional, as was the case with the HOA.

Whether the decision to withhold board approval needed to be exercised honestly and bona fide or even reasonably was also considered. This issue did not need to be decided, but the court considered that the HOA should not be taken to permit the board to act *capriciously.*

Key takeaways and practice points

The case highlights that clarity is critical when drafting heads of agreement. Care should be taken to clearly distinguish any matters that are intended to be conditions precedent, such that the transaction will not proceed if they're not satisfied. Any ambiguity in the drafting can leave doubt as to whether or not the parties are bound to proceed with the transaction.

A heads of agreement should also be clear on what terms are binding, including any terms that remain binding if the transaction does not proceed. For example, confidentiality obligations should remain binding even if conditions for sale are not met, to protect any commercial or other confidential information exchanged between the parties in anticipation of the transaction.

Dialogue Consulting Pty Ltd v Instagram, Inc [2020] FCA 1846

What was this case about?

This case concerned various issues relating to an agreement to resolve disputes by arbitration, including whether the agreement had been validly formed over the internet, whether the requirement to arbitrate could be considered an unfair term under the Australian Consumer Law (ACL), and whether the right to arbitrate had been waived.

Summary

Instagram banned Dialogue from accessing the Instagram platform, alleging that a social media management tool provided by Dialogue breached Instagram's Terms of Use by scraping user data from the Instagram platform.

Dialogue commenced proceedings against Instagram, alleging that Instagram had breached various implied terms of its own Terms of Use by restricting Dialogue's access to the platform. For 12 months, Instagram engaged in the proceedings, participating in case management procedures and interlocutory applications. However, Instagram then sought a stay of the proceedings, contending that the matter should be referred to arbitration under the process set out in the Terms of Use. At the relevant time, the Terms of Use required disputes to be determined by arbitration under Californian law, unless the user chose to opt out.

At trial, Justice Beach concluded that Instagram's registration page, which included hyperlinks to the Terms of Use and required users to affirmatively assent to such Terms by clicking a "Register" button, was a legitimate "sign-in wrap" agreement under both US and Australian law. In coming to this conclusion, Justice Beach noted that Instagram's registration page conspicuously notified users that registration signified agreement to Instagram's Terms of Use and provided users with a means to access the Terms to satisfy any inquiries – whether or not the user actually read the Terms of Use was irrelevant to formation of a valid contract. His Honour also considered the fact that Dialogue, a service provider to about 10,000 customers globally, was a "highly sophisticated user of internet websites", and surpassed the "reasonably prudent user" standard required under the test.

This meant that the Terms of Use did constitute an arbitration agreement between the parties. Justice Beach rejected Dialogue's alternative argument that Instagram's proposal to arbitrate under Californian law would cause a significant imbalance in the parties' rights and obligations under the contract and amounted to an unfair term or unconscionable conduct under the ACL. In doing so, Justice Beach noted that the arbitration agreement was plainly and prominently set out in the Terms of Use and applied equally to both parties, with either party having the ability to invoke it. Furthermore, his Honour noted that the arbitration clause was reasonably necessary to enable Instagram to protect its business by avoiding litigation in multiple jurisdictions, and to efficiently manage disputes with users. Additionally, there were no major concerns relating to costs – the arbitration clause required Instagram to pay all administrative fees, the arbitrator's compensation, as well as costs relating to location, witnesses and evidence. Dialogue's filing fee and administrative costs, on the other hand, would be capped at USD200.

Nonetheless, Justice Beach, applying US law, held that Instagram had waived its right to arbitrate. In doing so, his Honour took into account the following findings:

- Instagram participated in the proceeding at length (including at several hearings and a court-ordered mediation) before making a stay application;
- Instagram's defence exhibited detailed familiarity with the Terms of Use, but did not raise the arbitration clause;
- a newer, revised version of Instagram's Terms of Use abandoned the use of the arbitration clause as part of a new corporate strategy;
- Instagram's conduct amounted to "deliberate and inconsistent acts", which would likely cause unnecessary expense, delay and prejudice to Dialogue if a stay was granted; and
- Instagram's belated assertion of its right to arbitrate was inconsistent with public policy objectives behind arbitration, such as expediency and cost-efficiency.

For similar reasons, Justice Beach considered that there had also been a waiver under Australian law.

Instagram has applied for leave to appeal Justice Beach's decision to the Full Federal Court.

Key takeaways and practice points

This case contains a useful discussion on the various ways in which contracts can be validly formed online. In particular, it emphasises the need to provide adequate notice of the contract terms and to establish that there is a clear act of acceptance, so that the parties have clearly reached agreement on those terms.

This case also demonstrates the risk of waiving contractual rights, whether that be a right to require disputes to be resolved by arbitration or otherwise, by acting in a way that is inconsistent with the exercise of those rights. Once a party has progressed too far with one strategy under an agreement, it may be difficult or impossible for them to change tack and seek to rely on other rights under the agreement. Careful consideration is required to ensure that your chosen strategy does not become a "one way door" that blocks off alternatives.

Glencore Coal Queensland Pty Ltd v Aurizon Network Pty Ltd [2020] QCA 182

What was this case about?

This case concerned the interpretation of a clause that on its face seemed like it might exempt a party from paying for certain rail infrastructure while continuing to enjoy the relevant benefits of using that infrastructure. In rejecting this interpretation, the Court of Appeal explored a number of different arguments relating to contract construction, implied terms and obligations of good faith.

Summary

Aurizon operated a rail network used by the four appellants in this case (**Customers**). The parties agreed to add six segments to the network. Fees were to be shared between the Customers depending on which segments the Customers would use. Under the arrangement, each Customer could notify Aurizon that a segment was to "cease being a Customer's Segment" and in that case the fees associated with that segment would fall to the remaining Customers. Each of the Customers purported to issue such notices, effectively pushing the whole burden of the fee onto the final remaining Customer for each segment.

Aurizon argued that the notices were invalid on three grounds: (1) proper construction of the relevant clause prevented a Customer from giving notice unless it no longer needed that segment of the Network to transport its coal to the Terminal; (2) there was an implied term of good faith that prevented a Customer from giving notice unless doing so in good faith; and (3) the notices were invalid as they were given too late. At first instance, Justice Jackson rejected Aurizon's first and third argument. However, his Honour accepted Aurizon's case on the good faith issue. Each of the three issues were challenged on appeal.

The Queensland Court of Appeal dismissed the appeal on different grounds. Justice McMurdo (Appeal Justices Fraser and Mullins agreeing) concluded that read in context the correct construction of the relevant clause was that a segment would only "cease being a Customer's Segment" if that segment was no longer needed in order for the Customer's coal to be carried to the Terminal. His Honour noted that each of the Customers still needed to use the network to transport their coal and that while one Customer may have been willing to expose itself to the risk of an increased contribution where another Customer no longer needed that segment, it is unlikely that a Customer would be so willing if the other Customer would still use such infrastructure.

Justice McMurdo held that were he incorrect in his construction of the clause, he would have reached the same conclusion by an implied term. The term that would be implied is that a Customer could not give notice in respect of a Customer's Segment if such segment was still required for access to the rail network. His Honour noted that if a Customer was able to opt out of its obligations to contribute while still enjoying the benefits of the infrastructure, the deeds would lack business efficacy. His Honour considered that the other conditions for implying such a term were satisfied, as it would be reasonable and equitable, obvious, not contradictory to any express terms, and capable of clear expression.

While it was not necessary for Justice McMurdo to turn to the good faith argument, his Honour commented that it would be difficult to accept that a Customer was in breach of any implied term of good faith and fair dealing simply by issuing a notice. In particular, his Honour noted that whether the Customer was acting in good faith and fairness depends on all circumstances (not solely whether it still needed the particular segment), and the trial judge may not have identified all the circumstances by which the appellants' use of power was in bad faith or unfair.

Key takeaways and practice points

This case illustrates the importance of clear and thorough drafting that anticipates the ways in which rights conferred under the agreement may be vulnerable to misuse.

In this case, the Court was able to find a construction that resolved the matter. However, that may not always be straightforward. While implied terms were raised as an alternative solution in this case, it is risky to rely upon the Courts intervening in that way, as there are a number of hurdles to be overcome before a term can be implied into an agreement, and in particular it is not possible for implied terms to contradict express terms.

This case also emphasises that the law surrounding the duty of good faith remains unsettled. In particular, a decision that a party has not acted in good faith cannot be made simply because a party has taken an action that may on its face seem to be unfair. Rather, it is necessary to consider all of the circumstances in order to consider whether there actually has been bad faith. Again, rather than relying on the Courts to intervene, it would be prudent to instead draft express controls on the exercise of otherwise broad rights to prevent undesirable outcomes.

James Adam Pty Ltd v Fobeza Pty Ltd [2020] NSWCA 311

What was this case about?

This case considered whether a drafting mistake can be rectified at common law through an exercise of contractual construction. It illustrates that even where it is clear that there has been a drafting mistake, the courts will not intervene unless it is self-evident how the mistake should be resolved. The case also considered the distinction between rectification by construction and rectification in equity.

Summary

James Adam (**vendor**) and Fobeza (**purchaser**) entered into a contract for the sale of rural land that was to be subdivided. One of the parcels of land known as "Lot 101" was to be excluded from the sale. Annexed to the contract was a sketch plan of the proposed subdivision, and clause 39 of the contract provided that completion of the contract was conditional upon registration of the plan of subdivision in accordance with the sketch plan. The sketch plan precisely defined the boundaries of "Lot 101" by dimensions and bearings, but incorrectly stated the area was "2,001m^2". The correct area of "Lot 101" was "2,205m^2", and the correct area was registered with the plan of subdivision by the vendor. Upon being notified of the mistake, the purchaser sought to rescind the contract under clause 41, which granted the purchaser the right to rescind if "Lot 101" as registered on the plan was "2,100m^2" or more. The vendor denied the validity of the recission and served a notice to complete.

The purchaser brought proceedings seeking a declaration that its rescission was valid. The vendor sought a declaration that clause 41 of the contract should be read as "2,310m^2" rather than "2,100m^2", on the basis that because "2,100m^2" was approximately 5% greater than "2,001m^2" (the incorrect area of Lot 101), the same calculation should apply on the correct area. The primary judge at first instance held that the purchaser had validly rescinded the contract.

The Court of Appeal upheld the primary judgement and refused to rectify the contract in the manner proposed by the vendor. In doing so, the Court considered whether the two limbs of the common law test of rectification by construction were satisfied. Under this test, the vendor had to prove that (i) the literal construction of clause 41 was absurd; and (ii) the vendor's proposed construction of the clause was self-evident to be taken as the parties' objective intention. Consideration was also given to the distinction between rectification by construction and rectification in equity.

The Court found that the contract contained an error that was sufficiently absurd or inconsistent for the vendor to engage the first limb. The vendor had the obligation to register the plan in accordance with the sketch plan's dimensions and bearings. However, doing so would also inevitably grant the purchaser the right to rescind, since the area actually depicted in the sketch plan was an area of 2,205m^2 rather than an area of 2,001m^2 (as was incorrectly stated in the plan). The Court found there was no rational basis for imputing the intention to the parties that the vendor's compliance will always trigger the purchaser's right to rescind, and thus there was a clear error.

However, the Court found the vendor failed the second limb of the test, as it was not clear how the error should be resolved. Unlike cases where there is a binary choice between constructions, here there were a number of possible constructions of clause 41 and none were sufficiently self-evident to be taken as the parties' objective intention. There were multiple different ways in which the correct threshold for the purchaser's right of rescission could have been calculated – the vendor's proposal of 2,310m^2 was only one option. It did not matter if all the other options would have resulted in the same outcome (i.e. that the right to rescind would not have been triggered) – the right was essential to the bargain struck by the parties and thus that right must be capable of being articulated with precision. Having multiple arguable figures where none are self-evident necessarily meant that the error could not be resolved through rectification by construction. The Court thus upheld the trial judge's decision that the Contract had been validly rescinded.

While rectification in equity was not an issue of the appeal, the Court nonetheless considered the distinction between the equitable doctrine and the common law principles applied in this case. President Bell and Justice Macfarlan considered that the terminology "rectification by construction" should be eschewed, and that the concept did not need to be elevated to the status of a doctrine, as it is apt to be confused with the equitable doctrine of rectification. The principle underpinning so called common law "doctrine", is that in very limited circumstances, a contract can be construed in a way that involves a recognition that the drafting of the contract has been miscarried.

Justice Leeming disagreed and discussed how the two doctrines are conceptually distinct. Rectification in equity turns upon establishing the document does not reflect the parties' actual intentions, viewed objectively from their words or actions. Rectification by construction on the other hand does not rely upon extrinsic evidence such as the parties' actual intention. Rather, it turns upon concluding that the literal meaning is absurd or inconsistent, and that the true meaning of the document can be ascertained from construing the contract objectively. As part of the laws of contractual interpretation, rectification by construction ordinarily comes before rectification in equity, as courts should endeavour to resolve mistakes without recourse to extrinsic evidence.

Key takeaways and practice points

Although a mistake may be established where the literal construction of a clause is absurd, this case demonstrates that the courts will not correct the mistake at common law if it is not self-evident how it should be fixed. Problems will occur when the construction choice is not binary and where the error involves a contractual right that is essential to the bargain. It will not be sufficient to show that all arguable constructions would have led to a favourable outcome to one party, if it is not self-evident which construction should be taken as the parties' objective intention.

Parties should take care to ensure the written contract reflects what they intend, because extrinsic evidence of negotiation or correspondence often cannot be relied on to rectify drafting mistakes. Additionally, special care should be applied to figures and numbers that are essential to the contractual bargain, as an error of this kind is less likely to lead to a self-evident construction, or a binary choice between two constructions. Typically, construction can only rectify errors such as a missing word, a concept being confused with its antonym, or a clause that has been misnumbered or incorrectly cross-referenced.

Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd [2020] NSWCA 234

What was this case about?

This case, which concerned a franchise arrangement gone wrong, illustrates the challenges that a breaching party may face in attempting to escape liability under a contract by relying on a force majeure clause or by asserting that reliance damages should not be awarded as costs incurred by the innocent party would never have been recovered. In particular, in these cases there will be an onus of proof on the breaching party that may not be easy to discharge.

Summary

This case concerned a franchise business operated under the "Meet Fresh" brand that sold traditional Taiwanese desserts. The franchisee entered a franchise agreement with the franchisor under which it was entitled to use the brand. The same parties entered into a licence agreement for a premises from which the franchise business was to be operated, and the franchisee incurred costs in fitting out the premises. Later a Taiwanese entity that owned the IP associated with the "Meet Fresh" brand intervened and told the franchisee, with whom it had no direct relationship, to stop using the brand. The franchisor advised the franchisee to change the business name to "Meet Desserts". Eventually the franchising arrangements were terminated, and the franchisee sued for damages, including to recover fit out costs.

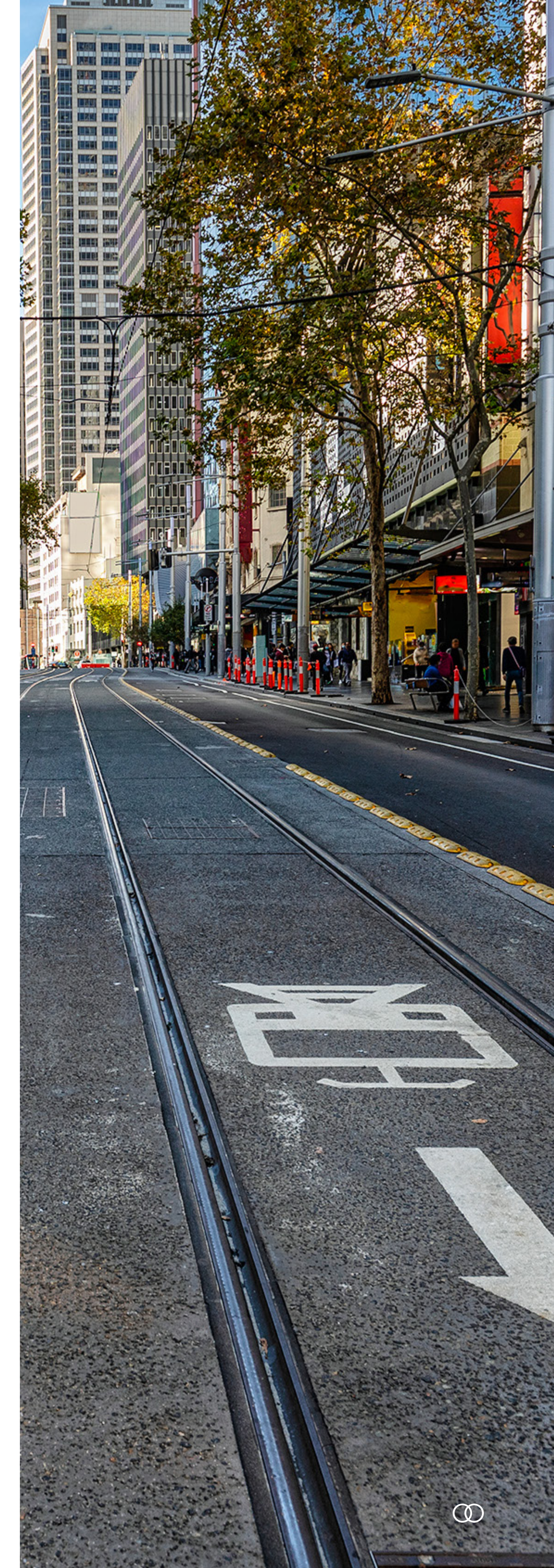
The Court of Appeal first considered whether the franchisor could rely on the force majeure clause under the franchise agreement to escape liability. The franchisor contended that the loss of the rights to the "Meet Fresh" brand was outside its control, meaning the force majeure clause was applicable. The clause provided that the franchisor was not liable for a breach that was attributable to an event beyond the franchisor's reasonable control. The onus of proving this clause applied was on the franchisor because it operated to establish an exception to the franchisor's promises, rather than as a qualification on the whole scope of those promises. Given there was a lack of evidence about why the rights to use the "Meet Fresh" brand had been withdrawn, the franchisor failed to discharge this onus and the force majeure argument was unsuccessful.

The Court of Appeal also considered whether the franchisee should be entitled to damages on the basis of wasted expenditure or reliance damages (as distinct from expectation damages or damages for loss of profits) which allowed the fit-out costs to be taken into account. The Court referred to the principle established in the *Amann Aviation* case that "*the law assumes the plaintiff would at least have recovered his or her expenditure had the contract been fully performed*", which means that the onus is on the breaching party to establish the expenditure would have been wasted even if the contract was performed. The franchisor sought to establish that the fit out costs would have been wasted as the business was not doing well. The franchisee's accounts showed a net loss over the first two years of operation. However, the Court considered this insufficient to establish that the business would not have turned around so that the franchisee would have been able to recover the fit out costs. The Court noted that the franchisee had requested an extension of the franchise arrangement, and said that the franchisee could be assumed to have been in a position to make an informed decision regarding its business prospects. Furthermore, an expert report projected that the franchisee would earn substantial profits from the beginning of the second franchise term.

Key takeaways and practice points

Relying on a force majeure clause to avoid liability is never straight-forward, and as this case illustrates the onus will be on the breaching party to establish that a relevant force majeure event has actually occurred so that the protection conferred by the clause has been triggered. Where the alleged force majeure event relates to an action by a third party, it will be important to lead evidence as to the reasons for that action and to establish that they were outside the breaching party's control.

Where an innocent party seeks damages for reliance or expenditure loss, they will have the benefit of an assumption that they would have been able to recover their expenditure if the contract had been performed. The onus is on the breaching party to prove that the expenditure would have been lost regardless of what happened. This may be challenging to do, particularly as past losses will not necessarily be taken as a reliable indicator of future financial outcomes. Again, this illustrates that escaping liability for a broken contractual promises is not straight-forward.



Pilbara Iron Company (Services) Pty Ltd v Chevron (Tapl) Pty Ltd [2020] WASC 296

What was this case about?

This case considered whether a price review notice issued outside the stipulated "notice window" could still be effective. The case provides a useful analysis of how courts determine whether compliance with time stipulations in contractual provisions are essential.

Summary

Pilbara Iron Company (Services) Pty Ltd and several other entities within the Rio Tinto Group (**Customers**) entered into an agreement with Chevron (Tapl) Pty Ltd and other joint venture participants in the Gorgon Gas Project (**Suppliers**) for the supply of natural gas. The contract contained a price review clause which provided that either party could initiate a price review by issuing a notice not more than 120 days nor less than 90 days prior to a specified "price review date" (the **Notice Window**).

A dispute arose when the Customers, otherwise complying with the requirements in the price review clause, issued a price review notice after the Notice Window had expired. The Suppliers claimed that the notice was ineffective, asserting that the time stipulation was an essential term. The Customers contended that the notice was still effective notwithstanding that it was issued outside the Notice Window.

Justice Archer began her analysis by noting that the issue for determination was not whether the notice had to be issued within the Notice Window (this was accepted), but whether the parties intended for the right to initiate a price review to be lost if the notice was issued outside the Notice Window. In determining whether the time stipulation was essential, Justice Archer considered a wide range of authorities in relation to the proper approach to time stipulation, but ultimately arrived at her decision through the application of conventional principles of contractual construction, taking account of:

a. the text of the notice subclause;

b. the notice subclause in the context of the broader price review clause; and

c. the notice subclause in the context of the whole agreement.

Justice Archer started by considering the text of the notice subclause itself. Her Honour noted that the subclause first defined "Price Review Notice", then referred to the time stipulation: "*…The Buyer or the Sellers may initiate a Price Review by issuing […] a notice which complies with Clause 14.4 (**'Price Review Notice'**) not more than 120 days nor less than 90 days prior to a Price Review Date.*" Justice Archer noted that the clause could have been expressed in such a way that the time stipulation was included in the definition (i.e. before the brackets). While not determinative, this supported the Customers' contention that a notice that otherwise complies with the subclause would still be a valid price review notice regardless of whether it was issued within the Notice Window.

The Suppliers also contended that the time stipulation functioned as a non-promissory condition precedent that had to be strictly complied with for the price review to take place. Justice Archer rejected this argument, noting the lack of conditional language (e.g. 'on the condition that', 'subject to', or 'provided that') and an absence of any drafting specifically directed towards what was to happen if the condition was not met.

The Suppliers also argued that the clause functioned as an 'initiating power' that triggered the price review process, as opposed to a 'machinery provision' which merely sets out the review process. In drawing this distinction, the Suppliers sought to argue that the clause was essential. Justice Archer found this distinction to lack any meaning, and further found that, in any event, the time stipulation sat outside the definition of Price Review Notice, so did not form part of the relevant 'trigger' or 'initiating power'.

The Suppliers further argued that if the subclause was not considered 'essential' then it would have 'no work to do'. Justice Archer found that breach of the subclause did have 'work to do' insofar as it fixed a date after which a party could issue a 'Deadline Notice', i.e. a notice requiring the other party to issue a price review notice within a reasonable time or forfeit any right to initiate a price review. Accordingly, the time stipulation was held to be inessential while still having work to do.

Justice Archer then looked to the broader price review clause to see whether it shed further light on the 'essentiality' of the time stipulation. Her Honour rejected the Suppliers' argument that the parties objectively intended the time stipulation to be essential to ensure they had enough time to negotiate before the 'price review date', noting that the price review clause contemplated the possibility of further negotiations after the price review date. Instead, Justice Archer found that the parties placed objective value on the opportunity to reach agreement and intended for there to be some flexibility in the timeliness of the price review negotiations.

Finally, Justice Archer considered the time stipulation in the context of the whole agreement, noting that certain features supported the Customers' argument that the term was not essential. In particular, Justice Archer noted, among other things, that limited termination rights meant it was less likely the parties intended to apply the Notice Window strictly in a way that would result in the Customers being forced to pay a price they believed did not reflect the market price, that a provision dealing with delays in performance generally showed the parties turned their mind to the issue and did not consider all delays material, that a general provision allowed for the late exercise of rights, and that there was a deeming provision that set out consequences of failing to perform in accordance with certain clauses which did not address the price review notice. All of this pointed to the conclusion that the time stipulation was not essential.

Key takeaways and practice points

The decision demonstrates that if a time stipulation in an agreement is intended to be essential, this should be expressly stated to make this clear. The judgment also provides a useful summary of the law relating to this issue.

This case also demonstrates that the placement of the defined term in brackets when defining a term in the body of a clause should be carefully considered. The placement of additional qualifications or stipulations after the defined term in brackets will probably not be read as part of the definition itself, and as such may not be an essential part of the concept that has been defined in the clause.

Price v Spoor [2021] HCA 20

What was this case about?

This case considered whether it is possible to contract out of statutory limitation periods.

Summary

The case involved a claim for unpaid amounts under two mortgage agreements secured over land in 1998. The unpaid amounts 000 fell due in 2000, but proceedings were not brought in the Queensland Supreme Court until 2017.

The mortgagor argued that the claim was statute-barred due to the Limitation of Actions Act 1974 (Qld) (**Act**), which provides that actions for breach of contract cannot be brought after 6 years and actions for the recovery of land cannot be brought after 12 years.

The mortgagees argued a limitation defence could not be pleaded because of the following clause 24 in the mortgage agreement, which sought to prevent the parties from pleading any limitation defence:

> *RESTRICTIVE LEGISLATION*
>
> ***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 powers 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 lawfully be done.***

In response, the mortgagor argued that the language was too generalised and vague, and strong words were required to contract out of a statutorily conferred benefit.

The key issue was whether clause 24 was enforceable and effective to prevent the mortgagor from pleading a limitation defence. At first instance, the primary judge Dalton J held clause 24 was too vague to prevent the operation of the Act and ordered the mortgagees to release the mortgages.

The Supreme Court of Appeal (Gotterson JA, with Sofronoff P and Morrison JA agreeing) unanimously overturned Dalton J's orders and allowed the mortgagees' appeal. In particular, Gotterson JA found that the word "defeat" in clause 24 described the effect of the limitation provisions in the Act and therefore operated to exclude the Act from applying to the mortgages, and that the period of limitation never applied and hence never expired.

The mortgagors obtained special leave to appeal to the High Court. The key issue for the High Court was whether clause 24 was contrary to public policy and, therefore, void and unenforceable. The High Court unanimously dismissed the appeal and held the clause was effective to oust the limitation period under the Act.

As a matter of law, a person may waive a statutory right conferred on them unless it would be contrary to the statute to do so per *Westfield Management Ltd v AMP Capital Property Nominees Ltd (*2012) 247 CLR 129. This may be because the statue expressly prohibits it or because waiver of the statutory right would be contrary to public policy. This requires consideration of the purpose of the statute and whether the statutory right is conferred in the public interest or for the benefit of an individual alone. In this particular case, while acknowledging that statutory limitation periods promote the public policy of finality of litigation, ensuring speedy resolution of disputes and orderly administration of justice, the High Court ultimately found that the Act conferred an individual benefit. It was therefore open to parties to contract out of the statutory limitation periods established under the Act.

The High Court noted that the meaning of clause 24 was to be objectively determined having regard to the text and surrounding circumstances of the contract, and the commercial purpose of the transaction. As mortgages were commercial documents, the clause was interpreted by reference to how a reasonable businessperson what have understood it. Steward J recognised that the mortgages, including clause 24, were the product of free negotiation between the parties at arm's length. In this case, it was clear that the clause was intended to have a broad application as the words "provision of all statutes" plainly included the Act, and use of the word "defeat" was sufficient to overturn the effect of limitation provisions.

Key takeaways and practice points

While there have been previous comments from High Court judges on this issue, this case sets a clear precedent that public policy ought not prevent parties contracting out of limitation periods (although some care may need to be taken in cases where the underlying statute differs in purpose or effect from the Act considered in this case). The decision also provides guidance on the type of contractual drafting that may be used to overcome statutory limitation periods.

That said, some questions remain unanswered and contracting parties should not automatically assume the enforceability of similar clauses. Firstly, such clauses may potentially be unenforceable as unfair terms under the Australian Consumer Law. Secondly, some statutory limitation periods are imposed for different public policy reasons (for example, those found in building legislation across Australia) which may lead a court to reach a different conclusion reached in this case.

In any event, it is clear that parties need to pay careful attention to any clauses that purport to contract out of statutory limitations that would otherwise apply, as such provisions may substantially alter the allocation of risk between the parties.

Roude v Helwani [2020] NSWCA 310

What was this case about?

This case concerning a dispute about residential building works raises interesting issues about how quantum meruit claims should be assessed, and illustrates the importance of raising any disputes about payment at the earliest possible stage.

Summary

This case concerned an undocumented agreement to carry out electrical and plumbing work at a residential premises. After unsuccessfully pursuing payment for a number of years, the builder brought a quantum meruit claim (i.e. a claim to recover a reasonable sum for work performed) against the home owners. Following various decisions in the lower courts, a number of points of law were ultimately raised before the Court of Appeal. In particular, the home owners argued that:

- As a matter of law, the builder needed to provide objective evidence against which the reasonableness of the invoiced amounts could be assessed. The builder's invoices alone (without reference to objective market value of the work done) were not capable of establishing the reasonable value of the work done.
- While the builder had provided a schedule that contained a detailed breakdown of the prices charged for the items of work, that was not sufficient to establish that the prices charged were objectively fair or reasonable.

On the first point, the Court found there was no authority to substantiate the owners' proposition that a quantum meruit assessment needs to be based on an established market price for the work or other objective external standards. Quite to the contrary, the authorities make clear that while evidence of market value is helpful in determining what is reasonable and fair, the court is not precluded, in the absence of such evidence, from assessing the fair value of the benefit provided by looking at the circumstances of the case. Here, the fact that the owners failed to dispute the invoices when they were presented to them, and that they partly paid them, was evidence of their reasonableness.

On the second point, in the absence of any contrary evidence, it was appropriate to accept the builder's own evidence that his charges were reasonable. There was nothing unreasonable on the face of the invoices, and the builder's expertise over 30 years in the industry meant that it was no error to accept his statements, in the absence of objection, as expert opinion on the reasonableness of the charges.

Key takeaways and practice points

First of all, this case illustrates the risks of proceeding without a documented agreement. Perhaps more importantly, where there is a difference of view as to the value delivered, it illustrates the dangers of not challenging invoices and claimed payments at the earliest possible stage. In this case, by initially accepting and part-paying the builder's invoices, and then later not directly challenging the builder's evidence as to the reasonableness of his charges, the home owners clearly undermined their legal position in seeking to resist the builder's quantum meruit claims. While no one likes to quibble about claimed payments, particularly when the parties may still be on good terms, it is important to set the position straight as early as possible in order to avoid later confusion. In particular, if there are doubts as to the reasonableness of any invoices it is better to resolve matters before making payment.

Sandoz Pty Ltd v H Lundbeck A/S [2020] FCAFC 133

What was this case about?

This case usefully illustrates the pragmatic approach that should be taken to contractual interpretation, with commercial common sense acting as a guide to resolve ambiguity.

Summary

Lundbeck owned a patent covering escitalopram products (antidepressants marketed as Lexapro®). The patent originally expired in 2009, but Lundbeck successfully applied to extend the patent for an additional 5 years to 2014. Separately, in order to settle a dispute, Lundbeck agreed to grant Sandoz a licence to make generic escitalopram products, the term of which was tied to the expiry date of the patent.

The original extension of Lundbeck's patent was found to be invalid and so, relying on the licence that had been granted by Lundbeck under the settlement agreement, Sandoz started supplying generic products from the original patent expiry date in 2009. However, Lundbeck later secured a new extension of the patent through to 2012. Lundbeck then commenced proceedings seeking orders that Sandoz had infringed the patent between 2009 and 2012. The primary judge agreed with Lundbeck and awarded damages against Sandoz for patent infringement, but on appeal the Full Federal Court reversed this decision. In doing so, the Court applied several important principles of contractual construction. After quoting several authorities, the Court emphasised that any consideration of the commercial purpose, and any surrounding circumstances, should be confined to the position as known to both parties at the time the contract was made. It is not permissible to evaluate the commercial sense or otherwise of the contract by reference to events that occurred after it was entered into. The Court also indicated that it is important to consider how the contract would be understood by 'a reasonable reader'.

The Court held that the parties' intention, objectively ascertained, in entering the settlement agreement was for the licence granted to Sandoz to commence from the original expiry date of the patent in 2009. If, instead, the licence was interpreted so that the start date could be affected by any later extension, then the practical effect would be that Sandoz could not have ever relied on the licence until after any outstanding or future application to extend the term of the patent was heard and fully determined. This construction would create a 'measure of uncertainty' for Sandoz and would defy commercial common sense.

Key takeaways and practice points

The key aim is interpreting a contract is to objectively assess what a reasonable commercial party, taking into account relevant context, would have understood the contract to mean on entering it. This means that courts will naturally prefer an interpretation that make commercial sense in the context in which the contract was made over an interpretation that would lead to significant uncertainty for one of the parties or some other uncommercial outcome. If the parties wish to achieve a different outcome, that may not be easy to determine from an objective assessment, then they will need to use explicit and unambiguous language.

Wärtsilä Australia Pty Ltd v Primero Group Ltd [2020] SASC 162

What was this case about?

This case considered whether a requirement for documents to have been "provided" or "made available for inspection" could be satisfied by sending a hyperlink to a cloud storage location. It illustrates the importance of following formal requirements under a contract in a strict fashion, and the risks that can arise when using a novel form of technology.

Summary

Wärtsilä Australia Pty Ltd (Wärtsilä) was engaged by AGL to construct a power station, and Wärtsilä subcontracted Primero Group Ltd (Primero) to perform various works. In March 2020, Primero served Wärtsilä with a progress payment claim under SOPA. For such a claim to be valid, there must be a "reference date" from which progress claim may be made determined in accordance with the contract. Whether or not the reference date claimed by Primero was correct depended on whether or not certain quality assurance documents had been "provided to" and "available for inspection by" Wärtsilä under the subcontract.

Primero had on the date in question emailed Wärtsilä a hyperlink to a cloud storage location where the documents were purportedly stored. However, the evidence ultimately established the documents were not capable of being downloaded by Wärtsilä at that date. In any event, the Court found that considered that sending the hyperlink was merely "a means by which Wärtsilä was permitted to download documents stored in the cloud", and until Wärtsilä downloaded the documents, the documents had not been "provided". Similarly, the hyperlink was not seen as making the documents "available for inspection", because they were not capable of being inspected until the documents were downloaded.

Key takeaways and practice points

This case illustrates the importance of complying strictly with formal requirements imposed under a contract. Even if the technical solution had worked as intended in this case, the contractual requirement would not have been satisfied until the documents were actually downloaded by Wärtsilä. That level of residual uncertainty is clearly not desirable, especially when important issues of payment are at stake.

Before using any new technical method of performing a contractual obligation, consideration should be given to whether the method used will actually fulfil the obligation and also whether there are technical risks that may need to be factored in. In this particular case, delivery of the documents by comparatively "old-fashioned" means such as in hard copy or stored on a physical storage device would have provided far greater certainty.

Woolworths Group Ltd v Twentieth Super Pace Nominees Pty Ltd (t/as SCT Logistics) [2021] NSWSC 344

What was this case about?

This case considered the interrelationship between a force majeure clause and the overall risk allocation framework of an agreement. It illustrates that a force majeure regime will not always operate to relieve a party from liability under the agreement.

Summary

Woolworths engaged SCT) to transport goods by rail to Western Australia. Extreme weather involving heavy rain and flash flooding caused a SCT train to derail. As a result of the derailment, Woolworths lost goods worth $893,399.25. Woolworths sought to recover this amount from SCT.

The relevant contract provided that SCT would indemnify Woolworths against losses arising from or in connection with any loss, theft, destruction or damage to the goods, but also that neither party was liable to the other for any delay or failure to perform its obligations that is owing to a force majeure event. Though the term "Force Majeure Event" was capitalised, it was not defined in the agreement. SCT argued that the derailment was a force majeure event. In response, Woolworths argued that SCT's indemnity to Woolworths for any loss or damage to the goods arose irrespective of a force majeure event or a failure to perform as the risk associated with the goods remained with SCT until the goods were accepted by Woolworths at the delivery point. Woolworths argued that the force majeure carve out it did not override the allocation of risk or indemnity.

After a close analysis of the contract, Justice Henry concluded that Woolworth's construction of the agreement was correct. Justice Henry accepted that the risk clause made SCT liable for the goods, irrespective of how they were damaged. Justice Henry also found that the force majeure clause would only apply in circumstances where there was an obligation under the agreement in respect of which SCT was delayed in fulfilling or had failed to fulfil and there was a causal link between the alleged force majeure event and SCOT's failure. These conditions were not satisfied in this case. Justice Henry therefore held that Woolworths was entitled to be indemnified for the loss and damage incurred, irrespective of the force majeure event.

Key takeaways and practice points

This case highlights that force majeure clauses must be read strictly and do not automatically act as an exclusion of liability or necessarily relieve parties from their requirements to perform contractual obligations.

The term "force majeure" is not a term of art and has no fixed meaning in Australian common law. Accordingly, if this concept is to be used in an agreement act it is important that it be clearly defined so that it is clear what will constitute an event of force majeure in the context of that agreement. If the agreement fails to define force majeure, the court will attempt to give the term meaning according to the principles of contract construction, but it will add to the uncertainty as to how the clause may be applied in practice.

A contract will always read in light of the whole agreement, giving regard to its commercial purpose and the bargain struck between the parties. This means it is critical that the parties adopt a consistent approach that reflects their intentions across all aspects of the agreement, including as to how liability should be allocated between the parties.

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