Australian Construction Law 2009
A review of recent developments and their implications

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## Table of Contents

### Part 1: Contractual interpretation
1. *Aintree Holdings Pty Ltd v Ground & Foundation Supports Pty Ltd* [2008] WASCA 225 3
2. *Silent Vector Pty Ltd t/as Sizer Builders v Squarcini* [2008] WASC 246 5
3. *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57 8
4. *Strahle v CKG Duporth Pty Ltd* [2009] QSC 56 10
7. *Tudor Developments Pty Ltd v Makeig* [2008] NSWCA 263 16
8. *Braham v Evans* [2008] WASC 274 18

### Part 2: Breach of contract
9. *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* [2009] HCA 8 21

### Part 3: Arbitration and dispute resolution
15. *United Group Rail Services Ltd v Rail Corporation New South Wales* [2009] NSWCA 177 38
16. *Gordon & Gotch Australia Pty Ltd v Horwitz Publications Pty Ltd* [2008] NSWCA 257 40
18. *Western Areas Exploration Pty Ltd v Streeter [No 2]* [2009] WASCA 15 46

### Part 4: Security of payments legislation
20. **Nebmas Pty Ltd v Sub Divide Pty Ltd & Ors** [2009] QSC 92
22. **Match Projects Pty Ltd v Arccon (WA) Pty Ltd** [2009] WASAT 134
23. **Walton Construction (Qld) Pty Ltd v Salce & Ors** [2008] QSC 235
24. **Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Ford** [2008] NTSC 42
25. **Holdmark v Melhemcorp** [2009] NSWSC 305

**Part 5: Insurance and Indemnity**
27. **Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd & Ors** [2008] NSWCA 243
28. **Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd** [2009] WASCA 31
30. **Godfrey Spowers (Victoria) Pty Ltd v Lincolne Scott Australia Pty Ltd & Ors** [2008] VSCA 208
Part 1: Contractual interpretation

Contractual interpretation is an important part of the work of any lawyer. Because the law of contracts is derived from precedent and judicial practice, and the way courts approach contractual interpretation is constantly evolving, it is important to stay on top of recent developments. This applies as much to those working in the disputes area as it does those drafting the contracts. More and more, the law of contracts is reacting to the practices of its users. As is clear from the decision in Aintree Holdings, traditional notions of 'the four walls of the contract' appear to be giving way to interpretations that take into account the full matrix of fact in which the parties made their agreement. Similarly, the judgment in Silent Vector suggests that, in order to exclude certain remedies under a standard form contract, the parties must clearly express their intention to do so, and evidence of surrounding circumstances at the time the parties entered into the contract will be relevant in this regard.

1. Aintree Holdings Pty Ltd v Ground & Foundation Supports Pty Ltd
   [2008] WASCA 225

   Introduction
   The Court of Appeal of the WA Supreme Court determined that sketches or architectural drawings that are provided by a party during a tender process may acquire the status of a contractual document by way of an implied term.

   Facts
   Aintree Holdings Pty Ltd (Aintree) asked Ground & Foundation Pty Ltd (Ground) to submit a tender for the supply and installation of piling for a temporary retaining wall. Aintree’s request for tender was accompanied by architectural drawings showing the height of the piling as Australian Height Datum (AHD) 7.70.

   Ground submitted a tender to Aintree. Aintree accepted the tender subject to Ground supplying further details of the proposed work. Ground then supplied three sketches to Aintree that depicted the height of the piling as AHD 7.60. Aintree accepted the sketches and Ground proceeded to supply and install the piling to a height of AHD 7.60.

   Dispute
   A dispute arose when it was time for Aintree to pay Ground for the piling. Aintree paid less than the price stipulated in the contract, arguing that the work had not been performed in accordance with the contract. The Court had to determine whether the contract required the piling to be erected to a height of AHD 7.60 or AHD 7.70.

   Decision
   The Court held that it was necessary to interpret the contract in the context in which it was formed. The case did not involve a conventional tender process. Rather, Aintree had left it to Ground to describe the work that it would perform (by reference to the architectural drawings) and set the amount that it would charge for performing the work.
The Court held that it was a condition of the contract that Ground submit the sketches to Aintree (due to Aintree accepting the tender subject to Ground supplying further details of the proposed work). The Court also held it was an implied term of the contract that upon Ground supplying the sketches and Aintree accepting them, Ground was then required to supply and install the piling in accordance with the sketches supplied. In other words, the sketches acquired the status of a contractual document and Ground was required to comply with them.

Since the sketches stipulated that the piling was to be erected to a height of AHD 7.60 and Ground supplied and installed the piling in accordance with that requirement, Aintree was obligated to pay to Ground the full price stipulated in the contract.

**Practical implications**

In some circumstances, architectural or other drawings submitted by a tenderer during a tender process may be contractually enforceable even if those drawings have different specifications from the specifications outlined in the request for tender.

This case highlights the importance of checking the drawings submitted by a tenderer to ensure that the drawings meet the required specifications set out in the request for tender.
2. *Silent Vector Pty Ltd t/as Sizer Builders v Squarcini* [2008] WASC 246

The WA Supreme Court recently considered the effect of using 'nil' and 'N/A' in Annexure Part A to the Australian Standard General Conditions of Contract AS2124.

**Facts**

The applicant Silent Vector Pty Ltd (*Silent Vector*) entered into a building contract with a developer Mr Squarcini (*Squarcini*) for the construction of a 12 storey apartment building. The parties used the Australian Standard General Conditions of Contract AS2124-1992 (*Contract*).

A number of disputes arose between the parties and were referred to arbitration. Among Squarcini's claims was a claim for general damages for delay for non-completion by the date for practical completion. The arbitrator heard this issue as a preliminary point of law and made an interim award in favour of Squarcini.

Silent Vector sought the leave of the WA Supreme Court to appeal the interim award pursuant to section 38(2) of the *Commercial Arbitration Act 1985 (WA)* (*Act*). Silent Vector claimed that the arbitrator had erred in law by construing the contract between Silent Vector and Squarcini as entitling Squarcini to claim general damages for delay, and that Squarcini had no such entitlement.

Silent Vector's argument was to the effect that by using 'N/A' in Annexure Part A (which deals with the amount of liquidated damages payable by the builder for delay in completion), the parties intended that no damages would be payable for delay in completion. Leave to appeal was refused.

**The Contract**

The annexure to the Contract is divided into Part A and Part B. Part A contains two columns. The left hand column contains a list of various items and, in places, corresponding contractual clauses. In the right hand column, the parties were required to insert certain information related to the corresponding item in the left hand column, and, where relevant, the contractual clause. All of the information inserted by the parties into Part A had been handwritten.

Part B is a table intended for use as a reference to clauses that may have been deleted, amended or added to the standard.

A number of clauses in the Contract were prefixed by an asterisk, indicating that they were optional and, according to the preface of AS2124-1992:

> may be omitted …as necessary without making consequential amendments: but such omission should be clearly shown on the face of the contract by striking out these clauses or indicating clearly elsewhere that they were not to apply.

Clause 35.6 of the Contract was the liquidated damages clause at issue between the parties. It provided:

> If the Contractor fails to reach Practical Completion by the Date for Practical Completion, the Contractor shall be indebted to the Principal for liquidated damages at the rate stated in the Annexure for every day after the Date for Practical Completion to and including the Date of
Practical Completion or the date that the Contract is terminated under Clause 44, whichever first occurs.

Clause 35.7 of the Contract (which was an asterisked clause but had not been marked by the parties as having been deleted) further provided:

The Contractor's liability under Clause 35.6 is limited to the amount stated in the Annexure.

In respect of clause 35.6, the left hand column in Part A of the Contract included the item 'Liquidated Damages per day'. Against this item in the right hand column the parties had written 'N/A'. In respect of clause 35.7, the left hand column of Part A stated 'Limit of Liquidated Damages'. Against this item the parties had once again written 'N/A'.

Clause 35.6 was not listed in Part B as having been deleted or amended. The parties had inserted in Part B some but not all of the deleted and amended clauses.

The arbitrator's decision

The arbitrator identified the question of law for his determination as being which of two possible constructions should be given to Clause 35.6 when read with the annexure.

The first construction, as argued by Silent Vector, was that insertions of 'N/A' beside items relating Clauses 35.6 and 35.7 in the annexure meant that the rate at which liquidated damages were payable was intended to be nil. Broadly speaking, the existence of a valid and mandatory liquidated damages clause in a building contract that stipulates a positive amount of liquidated damages for failure to reach practical completion by the due date will preclude any claim to unliquidated damages. Liquidated damages at the rate of nil would leave the principal confined to liquidated damages at that rate and preclude it from claiming unliquidated, general damages. This was described by the arbitrator as the 'narrow meaning'.

The 'wide meaning', as argued by Squarcini, was that use of 'N/A' meant that the parties intended that cl 35.6 as a whole was not applicable, leaving Squarcini able to claim general damages for delay.

The arbitrator found that the 'wide meaning' was the preferable construction, and so Squarcini was able to claim general damages for delay. Alternatively, the arbitrator held that if he were wrong in arriving at that conclusion, he was led to the same result by reason of the failure of the parties to use clear and unequivocal words as was required before it could be found that either party intended to abandon a remedy in general law damages.

The arbitrator considered the use of N/A and 'Nil' in a number of decided cases. However, he was able to distinguish each of these decisions on a number of bases, relating to both the ambit of the liquidated damages clauses in the relevant standard form contract in each case, and the differing ways the parties had amended, or inserted information corresponding to, the clauses of that standard.

Justice Jenkins’ decision

Justice Jenkins refused Silent Vector leave to appeal. To satisfy the requirements under section 38(5) of the Act for leave to be granted, Silent Vector had to show, among other things, that:

(a) there was strong evidence that the arbitrator made an error of law; and
(b)  the determination of the question may add, or be likely to add, substantially to the
certainty of commercial law.

Justice Jenkins held that Silent Vector had failed to show that there was strong evidence
that the arbitrator made an error of law. The construction of the Contract chosen by the
arbitrator was open to him and he did not reach that construction by invalid means. Her
Honour held that the construction favoured by the arbitrator was one that a reasonable
person would arrive at having regard to the language used in the Contract.

Further, her Honour did not consider delivery of another decision interpreting such a clause
that had been amended in a particular fashion by the parties would be likely to add to the
certainty of commercial law. She noted that the construction of amended Australian
Standard contracts that have rates for liquidated damages inserted as 'Nil' or 'N/A' was not
certain given the unlimited ways they can be altered and completed and given the different
forms of damages clauses in the standard form contracts.

Her Honour concluded by saying:

What is clear to me is that parties to such contracts should be careful to delete, amend or
add clauses to such contracts in a consistent and clear manner. The uncertainty that exists
in this area of commercial law primarily exists because the parties have failed to adhere to
this principle.

Practical implications

The way in which annexures to the Australian Standard Conditions of Contract are filled out
is important. There may be significant adverse consequences for a party if the meaning of
the language used in an annexure or amendments made to operative provisions is
disputed.

The effect of using the words 'Nil' or 'Not Applicable' (or 'N/A') may in some circumstances
be uncertain, and in others quite clear. The use of the word 'nil' will mean that there is a
sound argument that the principal is precluded for claiming any damages for delay in
completion but this is not always the case. The better view appears to be that the use of
'N/A' leaves open the principal's right to claim general damages for delay for breach of
contract at common law.

However, the result will turn on the wording of the corresponding clauses in the particular
standard contract under consideration and whether the parties have clearly and
consistently expressed their intention. Evidence of surrounding circumstances at the time
of entering into the contract may also be relevant.

It is important, whenever parties are completing annexures to a standard from contract,
that this be done using precise wording to reflect the parties' intention, and as clearly as
possible.
3. **Agricultural and Rural Finance Pty Ltd v Gardiner [2008] HCA 57**

**Introduction**

This case is authority for the proposition that the term 'punctual payment' in a commercial contract should be interpreted strictly and given its ordinary meaning; it is not dependent on the attitude of the person to whom the money is owed.

**Facts**

In 1997 Oceania Agriculture Pty Ltd (OAL) promoted the Port Macquarie Tea Tree Plantation investment scheme, which it marketed as having tax advantages for investors. The investors entered into a licence and management arrangement with OAL under which investors were granted a licence over an allotment of rural land. OAL was to plant and maintain tea trees on the land and harvest and sell the oil on behalf of the investors.

Investors could fund their licence and management fees using a loan from Agricultural and Rural Finance Pty Ltd (ARF), the appellant. The loan required 'due and punctual payment' of sums payable by the borrower. Investors who accepted finance from ARF had the option of entering into a loan indemnity agreement with OAL and ARF. For a flat fee, and if amounts due under the loan agreement had been paid 'punctually', OAL would indemnify obligations under the loan contracts if the business ceased for one of a number of specified grounds. If the indemnity was triggered, ARF would have recourse solely to OAL and not to the investor concerned.

Mr Gardiner, the first respondent, was an investor in the scheme. ARF made four loans to him between 1997 and 1999. Each loan agreement required periodic payments and provided that the whole of the principal outstanding was immediately payable at the option of ARF if Mr Gardiner defaulted in the punctual payment of interest or any repayment instalment. Mr Gardiner failed to pay certain amounts under three of the four loan agreements on the due dates. However, ARF accepted late payments and did not choose to accelerate the loan as it was entitled to do.

By 2003, the investment scheme had collapsed and all of the investors ceased carrying on business. ARF called up the entire outstanding principal and interest from 216 investors, including Mr Gardiner, and commenced proceedings in the NSW Supreme Court to recover those sums.

Mr Gardiner sought to rely on the indemnity agreements for his loans, claiming that his overdue payments had been 'punctual' and that ARF, by its statements and actions, had waived compliance with due dates by accepting late payments.

At first instance, ARF was successful. Young CJ held that, leaving aside the question of punctuality, the indemnity was not effective and enforceable in respect of any of the four loan agreements and Mr Gardiner was liable to pay the principal and most of the interest ARF claimed to be owed.

On appeal, the Court of Appeal held that the indemnity was effective and enforceable against OAL. ARF obtained judgment for its claim under only one of the loan agreements, for which Mr Gardiner was not punctual in his payments under any definition of
'punctuality'. However, ARF failed in its claims to recover principal or interest from Mr Gardiner in respect of the other three loan agreements. Under one of these three loan agreements, Mr Gardiner had made his payments punctually and, on appeal, ARF did not dispute the effectiveness and enforceability of the indemnity clause in respect of that loan agreement.

ARF appealed to the High Court in respect of the remaining two loan agreements.

**Decision**

The High Court unanimously held that Mr Gardiner could not rely on the indemnity. The term 'punctual' used in both the loan agreement and the indemnity was to be given its ordinary meaning and did not depend on ARF's attitude to late payments. Given the commercial context in which the term was used, the term demanded strictness as to time and required that Mr Gardiner pay by the due date. As Mr Gardiner had not done so, the indemnity was neither effective nor enforceable.

The Court rejected Mr Gardiner's claims that ARF had waived the requirement of punctuality. Further, even if ARF had waived its rights to punctual payment, the Court held that OAL was not bound to indemnify the loans, because the obligation for punctual payments was owed to ARF and not to OAL.

The Court also considered, but ultimately did not need to decide, whether a freestanding doctrine of waiver exists at Australian law, separate from concepts of estoppel, contractual variation and election.

**Practical Implications**

In a commercial contract the term 'punctual' will be interpreted strictly and given its ordinary meaning; it is not dependent on the attitude of the payee. Therefore, parties should ensure that they make punctual payment where they are required to do so, otherwise they run the risk of losing any rights that are contingent upon punctual payment.
4. **Strahle v CKG Duporth Pty Ltd [2009] QSC 56**

**Introduction**

This Queensland Supreme Court decision dismissed an application for a declaration as to the construction of the dispute resolution clause of a contract.

**Facts**

Strahle as the buyer and CKG Duporth Pty Ltd (CKG) as the seller entered into a contract dated 28 November 2006 for the purchase of a lot in a building that was to be constructed in the proposed Riva Community Titles Scheme (sale contract).

CKG entered a contract with the builder on 12 April 2007. It was specified in clause 6.5 of the sale contract that the sale contract was subject to certain conditions, including CKG obtaining all approvals necessary to commence construction of the development by 15 June 2007.

Relevantly, clause 8.2 of the sale contract stated that if CKG had not given Strahle notice that the scheme had been established, and that the council had issued a certificate of classification for the building containing the lot by 30 January 2009, or by any extended date under clause 8.3 of the sale contract, then either Strahle or CKG could terminate the sale contract. Clause 8.3 then stated that CKG could extend the date in clause 8.2 of the contract by giving Strahle notice if there were delays in completion of any aspect of the development because of bad weather, disputes with neighbours, industrial disputes, delays in obtaining approvals for the development, damage by fire, explosion or act of God, or a combination of these or any other causes beyond CKG's control.

Significantly, clause 8.4 of the sale contract stated that if there were any dispute between Strahle and CKG as to whether the delays in completion of any aspect of the development had been cause by the matters in 8.3, then the matter must be referred to the architect to decide as an expert.

On 20 November 2007 Strahle's solicitor raised his client's concerns about the delays in the construction, and CKG responded that there had been a delay due to events beyond CKG's control, noting that it reserved the right to claim an extension for the delay at some future date.

On 17 September 2008, CKG's solicitor notified Strahle's solicitor that completion was further delayed by causes beyond CKG's control and that the date referred to in clause 8.2 of the contract was to be extended from 30 January 2009 to 30 August 2009. Strahle's solicitor requested evidence of the reasons for the delay and certification by the architect.

CKG's solicitor responded that the reasons for delay were inclement weather, a water leak in the basement, delays in obtaining development approval and other delays beyond CKG's control. Strahle felt that this response was not detailed enough and notified CKG that a dispute has arisen under clause 8.3 of the contract due to lack of evidence.

On 30 October 2008 CKG's solicitors sent Strahle's solicitors a copy of an unsigned letter from the architect certifying that there had been delays for reasons beyond CKG's control. Strahle did not accept that the unsigned letter complies with clause 8.4 of the contract.
Strahle's solicitor sent a letter on 16 January 2009 disputing that the architect's letter had resolved the issue. CKG's solicitors replied on 29 January 2009 stating they had received instructions to refer the matter to the architect.

Dispute

On 20 February 2009, Strahle applied to the Queensland Supreme Court for a declaration in the following terms:

… that upon the proper construction of the contract made on or about 28 November 2006 between the applicant and the respondent for the sale of lot number 201 Riva ["the contract"] any extension of the date in clause 8.2 (namely, 30 January 2009) pursuant to clause 8.3 must be by up to the number of days the events specified in clause 8.3 caused the delay in the completion of the Development:

• after 15 June 2007 (or, alternatively, entry into the contract); and
• according to the respondent's construction program.

Strahle pursued the claim for the declaration on the basis that it would help the architect to carry out the task that had been referred to the architect pursuant to clause 8.4 of the sale contract.

CKG contended that the declaration should be refused because there was no utility in granting it, as the sale contract stated that a matter that was in dispute was to be decided by the architect as an expert, and there was no evidence the architect had threatened to address the wrong question under the sale contract.

CKG also contended that there was no basis for limiting the architect's task by reference to any construction program, when there was no reference to such a construction program in the sale contract.

Decision

Mullins J held that the declaration that was sought as to the construction of clause 8.3 of the sale contract would not resolve any issue between Strahle and CKG, as that task has been given to the architect under clause 8.4 of the sale contract. He referred to the principle in *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 that 'the court does not make a declaration as to the construction of a contractual provision, where there is no issue to be determined between the parties as to that construction'.

Mullins J also held that there was no warrant in clause 8.4 of the contract for limiting the determination of delays by reference to a construction program that was not referred to in the sale contract.

The application was therefore dismissed, and Strahle was ordered to pay CKG's costs.

Practical implications

A declaration as to the construction of a clause of a contract will not be granted unless it will resolve a 'live' issue between the parties. An issue will generally not be live between the parties where an expert or adjudicator has been appointed to decide that issue.
5. **Raedel & Anor v Jezer Construction Group Pty Ltd [2009] QCA 61**

**Introduction**

This was a decision of the Court of Appeal of the Queensland Supreme Court refusing to set aside an appeal against orders of a judge of the District Court. The appeal related to the primary judge's refusal to recognise that there were variations made under a subcontract.

**Facts**

This proceeding was brought by Ramaville Pty Ltd (*Ramaville*) against Jezer Construction Group Pty Ltd (*Jezer*) in 1999. Raedel and Anor (*Raedel*) are the directors and shareholders of Ramaville, who took an assignment of Ramaville's cause of action on 14 September 2000, before Ramaville went into liquidation.

Raedel delivered an amended statement of claim in 2002 in which it claimed $77,403 under a subcontract between Ramaville and Jezer.

The allegations were that:

(a) Ramaville and Jezer entered into a subcontract in writing dated 7 August 1998 under which Ramaville agreed to supply materials and labour for landscaping at a construction site;

(b) between 17 April 1998 and 17 January 1999, Ramaville performed work and supplied equipment pursuant to the subcontract, or alternatively, at the direction of Jezer;

(c) the amount due under the subcontract or, alternatively, as reasonable remuneration for material supplied and work performed was $77,403; and

(d) Ramaville assigned its debts to Raedel and Raedel gave notice of the assignment to Jezer.

The primary judge found that that Raedel had only proved $36,488 of their $77,403 claim. It was also found that Jezer had proved its counter-claim for liquidated damages in the sum of $62,000, and that Jezer was entitled to deduct $30,894 from the $36,488 it owed to Raedel. This deduction represented the cost to Jezer of doing work that Ramaville had failed to do. Jezer's counterclaim therefore exceeded Raedel's claim by $56,406 and Raedel's claim was dismissed.

**Dispute**

Raedel appealed to the Court of Appeal of the Queensland Supreme Court. The grounds of appeal were that:

(a) the primary judge erred in finding that the agreed negative variation of $1,845 should be deducted from the claim;

(b) the primary judge erred in finding that the 'bobcat variations' for Daley Tipping Truck and Machinery Hire were not proved and should be deducted from the claim;
(c) the primary judge should have found that the work performed by Daley Tipping did not form part of the subcontract and should have allowed into evidence the invoices relating to these works and their payment;

(d) the primary judge erred in finding that the painting works, concreting works, earthworks, and rubbish removal were works that should have been performed by Sunshine Landscaping under the contract;

(e) the primary judge should have allowed evidence at trial defining the scope of works referred to in the contract as 'landscape works'; and

(f) the primary judge failed to admit evidence relating to the quotations and scope of works that defined the meaning of 'landscape works'.

Decision

The challenge against the primary judge's findings was ultimately unsuccessful.

Raedel contended that the primary judge had erred by not finding that the parties by their conduct waived compliance with the liquidated damages provisions, or alternatively that extensions of time were agreed from time to time between Ramaville and Jezer, or alternatively that Jezer and its subcontractors prevented Ramaville from completing the contract works on time.

Answering these claims, Muir JA found that even if it were the case that the finishing dates in the construction programme were impossible to meet, Ramaville had committed itself to meeting those dates by entering into the subcontract.

Raedel had referred to a blank sheet of paper with an undertaking stating the jobs to be completed and the dates for their estimated completion, written by a representative of Jezer, and suggested that it was a notice in writing by Jezer extending the time for completion of the subcontract works. The notice also stated that Jezer was authorised to bring in additional resources at Raedel's expense if the schedule was not met.

Muir JA stated that it was unlikely that the parties considered this document to have any contractual force except insofar as it permitted Jezer, in the event of non-compliance by Ramaville, to hire labour and equipment at Ramaville's expense. He further held that it was unlikely that a reasonable person with the knowledge of the parties would have concluded that the document manifested an intention to grant Ramaville an extension of time. Muir JA emphasised that Jezer's letterhead had not been used on the document, and that the notice was not in the customary form used to give instructions or to request or notify variations.

Practical implications

This decision confirms that a court will look closely at the form of a document that is said to constitute a variation or an extension of time. It also suggests that it is irrelevant whether scheduled completion dates in a construction programme are impossible to meet, so long as a commitment to meet those dates has been given.
6. *Downer Connect Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd (No 2) [2008] VSC 443*

**Introduction**

This was a hearing of a preliminary question in the Victorian Supreme Court, in which a subcontractor's attempt to have certain terms implied into the subcontract failed.

**Facts**

Downer Connect Pty Ltd (*Downer*) subcontracted with McConnell Dowell Constructors (Aust) Pty Ltd (*McConnell*) to install a telecommunications conduit in a pipeline trench. McConnell had been engaged as the contractor under a head contract with Duke Australia Operations Pty Ltd and DEI Tasmanian Holdings Pty Ltd (*Duke*), and McConnell was to dig the trench in which Downer was laying the conduit. McConnell was responsible to Duke for both the conduit and the pipeline.

The project ran into difficulties including adverse terrain and poor weather, and Downer was unable to perform its subcontract works on time. This led to increased costs for Downer, which it sought to recover from McConnell.

**Dispute**

Downer was seeking to recover the additional costs as damages from McConnell, alleging that McConnell had breached certain implied terms in the subcontract. Downer argued that the terms needed to be implied in order to give business efficacy to the contract and in order to construe the subcontract consistently with the head contract. It also argued that the implication was necessary given the relationship between the parties to the subcontract and the nature of the subcontract works.

The implied terms that Downer was seeking were that:

(a) neither party would prevent the other from performing the subcontract; and

(b) further or alternatively, during the course of the project, McConnell would:

(i) not delay, disrupt or prevent Downer from performing its subcontract works; and

(ii) perform its head contract works so as to ensure sufficient open, prepared trench was available for Downer to install the conduit and thereby enable Downer to perform its subcontract works in accordance with the subcontract.

**Decision**

Harper J stated that an implied term is one that the court presumes would have been agreed had the parties turned their minds to it when they were negotiating the contract. Implied terms must be capable of clear expression. It was asserted that the courts are cautious when deciding whether to imply a term, and will only do so when it is necessary to give business efficacy to the contract.
The Court held that the alleged implied terms were not necessary to give the subcontract business efficacy. Harper J found that risk is an inevitable incident of works, and many things may impinge upon the timely and efficient progress, and therefore the cost, of a job. It was said that parties to a works contract are free to deal with risks in any way that they agree between themselves, and are also free to place them beyond the contractual relationship.

Harper J applied the principle formulated by Cockburn CJ in *Stirling v Maitland* (1864) 5 B & S 840 that:

> If a party enters into an agreement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing *of his own motion* to put an end to that state of circumstances, under which alone the arrangement can be operative. [emphasis added in original]

Harper J held that McConnell could not be made responsible in damages to Downer if the delay was caused by something that was not McConnell’s fault, such as inclement weather. The terms that Downer argued should be implied into the contract did not distinguish between things that were and were not McConnell’s fault, leading Harper J to conclude that the terms were not capable of clear expression, and were not so obvious as to go without saying.

For this reason, Harper J found in favour of McConnell.

**Practical implications**

It was held in this case that any implied terms in a contract must be necessary to give the contract business efficacy, must be capable of clear expression and must be so obvious that they go without saying. Risks were found to be an inevitable incident of works, and parties to large construction projects were said to be able to manage the risks associated with the project by agreement between themselves. In some cases, this agreement may include placing certain risks outside the contractual relationship between the parties.

Harper J emphasised that where an agreement requires the continuance of a certain existing state of affairs, there is an implied requirement that a party will not do anything *of its own motion* to put an end to that state of affairs. There is no implied requirement, however, that a party must avoid all delays, even where those delays are clearly beyond its control.
7.  *Tudor Developments Pty Ltd v Makeig* [2008] NSWCA 263

**Introduction**

In this decision of the Court of Appeal of the NSW Supreme Court, it was found that the operation of general law principles relating to estoppel do not apply to section 96A of the *Home Building Act 1989* (NSW) (*Act*).

**Facts**

In August 2002, Tudor Developments Pty Ltd (*Tudor*), a developer, entered into a contract for the sale of land with Makeig, without attaching the certificate of insurance required by subsection 96A(1) of the Act. That subsection provides that such a contract is avoidable at the option of the purchaser before completion. Makeig, the purchaser, sought to rescind the contract in reliance upon this statutory provision. Tudor then commenced proceedings seeking specific performance of the contract. When the matter came before the court in the Equity Division, Tudor argued that Makeig should not be allowed to rely on section 96A to avoid the contract, as Makeig had engaged in conduct that amounted to an affirmation of the contract. Tudor argued that this conduct gave rise to an estoppel, which should prevent Makeig from later choosing not to go ahead with the purchase. Young CJ, however, concluded that one cannot have estoppel 'in the face of a statute' and that, therefore, estoppel could not be validly be pleaded.

**Dispute**

Tudor challenged the decision of Young CJ in the Court of Appeal of the NSW Supreme Court, arguing that section 96A of the Act would have to be subject to general law principles of estoppel, as the legislature would not have intended for foreseeable injustices to arise. Tudor argued that since Makeig could choose to avoid the contract under section 96A, she could also have the power to affirm the contract, which may give rise to an estoppel should she later choose to rescind the contract. Consequently, this raised a question as to whether the general law of estoppel was applicable to the election made under section 96A of the Act.

**Decision**

The appeal was dismissed by the Court of Appeal.

It was held that general law principles of estoppel do not apply universally in relation to statutory prohibitions or disabilities, with their operation depending on the construction of the particular statutory provision, in its context and informed by an understanding of its purpose.

It was held that estoppel is not available in the context of section 96A of the Act, because it would not be consistent with the purpose of the provision or with other provisions in the Act.

Basten JA, with whom Beazley JA agreed, found that Tudor’s construction of section 96A was not supported by the legislative history of the provision, and was not consistent with other relevant provisions in the Act, including the prohibition against contracting out in section 103D of the Act.
Additionally, the Court noted that since the statute prescribes the consequences of non-compliance with section 96A, there was no reason to look to the general law. Specifically, the section provides that the developer is subject to a monetary penalty, and the purchaser can, up until the point of completion, decide to avoid the contract. Basten JA held that there was nothing in the section that suggested that the power to choose to avoid the contract could be lost earlier than at completion by some conduct of the purchaser that might give rise to an estoppel under the general law.

Basten JA further held that estoppel will only be available where it does not operate counter to the public interest protected by the provision. The purpose of section 96A is to ensure that purchasers of residential properties enjoy a degree of protection against inadequate construction work. This means that any treatment of section 96A as a right to make an irrevocable election to affirm the contract would be inconsistent with this purpose. While an option to avoid may permit a choice, it does not follow that conduct demonstrating an intention not to avoid will be an affirmation, or that any affirmation will be binding.

Consequently, it was held that the power conferred by section 96A of the Act is not a power to make an irrevocable election and that the section should be allowed to operate in its terms, without interference from the general law.

Handley AJA dissented in this decision. He found that section 96A of the Act was not intended to protect purchasers from themselves. He therefore found that the general law of election should apply to the provision to the extent that, if the purchaser made a deliberate election to affirm the contract with knowledge of the choice, estoppel may be an available remedy.

**Practical implications**

This decision is significant in that it found that general law principles of estoppel do not apply universally in relation to statutory prohibitions. Instead, the application of these general law principles depends on the construction of the statute in its context and informed by an understanding of its purpose.
8. **Braham v Evans [2008] WASC 274**

**Introduction**

This case considers the following issues:

(a) when the limitation period under the *Builders' Registration Act 1939 (WA) (Act)* begins to run in relation to latent structural defects;

(b) the ability of the Building Disputes Tribunal (*BDT*) to make a decision in proceedings where a party refuses to accept the delivery of a notice of proceedings; and

(c) the appeal process from the State Administrative Tribunal (*SAT*) in relation to a refusal to grant leave to appeal a decision of the BDT.

**Facts**

The Brahams submitted plans to the council for a building permit to construct a house on their land. The council granted the Brahams a building permit.

Almost six years later, the Brahams sold the property to Mr Evans and Mrs Grace (*Evans*). A few months after Evans moved into the property, the roof began to leak. Evans contacted a plumber who recommended that Evans obtain a copy of the house plans from the council. The actual house built by the Brahams was very different to the plans that were submitted to the council.

Evans filed a complaint to the BDT. The Brahams chose not to participate in the proceedings before the BDT, and refused to accept delivery of a notice of the proceedings. The BDT heard the dispute in the Brahams' absence, and ordered them to pay $425,000 to Evans to cover the costs of demolishing and rebuilding the house.

The Brahams appealed to the SAT for leave to review the BDT's decision. At the SAT proceedings, the Brahams raised several arguments as to why the BDT made an error of law. The SAT rejected each of the arguments raised by the Brahams, and refused to grant leave to appeal the BDT's decision, finding that there was not sufficient doubt as to the correctness of the decision. The Brahams then appealed to the WA Supreme Court against the SAT's decision.

**Dispute**

The issue in dispute was whether the SAT was correct in refusing to grant the Brahams leave to appeal the BDT's decision.

**Decision**

The Act provides that the SAT must grant leave before an appeal against a decision made by the BDT can be heard. The Court held that the SAT is required to have regard to the following general principles in determining whether or not to grant leave:

(a) an applicant for leave must show that the decision in respect of which leave is sought is wrong or attended with sufficient doubt to justify the grant of leave and that substantial injustice would be done by leaving the decision unreversed.
However, the requirement that 'substantial injustice' be shown is no more than a
guideline for the exercise of a broad discretion to grant or withhold leave in the
interests of justice; and

(b) it is open to the SAT to grant leave on terms that limit the review to one or more
specified grounds.

In respect of an appeal from a decision of the SAT to the WA Supreme Court, the Court
held that:

(a) an appeal against a decision of the SAT can only be brought on a question of law.
That is, the subject matter of the appeal must be the question of law, as opposed
to the appeal merely involving a question of law; and

(b) a question of mixed law and fact is not a question of law and is therefore not a
ground of appeal from a decision of the SAT. Accordingly, a ground of appeal that
asserts that a decision is against the evidence or the weight of the evidence does
not raise a question of law; however

(c) an error of law will arise if a decision is made where there is no evidence to support
a finding, the decision is so unreasonable that no reasonable tribunal would have
made the decision, or the tribunal draws an inference that is not open to be drawn.

The Brahams argued the SAT made an error of law because it failed to recognise that the
limitation period for making the complaint to the BDT had expired. The Court rejected this
argument because the six year limitation period under the Act runs from the date that the
property was 'fit for occupation in a free and uninterrupted manner'. The Court held for the
limitation period to start running, the building must be fit for occupation and that occupation
must be free and uninterrupted. In this regard, a property with latent structural flaws so
serious as to require demolition of the building cannot be said to have ever been 'fit for
occupation'.

The Brahams also contended that there was no evidence to suggest that the property was
not fit for occupation. The Court stated that whether or not a house is fit for occupation
does not require a direct expert opinion and the evidence relating to the property's
structural defects was sufficient.

The Brahams argued that the SAT made an error of law by failing to recognise that the
BDT did not have jurisdiction to make the its decision. This lack of jurisdiction allegedly
arose because the Brahams were not given a notice of the proceedings. The Court
rejected this argument because the Brahams were given a notice but had refused to take
delivery of it. In any event, this was a finding of fact, or a mixed finding of fact and law, and
did not give rise to an error of law.

Finally, the Brahams argued that the SAT made an error of law by failing to recognise that
the BDT had no evidence before it when it found that the Brahams carried out the building
work. The Court examined the SAT's reasoning and found there was no error of law.
Practical Implications

If building works contain serious defects that render a building unfit for occupation, the builder will not be able to take advantage of the six year limitation period under the Act, as the limitation period only starts running once the building is fit for occupation.

Builders should also be aware that if they refuse to accept the delivery of documents in relation to a BDT proceeding, the BDT may determine the issues in their absence. This might have serious consequences, particularly if the BDT orders the builder to pay for demolition and reconstruction costs.
Part 2: Breach of contract

Whenever a contract is made, a balance is struck between the rights of self-interested parties. This balance is especially fine in a construction contract, where the duration of obligations is usually long and the consideration often fixed. When the weight of the contract tips too far in favour of one party, the contract becomes more likely to be broken by the other, resulting in claims and potential disputes. Whilst construction contracts are peculiar in many respects, the general rules still prevail. When an allegation of breach is made, claimants will tend to draw on general common law principles, such as the right to restitution, and defendants will raise the exceptions (eg waiver, election and estoppel). Tabcorp Holdings is a good example of this. Defendants tend to rely on exceptions to these general rules and this is well illustrated by the Tele2 case, where the defendant sought to invoke a ‘no waiver’ clause in the boilerplate of its contract with the claimant, to escape liability for an earlier breach. Industry participants must, therefore, stay current at both levels of jurisprudence in order to manage risk in construction contracting.

9. Tabcorp Holdings Ltd v Bowen Investments Pty Ltd [2009] HCA 8

Introduction

In this case, the High Court confirmed the general principle that a plaintiff who sues for breach of contract is entitled to be put in the same position as he or she would have been in had the contract been performed. Where the contractual obligation was not to damage a building, the owner was entitled to claim the cost of rectifying the damage, even though this cost was greater than the diminution in value caused by the damage.

Facts

Tabcorp Holdings Ltd (Tabcorp) was a tenant in an office building owned and leased by Bowen Investments Pty Ltd (Bowen). By clause 2.13 of the lease, Tabcorp had covenanted not to make any substantial alteration to the premises without the consent of Bowen.

The leased premises contained a foyer constructed of special materials, including San Francisco green granite, Canberra York grey granite and sequence-matched crown-cut American cherry wood.

Dispute

The dispute arose when a director of Bowen discovered that Tabcorp had badly damaged the foyer and removed large sections of it without permission, in order to install a new foyer. Despite the protests of Bowen, Tabcorp continued to remove the existing foyer and substitute a new foyer.

The issue for the Court to determine was whether Bowen was entitled to the cost of restoring the original foyer, or whether the amount of damages for breach of clause 2.13 was limited to the diminution in value of the premises.
Decision

The Court held that Bowen was entitled to the cost of rectification and the loss of rent while the rectification was being carried out.

The Court considered the operation of clause 2.13 in light of the ‘ruling principle’ for assessing damages for breach of contract: that the innocent party should be placed as far as is possible in the same situation as if the contract had been performed (Robinson v Harman (1848) 1 Exch 850).

The Court looked also to the case of Bellgrove v Eldridge (1954) 90 CLR 613 (Bellgrove), which examined the appropriate measure for determining damages in the context of defective building works. In Bellgrove, it was held that the cost of rectification was the appropriate measure of damages to restore the plaintiff to the position he or she would have been in had the contract been performed. In Bellgrove, the Court reasoned that since the contract entitled the respondent to have a building erected upon her land in accordance with the contract’s terms, the appellant’s failure to perform his obligation under the contract led to the respondent suffering loss that could only be measured by ascertaining the cost of rectification.

This principle was not, however, without qualification. The Court in Bellgrove stated that the work undertaken to rectify the premises must be both necessary to restore the premises to the state that was contracted for and must be reasonable, in order for the cost of rectification principle to apply.

The Court in this instance held that the requirement of reasonableness would generally be satisfied except ‘only…[in] fairly exceptional circumstances’. Their Honours cited with approval what was said by Oliver J in Radford v De Froberville [1977] 1 WLR 1262 at 1270: that application of the ‘cost of restitution’ method will be unreasonable (and the ‘diminution in value’ method preferred) only where the innocent party is using a technical breach to obtain an uncovenanted profit. For example, it would be unreasonable to demand that better quality construction be demolished and costs be paid to reinstate the building with lower quality materials.

It would not, however, be unreasonable to demand reinstatement merely because the cost of reinstatement was greater than the costs recoverable on a diminution in value assessment. The fact that clause 2.13 was an express negative covenant would have given Bowen the right to obtain an interlocutory negative injunction, had it been aware of Tabcorp’s intentions. Bowen was not aware, so its right to equitable relief could only be secured through the payment of reinstatement costs. It was not for Tabcorp to argue that the payment of diminution costs was sufficient because it would return the landlord to as good a financial position as that which was contracted for. This argument was criticised by the Court because it ignored the existence of equitable remedies contracted for by the landlord, and sought to impose a ‘doctrine of efficient breach’ whereby breach would be tolerated so long as damages sufficient to compensate the innocent party for any financial loss were paid.
Practical implications

Where a building is damaged, the owner of the building will generally be entitled to damages covering the cost of rectifying the damage. This general principle will apply in almost all circumstances, except where the owner is using a technical breach to receive a profit that it was not entitled to receive under the contract.
10. **Willshee v Westcourt Ltd [2009] WASCA 87**

**Introduction**

The Court of the Appeal of the WA Supreme Court followed the decision of the High Court of Australia in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 83 ALJR 390 (*Tabcorp*), confirming the general principle that a plaintiff who sues for breach of contract is entitled to be put in the same position as he or she would have been in had the contract been performed. Where the contract was to provide a finish to a building of a particular quality, the owner was entitled to claim the cost of rectifying the breach, even though this cost was greater than the diminution in value caused by the breach.

**Facts**

Mr Willshee contracted Westcourt Ltd (*Westcourt*) to build a house with external walls constructed from an inner leaf of clay brick, with an external cladding of limestone blocks, separated by a cavity. Willshee was satisfied with the quality of the external cladding at the time of completion and for several years afterwards. However, after three and a half years the limestone began to deteriorate rapidly. Westcourt inspected the limestone and agreed that it needed repair. Repairs, in the form of cleaning, sealing and patching the limestone, were carried out by a third party recommended by Westcourt.

Westcourt agreed that the Contract contained an implied term that the limestone used in the building would be of high quality.

Willshee's claim for damages equal to the costs of replacement of the inferior limestone was rejected by the trial judge. Instead, Mr Willshee was awarded damages equal to the cost of repairing and sealing the limestone and the associated repainting that was also required. Willshee appealed to the Court of Appeal.

**Dispute**

The trial judge had accepted evidence that removing only the excessively deteriorating blocks was an impractical remedy. The cost of rectification work, by way of replacing the entire limestone exterior with high quality limestone blocks, would be approximately $258,000. The trial judge held that it was unreasonable to rectify the defect in the cladding, by complete replacement at a cost of $258,000, when the house was valued at $1.7 million in total. In making this decision the trial judge placed weight on the fact that the house was structurally sound and the rectification was based only on the aesthetic quality of the limestone.

The issue for the Court of Appeal to determine was whether Willshee was entitled to the cost of rectification for replacement of the existing limestone cladding, or whether the amount of damages was limited to the cost of repairing, by way of cleaning and sealing, the existing defective cladding.

**Decision**

The Court of Appeal held that Willshee was entitled to the cost of rectification, being the replacement of the inferior limestone cladding with new cladding of sufficient quality.
The Court of Appeal followed the recent High Court decision in Tabcorp that confirmed the 'ruling principle' for assessing damages for breach of contract: that the innocent party should be placed as far as is possible in the same situation as if the contract had been performed (Robinson v Harman (1848) 1 Exch 850).

In considering the issue of reasonableness in relation to replacing the entire limestone cladding, the Court of Appeal again looked to Tabcorp, holding that the case established that a plaintiff would be entitled to rectification except in 'fairly exceptional circumstances ... [and] only ... where the innocent party is "merely using a technical breach to secure an uncovenanted profit"...'.

Westcourt's breach, in using limestone of poor quality, was not 'technical' and instead was a 'serious and significant breach'. Therefore, it was not unreasonable to assess damages on the basis of rectification calculated as the cost of replacing the limestone cladding in its entirety.

**Practical implications**

The case demonstrates the application of the recent Tabcorp decision in the Western Australian courts. It confirms that where a building is not constructed to the specification or quality required under the contract, the principal will generally be entitled to damages covering the cost of rectifying the building. This general principle will apply in almost all circumstances, except where it is unreasonable to award rectification costs.

**Introduction**

The NSW Supreme Court confirmed that, as a general rule, the measure of damages for defective work performed under a construction contract is the cost of reasonable and necessary expenditure to rectify the defective work plus any consequential losses.

The Court also indicated that a representation given by a contractor that it has warranty insurance when it does not may give rise to a claim for misleading and deceptive conduct under section 52 of the *Trade Practices Act 1974* (Cth) (*TPA*).

**Facts**

Mrs Campbell entered into a contract with C.J. Cordony & Sons Pty Ltd (Cordony) for renovation work to her home. Following practical completion, Mrs Campbell had the work inspected by Tyrells Property Inspections (Tyrells). Tyrells produced a list of incomplete work. Mrs Campbell demanded that Cordony rectify the identified items within 14 days.

Cordony demanded that Mrs Campbell pay it $72,528.61, which was the unpaid portion of the contract price. Mrs Campbell responded by asking Cordony to provide a warranty insurance certificate, as required under both the contract and section 92 of the *Home Building Act 1989* (NSW). Cordony had not taken out warranty insurance.

**Dispute**

Mrs Campbell sued Cordony for:

(a) various credits against the unpaid portion of the contract price in respect of amounts paid by Mrs Campbell to a third party on behalf of Cordony;

(b) damages for breach of contract on the ground that the work was defective and did not comply with the specifications set out in the contract;

(c) removalist and rental expenses because the Campbell family intended to move out of the property while the defective work was being rectified; and

(d) damages for misleading and deceptive conduct in contravention of section 52 of the *TPA* arising from representations made by Cordony that it had warranty insurance when in fact it did not.

Cordony cross-claimed for the amount of $57,022.90 for work done under the contract.

**Decision**

The Court concluded that Mrs Campbell was entitled to each of the credits she claimed against Cordony in respect of the amounts she paid to the third party on behalf of Cordony.

The Court then dealt with Mrs Campbell's claim for damages for the defective work. The Court held that the measure of damages for the defective work was the cost (in excess of the unpaid portion of the contract price) of reasonable and necessary work to make the defective work conform to the contract specifications, plus any consequential losses due to the breach. The Court held that Mrs Campbell was entitled to her claim for damages in...
relation to the defective work, as the amounts that she claimed were reasonable and necessary to rectify the defects.

The Court did not allow Mrs Campbell's claim for rental and relocation expenses because the Court did not accept that it was necessary for the Campbell family to move out of the property whilst the defects were being rectified. Further, Mrs Campbell did not lead admissible evidence as to rental values and therefore the amount of her claim could not have been determined.

The Court found that Cordony had engaged in misleading and deceptive conduct, in contravention of section 52 of the TPA, by representing that it had a warranty insurance certificate when it did not. In relation to the damages for the breach of section 52 of the TPA, Mrs Campbell argued:

(a) she would not have contracted with Cordony had she known that there was no warranty insurance; and

(b) her damages were the cost of rectifying the defective work and the additional costs of recovering from Cordony in the absence of an insurance policy.

The Court did not accept Mrs Campbell's argument. Instead, the Court held that Mrs Campbell did not suffer any loss or damage as a result of Cordony's misleading and deceptive conduct. Rather, Mrs Campbell suffered damage as a consequence of Cordony's defective work in breach of the contract.

**Practical implications**

Contractors will be liable for all costs that are reasonable and necessary to bring their work into conformity with the specifications set out in a construction contract. Further, contractors will also be liable for consequential losses associated with their defective work. Those consequential losses might include rental and relocation expenses if it is necessary for a person to move out of a property while the defective work is being rectified.

Finally, contractors should ensure that all necessary insurance policies are in place. Giving a misleading or deceptive representation as to the existence of an insurance policy might expose the contractor to the risk of a claim under section 52 of the TPA.
12. **Sopov & Anor v Kane Constructions Pty Ltd (No 2) [2009] VSCA 141**

**Introduction**

In this case, the Court of Appeal of the Victorian Supreme Court considered whether a quantum meruit claim (i.e., a claim for the value of the work done as opposed to a claim for contract damages) was available to the contractor who terminated the contract following its acceptance of the principal's repudiation of the contract. In doing so the proper approach to assessing damages in this type of claim was outlined:

(a) a contractor who terminates a contract by reason of its acceptance of a principal's repudiation of the contract has the option of either claiming contract damages or compensation assessed on a quantum meruit basis for work done;

(b) in assessing a contractor's entitlement on a quantum meruit claim, the court will ascertain the fair and reasonable value of the work performed. As the assessment is non-contractual, the amount of damages recoverable on a quantum meruit claim may exceed the contract price; and

(c) provided that the work was carried out, it is irrelevant to the assessment of damages on a quantum meruit claim whether or not the work fell outside the original contract scope. Instead, the contractor will be required to prove the total costs incurred and payments made by it in carrying out the work, and that the amounts in question were fair and reasonable in the circumstances.

**Facts**

In August 1999, Cole Sopov and Norma Walker (*Sopov*) entered into a building contract with Kane Constructions Pty Ltd (*Kane*).

Sopov refused to pay the full amount on a progress claim certified by the superintendent, claiming a right of set off. Kane issued a 'show cause' notice stating that the failure to pay was a substantial breach of the contract. Sopov continued to insist on the right of set off, so Kane suspended work and removed its equipment from the site. Without giving proper notice as required under the contract, Sopov made a call on Kane's bank guarantee.

**Dispute**

Kane terminated the contract, claiming that Sopov had repudiated it by making a call on Kane's bank guarantee without giving proper notice as required under the contract.

The trial judge found in favour of Kane and awarded damages on a quantum meruit basis. Sopov appealed the finding of repudiation, and Kane appealed the calculation of the quantum meruit damages.

In November 2007, the Court of Appeal upheld the finding that Sopov had repudiated the contract, and referred the calculation of the quantum meruit damages to mediation. The mediation was unsuccessful and those issues fell to be determined by the Court of Appeal.

**Decision**

There were several issues that the Court of Appeal was required to decide:
(a) Was a quantum meruit claim available to Kane in the circumstances?

The Court reaffirmed the principle laid down by the Court of Appeal of the NSW Supreme Court in Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 at 277. In Renard, it was held that an innocent party who accepts the defaulting party's repudiation of a contract has the option of either suing for damages for breach of contract or suing on a quantum meruit basis for work done. The High Court subsequently refused an application for leave to appeal this decision.

(b) Was the amount of the quantum meruit limited to the contract price?

Following Renard, the Court held that the contract price does not place a 'ceiling' on a quantum meruit claim. In an action brought under the contract following repudiation, the contractor is entitled to damages amounting to the loss of the benefit that would have been gained had the contract been performed (subject to mitigation). By contrast, a contractor who sues on a quantum meruit basis is entitled to damages representing the reasonable cost of the work done. As was explained in Renard, there is nothing anomalous in the notion that the two different remedies might yield different results, nor that the quantum meruit figure might exceed the profit that would have been made by performing the contract.

The Court acknowledged ‘a growing chorus of judicial and academic criticism of the availability of quantum meruit as an alternative to contract damages where repudiation is accepted’, resting in part on the proposition that the law should not superimpose an obligation to pay a reasonable remuneration where there is a valid and enforceable agreement governing the right to payment (Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221 at 256).

The Court said that, unconstrained by authority, it might well have upheld Sopov's argument that the contractor's only remedy in the circumstances was to sue on the contract. However, it saw itself as heavily constrained, in particular by the High Court's refusal to grant special leave to appeal from the decision in Renard. Also, the issue could not be taken any further because it had been raised too late (it was raised for the first time on appeal, rather than at trial).

(c) What is the proper assessment of damages on a quantum meruit claim?

As to the question of the amount of damages payable, Chief Justice Warren had at first instance relied on a passage from the judgment of President Mason of the Court of Appeal of the NSW Supreme Court in Trimis v Mina (2000) 16 BCL 288 per Mason P at 296-7 (in obiter). Chief Justice Warren held that the influence of the contract cannot disappear entirely, even if the contract itself no longer exists. Her Honour reasoned that the assessment of quantum meruit damages should therefore take into account the conclusions that she had reached with respect to claims under the contract for variations and for delay costs.

The Court of Appeal said that this view could not be sustained. The quantum meruit remedy rests on the fiction of the contract having ceased to exist from the beginning, and so the contract can have no 'continuing influence' when the value of
the work is being assessed on a quantum meruit basis. The price agreed on at the time of entry into the contract is merely evidence of the view of the parties at that time as to the value of the work to be performed. *Trimis v Mina* was distinguished, as the contractor in that case had sued for damages in contract following the principal's repudiation, rather than on a quantum meruit basis.

The proper approach to assessment of a quantum meruit claim is to ascertain the fair and reasonable value of the work performed. As was said in *Renard*, it would be 'extremely anomalous' if the defaulting party could invoke the contract which it has repudiated to impose a ceiling on the amounts recoverable.

(d) Is the contract price the best evidence of value?

The Court also rejected Sopov's submission that the contract price is 'the best evidence' of the value of the benefit conferred, noting that the contract price is struck prospectively, based on the parties' expectations of the future course of events, whereas a quantum meruit claim is assessed with the benefit of hindsight, on the basis of the events that actually happened.

Kane argued that the contract price provided very little guidance because the actual course of events was 'radically different' from what had been anticipated when the contract was entered into. For example, it was found at trial that the superintendent's incompetence and lack of independence 'had a cumulative and influential effect upon the performance of the contract'.

The Court of Appeal held that the trial judge was entitled to approach the assessment of the value of the works in the way that her Honour did, by requiring Kane to prove:

(i) the total costs incurred and payments made by it in carrying out the works; and

(ii) that the amounts in question were fair and reasonable in the circumstances.

The Court further affirmed that the value of the work done can be proved by evidence of costs actually incurred.

(e) What were the appropriate adjustments to the cost figure?

The trial judge had disallowed Kane's claim for a 10 percent margin for overhead and profit on the basis that such a component did not fall within the actual cost of the work, and so should not be included in the assessment on a quantum meruit claim. The Court of Appeal rejected this conclusion, stating that an appropriate index of the value of the benefit conferred is to ascertain what it would have cost the principal to have the works carried out by another builder. The inclusion of a margin for profit and overhead meant that the calculation approximated the replacement cost of the works, and so was entirely consistent with the restitutionary objective of measuring the value of the benefit conferred.

The Court of Appeal also reversed the trial judge's decision to deduct the total value of unsuccessful variation claims from Kane's quantum meruit entitlement. As
it was not disputed that the work the subject of the variations had been carried out, the only question was the fair and reasonable value of that work, and it was irrelevant to the assessment of a quantum meruit claim whether or not the work fell outside the original contract scope. The Court emphasised that the only question is whether the performance of the work has conferred a benefit on the owner, for the reasonable value of which the builder should be remunerated.

Kane’s claim for delay costs succeeded in part at trial. As part of its cross-appeal, Kane argued that there was no evidentiary basis for the finding that it was responsible for those extensions of time that were disallowed by the trial judge, as the requisite matters had not been put in issue at the trial. Sopov submitted that it was incorrect to simply translate Kane’s delay claim made under the contract as being delay costs pursuant to the quantum meruit claim.

The Court of Appeal said that the relevant questions were, first, what would have been a reasonable time for Kane to carry out the works in ordinary circumstances, and second, to what extent the time for performance was in fact extended by circumstances outside Kane’s control. The Court found that the common law is, in important respects, more forgiving of delays than the provisions of the contract. The trial judge had therefore erred in deducting an amount for delay costs calculated in accordance with the contract. While the premise of Sopov’s submission was accepted, the Court rejected the conclusion advanced.

The trial judge had deducted sums from Kane’s quantum meruit entitlement for variation items where Kane had not performed the work as specified in the contract. Kane appealed the deduction, arguing that it had costed this work within its quantum meruit claim on the basis of what it had done, rather than on the basis of what the contract specified. The Court of Appeal upheld Kane’s argument. Provided that the work was done, and that the costs of the work were fair and reasonable, Kane could recover those costs on its quantum meruit claim, and non-compliance with the contract was wholly irrelevant for the purpose of this assessment.

Practical implications

It is important for principals to bear in mind that restitutionary liability is independent of contract and a principal who repudiates will not be able to invoke the contract price as a 'ceiling' on the amount of damages if the contractor chooses to bring a quantum meruit claim.

The contractor will be entitled to remuneration for the fair and reasonable value of the work done, and can prove the value of that work by evidence of the total costs incurred and payments made in performing it. As a consequence, the fair and reasonable value of rejected variation claims will be included in the assessment, provided that the work the subject of the variations has in fact been carried out. Similarly, the contractor will be allowed to recover the costs of work not performed as specified in the contract, provided that the work was done, and that the costs of the work were fair and reasonable.

The courts are also willing to accept the replacement cost of the works as an index of value, and to allow the contractor to recover a margin for profit and overhead on this basis.

**Introduction**

This English Court of Appeal decision serves as a reminder that if a party continues to perform its obligations under an agreement despite the ongoing breach of the other party, there is a danger that it may be unable to exercise its rights in relation to that breach, regardless of the existence of a 'no waiver' clause in the agreement.

Additionally, the court's consideration of 'no waiver' clauses casts doubt on whether parties can effectively contract out of the doctrine of election.

**Facts**

Tele2 International Card Company SA and others (Tele2 Parties) entered into an agreement with Post Office Limited (POL) under which the Tele2 Parties were to supply POL with phone cards and phone card services and POL was to market and sell those products and services (Agreement).

Under the Agreement, the Tele2 Parties were required to provide parent company letters to POL within 20 days of the execution of the agreement and then annually by 24 December each year. The letters were to guarantee the provision of operating capital to the subsidiary for the following year. The Tele2 Parties failed to provide a parent company letter for 2004 before 24 December 2003. This gave POL the right to terminate the Agreement, but it did not do so until 1 December 2004, when it gave written notice to the Tele2 Parties terminating the Agreement as of 1 April 2005. POL's termination was based on the fact that the Tele2 Parties had failed to provide parent company letters for 2004 in accordance with the Agreement.

**Dispute**

This was an appeal from an order of the High Court of Justice dated 25 February 2008, following an action brought by the Tele2 Parties. The appeal centred on whether the judge was correct to hold that POL was entitled to give a written notice to the Tele2 Parties on 1 December 2004 terminating the Agreement as of 1 April 2005.

The Tele2 Parties argued that as POL had delayed giving notice by nearly a year and had continued to perform the Agreement without any protest about the breach, POL had affirmed the Agreement by election and was not now entitled to give notice to terminate for this breach. In fact, doing so was a wrongful repudiation of the Agreement.

POL, in turn, relied on clause 16 of the Agreement, which stated:

**Waiver**

In no event shall any delay, neglect or forbearance on the part of any party in enforcing (in whole or in part) any provision of this agreement be or be deemed to be a waiver thereof or a waiver of any other provision or shall in any way prejudice any right of that party under this agreement.
Decision

The Court of Appeal was asked to decide the following issues:

(a) Had POL elected to abandon its right to terminate?

The Court of Appeal held against POL, finding that it had abandoned its right to terminate by:

(i) continuing to perform its contractual obligations;

(ii) agreeing to or accepting ongoing performance by the Tele2 parties; and

(iii) not protesting the breach or reserving its rights.

The Court of Appeal referred to Lord Goff's analysis of the doctrine of affirmation by election in Motor Oil Hellas (Corinth) Refineries v Shipping Corporation of India [1990] 1 Lloyds Rep 391, saying:

(i) if a contract gives a party a right to terminate upon the occurrence of defined actions or inactions of the other party and those actions or inactions occur, the innocent party is entitled to exercise that right;

(ii) the innocent party has to decide whether or not to do so, and its decision is, in law, an election;

(iii) it is a prerequisite to the exercise of the election that the party concerned is aware of the facts giving rise to its right and the right itself;

(iv) if the innocent party does not make a decision, 'the time may come when the law takes the decision out of its hands, either by holding [it] to have elected not to exercise the right which has become available to [it], or sometimes by holding [it] to have elected to exercise it';

(v) where a party acts in a manner consistent only with it having chosen one or other of the two inconsistent courses of action open to it, then it will be held to have made its election accordingly; and

(vi) an election can be communicated by words or conduct but where it is alleged that a party has elected not to exercise a right, it will be held only to have elected not to exercise the right if it has communicated its election in clear and unequivocal terms.

(b) Did the 'no waiver clause' apply in these circumstances?

The Court of Appeal also found that the 'no waiver' clause did not assist POL in the circumstances. The clause could not change the fact that the possibility of an election to abandon the right to terminate existed. Further, the wording of the clause did not deal with the issue of electing whether or not to exercise a contractual right – the clause did not attempt to say that the doctrine of election would not apply. Notably, in respect of this last point, Lord Justice Aikens added the qualifying comment 'even assuming that any contractual provision could exclude the operation of the doctrine'.

For these reasons, POL was not entitled to give the notice of termination dated 1 December 2004 and doing so was an anticipatory repudiation of the Agreement.
POL's failure to perform its obligations in reliance on the Tele 2 Parties' alleged breach was also a breach of the Agreement, which entitled the Tele2 Parties to claim damages from POL.

**Practical implications**

'No waiver' clauses are generally designed to guard against a waiver arising in circumstances where a party has failed to fully enforce its rights under a contract. In this case, however, the court held that the 'no waiver' clause did not attempt to say that the doctrine of election would not apply. Even if additional drafting overcame this, there is some concern that such a clause would not be able to prevent certain conduct from being construed as an election to abandon the right to terminate for the other party's breach. Parties must be vigilant in the exercise of their rights, and ensure that they promptly take action to enforce those rights if there is a breach by the other party.
Part 3: Arbitration and dispute resolution

The construction industry is one of the most active and creative users of alternative dispute resolution methods. When a construction contract is breached, claims may be resolved in a variety of ways other than litigation. Mediation, expert determination and arbitration are the most common methods. But these processes are consent-based, and as such their ostensibly procedural rules are informed by substantive principles of contract law. Perhaps ironically, the courts are playing an active role as more and more dispute resolution clauses are challenged before them. In this context, some of the most pressing questions of Australian law, such as the meaning of ‘good faith negotiation’ (posed in United Group Rail), are being answered. In the case of arbitration, statute law is increasingly important, and changes are in the wind. Construction industry users of mediation, expert determination and arbitration must know what they are agreeing to, and to do this they must keep one eye on the courts and the other on parliament.

14. 1144 Nepean Highway Pty Ltd v Leigh Mardon Australasia Pty Ltd [2009] VSC 226

Introduction

This case considered whether an order should be made to permanently stay a proceeding based on a party's non-compliance with a dispute resolution clause. There was also some discussion of how widely a court should construe those clauses.

The case also explores the principles to be applied when the court is considering the exercise of its discretion in staying proceedings.

Facts

1144 Nepean Hwy Pty Ltd (Nepean) agreed to lease premises to Leigh Mardon Australasia Pty Ltd (Leigh).

The lease contained a dispute resolution clause (clause 12) that required the parties to refer disputes to an appropriately qualified and experienced independent expert. A party could not commence legal proceedings in respect of a dispute without first complying with clause 12.

A dispute arose between the parties concerning a planning permit obtained by Nepean. Clause 2.1 of the lease provided that the lease was subject to and conditional upon Nepean obtaining, at its own expense, the necessary town planning permit from the responsible authority no later than 31 January 2009. The permit was not issued to Nepean by 31 January 2009 so Leigh, on 2 February 2009, exercised its contractual right to terminate the lease. The lease required that at least 30 days’ notice of the termination be given. If the default was remedied before the expiration of that 30 day period, then the termination would be ineffective and the lease would remain in full force and effect.

On 16 February 2009, before the expiry of the 30 day notice period, Nepean obtained the required permit. Initially, Leigh accepted that this permit complied with clause 2.3 of the
lease. On 22 April 2009, however, Leigh sent Nepean a notice of dispute alleging that it did not comply.

Dispute

The parties attempted to resolve the dispute amongst themselves, but this was unsuccessful. On 12 May 2009, Nepean instituted court proceedings alleging that the permit satisfied the requirements of clause 2.1 of the lease and that therefore the termination notice was ineffective, or alternatively that Leigh was estopped from asserting that the lease had been validly terminated. Nepean also alleged that it would be unconscionable for Leigh to depart from its representation that the lease remained on foot.

On 14 May 2009 Leigh applied for a permanent stay of the court proceedings, on the basis that Nepean had not complied with clause 12 before issuing the proceedings.

Nepean contended that the clause 12 dispute resolution procedure did not govern the issues that arose in the court proceedings, because it did not cover disputes about the termination or existence of the lease, but rather only disputes concerning the performance of the lease.

Decision

There were two issues for determination by the Court:

(a) Did Nepean's claims fall within the scope of the dispute resolution clause contained in the lease?

The relevant words in clause 12 stated: 'if a dispute or difference arises or the parties fail to agree in connection with any matter arising out of or relating to this agreement…'

Davies J stated that the authorities indicate that the language used in an agreement should not be read down, but rather be given the widest construction that the language permits when construed on its terms.

He noted that the courts have taken a liberal approach to the construction of dispute resolution clauses, and that they have generally preferred a construction that avoids different dispute resolution processes being used depending on the issues in dispute.

Davies J found that the words used in clause 12 were of the widest import and should be given their full meaning. Davies J referred to Heyman v Darwins Ltd [1942] AC 356, where a dispute about whether a contract had been repudiated was held to be within the scope of an arbitration clause, and to Dowell Australia Ltd v Trident Contractors Pty Ltd [1982] 1 NSWLR 508, where an arbitration clause that referred to arbitration 'any matter or thing whatsoever arising…in connection' with the contract was found to include matters including frustration, rescission and rectification.

Davies J stated that the question of termination arose out of the lease, as it had a material connection to the lease, and that it therefore was covered by the dispute resolution clause. Nepean was, therefore, required to use the dispute resolution procedure specified in the lease, unless the court refused to stay the proceedings.
(b) In the event that the claims did fall within that clause, should the court stay the proceeding?

Davies J referred to Allsop J in *Incitec Ltd v Alkimos Shipping Corporation* (2004) 206 ALR 558 for the principles to be applied in determining whether to stay proceedings brought in defiance of an exclusive jurisdiction clause. Allsop J found that 'the question is one of the exercise of a discretion in all the circumstances, but recognising that the starting point is the fact that the parties...should, absent countervailing circumstances, be held to their bargain'.

Davies J found that since the current dispute fell within the dispute resolution clause, Nepean was required to follow the mechanism prescribed by that clause. In this case, Nepean had not established a sufficient reason for the court to exercise its discretion and refuse a stay.

**Practical implications**

This case demonstrates courts' reluctance to read down dispute resolution clauses and their liberal approach to the construction of those clauses. It suggests that courts will avoid constructions that require parties to use different dispute resolution mechanisms depending on the issues in dispute.

It also confirms that, absent special circumstances, courts will attempt to hold parties to their bargain when deciding whether to stay proceedings brought in defiance of a dispute resolution clause.
15. United Group Rail Services Ltd v Rail Corporation New South Wales
[2009] NSWCA 177

Introduction

In this case, the Court of Appeal of the NSW Supreme Court provided some practical guidance on the status of contractual clauses requiring parties to negotiate 'in good faith'. UK courts have, for the most part, declined to enforce such clauses due to a perceived lack of certainty and the inherent contradiction in the concept of acting in good faith in adversarial and self-interested negotiation. By contrast, Australian courts have demonstrated more of a willingness to find such clauses enforceable. The general principles in Australia can be summarised as follows:

(a) if a term in a commercial contract can be ascribed a meaning, the Court will seek to give effect to it, paying regard to the context and framework of the contract as a whole;

(b) in the context of commercial dispute resolution clauses, the phrase 'genuine and good faith negotiation' connotes an 'honest and genuine attempt to settle a contractual dispute, giving fidelity to the existing bargain'; and

(c) it is possible to act in good faith while negotiating in self-interest. The good faith requirement does not require one party to advance the interests of the other.

Facts

United Rail Group Services Ltd (United) contracted to construct rail infrastructure for the Rail Corporation of New South Wales (Railcorp). A dispute arose between the parties, and the Court was asked to assess the validity of a clause requiring the parties to send a senior representative to negotiate in good faith. Negotiation was a preliminary step in the contract's overall dispute resolution mechanism. If the senior representatives failed to resolve the dispute within 14 days, the final step in the dispute resolution mechanism was arbitration.

United asserted that the clause requiring the parties to negotiate in good faith lacked certainty to the point of being incomplete, and so was void and unenforceable. Railcorp denied this assertion.

Decision

The Court declined to make any 'sweeping generalised rules' concerning contractual obligations to negotiate in good faith, making it clear that the case dealt only with express mutual promises to undertake genuine and good faith negotiations to resolve disputes arising from performance of a fixed body of contractual rights and obligations.

The phrase 'genuine and good faith' concerns an 'obligation to behave in a particular way in the conduct of an essentially self-interested commercial activity: the negotiation of a resolution of a commercial dispute'. In this context, Allsop P interpreted the phrase to mean 'an honest and genuine approach to settling a contractual dispute, giving fidelity to the existing bargain'. The 'existing bargain' consists of the contractual framework in which the clause sits, the context in which it arises, and the facts of the specific controversy.
that respect, the clause in question validly constrained the parties and was not vague, illusory or uncertain.

It should, however, be noted that the particular dispute resolution clause in this case was constrained by a number of definite factors. Negotiations were to be conducted by senior representatives, and limited to 14 days. After 14 days, if negotiation failed to resolve the dispute, the dispute resolution mechanism provided for arbitration. Arbitration was recognised by the parties as the final determination of the dispute. Consequently, the clause requiring the parties to negotiate in good faith had content, and the Court had a reference point or yardstick by which the requirement to act in good faith could be measured. His Honour highlighted that a clause requiring parties to negotiate in good faith without such constraints is likely to be so vague as to be unenforceable.

Of further note is Allsop P’s recognition that, notwithstanding that negotiations are always conducted in parties’ self-interest, such conduct does not necessarily demonstrate a lack of good faith. Modern commercial dealings, regulated by contract, are expected to be conducted between honest business people who, when faced with a dispute about an existing contract, will often be able to settle it. This requires an honest and genuine attempt to resolve differences by discussion and, if thought to be reasonable and appropriate, by compromise, in the context of showing a faithfulness and fidelity to the existing bargain. His Honour gave some examples in which parties would not be so acting:

(a) a party may well not be entitled to threaten a future breach of contract in order to bargain for a lower settlement sum than it genuinely recognises as due;

(b) a party would not be entitled to pretend to negotiate, having decided not to settle what is recognised to be a good claim, in order to drive the other party into an expensive arbitration that it believes the other party cannot afford; and

(c) if a party recognises, without qualification, that a claim or some material part of it is due, fidelity to the bargain may well require its payment.

**Practical Implications**

The Court’s judgment is of potentially broad reach. Given the prevalence of similar dispute resolution clauses in commercial contracts, his Honour’s interpretation of ‘genuine and good faith’ in such a context adds a deal of certainty to what is currently an opaque area of the law.

Of particular note is Allsop P’s suggestion that good faith negotiation clauses need to include some objective criteria by which the negotiations can be measured – for example, by specifying who must participate and how long the negotiation period must last before it can be called a failure.
16. **Gordon & Gotch Australia Pty Ltd v Horwitz Publications Pty Ltd**  
* [2008] NSWCA 257

**Introduction**

This was an appeal to the NSW Supreme Court, after a request for leave to appeal against an arbitrator's award under the *Commercial Arbitration Act 1984* (NSW) (*Act*) was refused by a primary judge.

**Facts**

Gordon & Gotch Australia Pty Limited (*Gordon*) distributed publications on behalf of Horwitz Publications Limited (*Horwitz*) for many years before entering into a written contract on 1 July 2000 (*Agreement*). The Agreement, which was varied by consent on 1 April 2002, was due to run for five years from 1 July 2000.

A dispute arose as to whether the Agreement required Gordon to have unsold copies of publications returned to it by distribution outlets, and to confirm the number of returned copies by counting them, in order to be entitled to a Returns Credit.

The Agreement contained an arbitration clause, and the dispute was submitted to arbitration under the *Act*. The arbitrator made two interim awards and a final award. The final award stated: 'That on its proper construction, and subject to the exceptions relating to Western Australia, Northern Territory, Tasmania, remote areas and supermarkets, the [Agreement] permitted [Gordon] to a Returns Credit only in respect to those publications which had been returned by the outlets to [Gordon] and in respect of which [Gordon] had confirmed by count that the return had actually occurred.'

There was a different approach to returns for distribution outlets in areas remote from the operations of the parties in New South Wales, and for supermarkets. Additionally, it was common ground that there was no expectation that full unsold copies of publications would be physically returned to Gordon by outlets in Western Australia, Northern Territory, Tasmania and remote areas. For years prior to and during the Agreement, the arrangement was that outlets in those areas would return only the covers of the unsold publications. The Agreement, however, did not specify that different arrangements would apply in these areas.

Schedule 1 to the Agreement set out the method of payment, including a certificate clause that stated: 'the Distributor will provide a final accounting in respect of each Publication to the Company on or before Finalisation. The Distributor will, on the date of such final accounting, be deemed to have purchased from the Company the number of copies of each Publication which that final accounting indicates have been sold by the Distributor.'

The award required Gordon to pay Horwitz $832,390 as damages for breach of contract and interest. Gordon sought leave to appeal from the awards. Leave was refused by the primary judge.
Dispute

Gordon appealed the arbitration awards under subsections 38(5)(a) and (b) of the Act on the grounds that there was a manifest error on the face of the award, that there was strong evidence that the arbitrator made an error of law and that the determination of the question would add or would be likely to add to the certainty of commercial law (subsection 38(5)(b)), and that the determination of the question could substantially affect the rights of the appellant as a party to the arbitration agreement (subsection 38(5)(a)).

Decision

The Court addressed, and ultimately dismissed, the following contentions by Gordon:

(a) The arbitrator failed to recognise differential treatment

Gordon's first complaint was that the arbitrator's failure to recognise the differential treatment of returns from remote areas and supermarkets was fatal to his conclusion that the Agreement had a meaning that required unsold publications to be returned by outlets to Gordon and for Gordon to count them. It was found that the way that the arbitrator approached the treatment of remote areas and supermarkets was entirely in accordance with the way that the matter had proceeded before him.

(b) The arbitrator's construction was plainly wrong

Gordon submitted that the construction of the Agreement was plainly wrong, as the arbitrator had implied into the Agreement a term to the effect that Gordon was only entitled to a Returns Credit in respect of those publications that had been returned by the outlets to Gordon and that Gordon had confirmed by count. Gordon asserted that such an implication was contrary to the Agreement, struck at the legitimacy of commercial certainty and was plainly wrong as a matter of construction. Essentially, Gordon argued that there was a manifest error of law on the face of the award, and also that the arbitrator had made an error of law and that the determination of the question would add substantially to the certainty of commercial law.

The Court found that not only was there no manifest error, there was no error at all, as the arbitrator’s view was right for the reasons he gave. The Court found that there was no impermissible implication of terms as opposed to interpretation by the arbitrator (the Court was of the view that interpretation can shade into implication). The court asserted, after considering the authorities on the issue, that both implication and interpretation can be seen as part of the one process of the construction of words in a document to identify linguistic and legal meaning.

(c) The arbitrator was plainly wrong in his failure to give a proper place and importance to the certificate clause in the Agreement

The Court referred to Gordon's reliance on the certificate clause and its effect before the primary judge. The Court found that the primary judge had dealt with the clause as part of her disposition of the question of the interpretation and construction of the Agreement. They found that there was no error in how the primary judge dealt with this matter.
The NSW Supreme Court ultimately dismissed the appeal, finding that:

(i) there was no error in the approach or conclusions of the primary judge as to the treatment by the arbitrator of the remote areas and supermarkets;

(ii) there was no error in the acceptance by the primary judge of the arbitrator's reasoning as to the meaning of the agreement;

(iii) interpretation is the ascertainment of the meaning that a document would convey to a reasonable person in the context;

(iv) Gordon did not impermissibly imply a term into the agreement;

(v) there was no error by the primary judge as to the proper place and importance of the certificate clause;

(vi) there was no manifest error on the face of the arbitrator's award nor was there strong evidence that the arbitrator made an error of law;

(vii) the determination of the proper construction and interpretation of the contract would not add or be likely to add substantially to the certainty of commercial law;

(viii) the arbitrator was correct in his interpretation of the Agreement; and

(ix) the primary judge did not err in her approach to the application before her.

Practical implications

This decision outlines the Court's approach to determining what constitutes a manifest error on the face of the award, and also the Court's approach to the other grounds of appeal under the Act. It demonstrates that the burden of proof will be a high one, and that it will be quite difficult to show that there was a sufficient error that would allow the Court to overturn an arbitrator's award.

**Introduction**

This decision deals with the enforceability of foreign arbitral awards in Australia. The decision in question awarded damages for breach of contract, but the contract was (allegedly) contrary to public policy.

**Facts**

Mr Yang applied for a business owner visa to permit him and his family to reside in Australia. To assist him with this application, he engaged a migration agent called Mr Lee. Mr Yang was advised in May 2003 that his application had been successful. Relevantly, the conditions of his visa included that:

(a) he genuinely have a realistic commitment to:
   (i) either establish or participate in an eligible business in Australia; and
   (ii) maintain direct and continuous involvement in the management of that business on a day-to-day level and in the making of decisions that affect the overall direction and performance of the business; and

(b) he declare that he would make a genuine effort to actively participate as owner in the day-to-day management at a senior level of an eligible business.

In January 2004, Mr Yang entered into a contract with S & L Consulting to buy shares in an Australian company. Under that contract, S & L Consulting promised that:

(c) it would complete all formalities relating to Mr Yang and his family obtaining Australian citizenship;

(d) Mr Yang and his family's permanent residency would not be revoked by the government unless they did not live in Australia for sufficient time during the 3 years after the contract was signed; and

(e) if a third party buyer for Mr Yang's shares had not been found within 3 years, S & L Consulting would buy those shares itself.

Under the contract, any dispute between the parties was to be submitted to the China International Economic and Trade Arbitration Commission (**CIETAC**) for arbitration in accordance with its rules.

**Dispute**

Three years after the contract was signed, S & L Consulting was not able to find a buyer for Mr Yang's shares, and it had not paid for those shares itself, contrary to what was required by the contract.

Mr Yang successfully sought arbitration at CIETAC, which resulted in an award against S & L Consulting (and Mr Lee, who had guaranteed S & L Consulting's obligations) for the cost of the shares, damages for breach of contract and costs.

Mr Yang sought to enforce this award in Australia, under the provisions of the *International Arbitration Act 1974* (Cth). S & L Consulting sought to prevent enforcement, arguing that
doing so would be contrary to public policy, as the guarantees in the contract relating to Mr Yang’s residency and citizenship acted as an incentive for Mr Yang not to comply with the conditions of his visa.

**Decision**

Justice White, in the NSW Supreme Court, held that public policy considerations did not prevent the enforcement of the award. He made the following observations in the course of his judgment:

(a) S & L Consulting did not argue that the contract was to perform an illegal act, but rather that it operated in a way that was contrary to the policy of the *Migration Act 1958* (Cth);

(b) in reality, S & L Consulting’s guarantee under the contract could not act as an incentive to Mr Yang to violate the terms of his visa, as S & L Consulting could not prevent the Minister from cancelling the visa (even if Mr Yang could claim damages from S & L Consulting if this happened);

(c) Mr Yang was not required to have an active role as an owner of an eligible business, but a failure to do so may cause the Minister to cancel his visa; and

(d) even if the relevant contractual provision were unlawful, it could be severed, with the rest of the contract remaining enforceable. As the arbitral award did not rely on this clause, the award was enforceable even if the offending clause were severed from the contract.

Although White J did not consider this contract to be illegal, he did discuss the findings of McHugh J in *Nelson v Nelson* [1995] HCA 25. In that case, it was held that legal or equitable rights arising out of a contract for an illegal purpose may still be enforceable if:

(a) the claimant was ignorant or mistaken as to the facts that rendered the agreement illegal;

(b) the statutory scheme that rendered the contract illegal was enacted for the benefit of a class of persons of which the claimant was a member;

(c) the illegal arrangement was induced by fraud, oppression or undue influence; or

(d) the illegal purpose had not been carried into effect.

In fact, a court would not refuse to enforce rights arising under a contract unless:

(a) the statute that made the contract illegal disclosed an intention that those rights should be unenforceable in all circumstances;

(b) the sanction of refusing to enforce the contractual rights is not disproportionate to the seriousness of the unlawful conduct; or

(c) the imposition of the sanction is necessary, having regard to the terms of the statute, to protect its objects or policies and the statute does not disclose an intention that the sanctions and remedies contained in the statute are to be the only consequences of a breach of the statute or the frustration of its policies.
Practical implications

Foreign arbitral awards to enforce contracts that may be contrary to public policy in Australia will not be struck down as a matter of course. Instead, those awards will be looked at on an individual basis to see whether they do in fact offend public policy. In making this assessment, the test of illegality of purpose from *Nelson v Nelson* [1995] HCA 25 is relevant.
18. **Western Areas Exploration Pty Ltd v Streeter [No 2] [2009] WASCA 15**

**Introduction**

This case concerned the issue of whether affidavits are admissible in proceedings relating to costs applications resulting from court-directed mediation. The Court held that evidence, obtained in the course of or for the purposes of an attempt to settle a dispute by mediation under direction, will only be admissible:

(a) where the evidence or documents are sought to be given or tendered in proceedings relating to 'costs applications'; and

(b) where the *Rules of the Supreme Court 1971* (WA) specifically permit the evidence or documents to be admitted.

**Facts**

On 27 August 2007, Registrar Boyle ordered that the parties submit their dispute to mediation on a confidential basis in accordance with Part VI of the *Supreme Court Act 1935* (WA) (*Act*). The mediation was arranged for 2 November 2007 but was abandoned just as it was about to commence. On 10 December 2007, Western Areas Exploration Pty Ltd (*Western Areas*) applied for an order that Streeter pay Western Areas' costs, which had been wasted as a result of the mediation not occurring. Both parties filed affidavits in support of their submissions. Before Master Sanderson, Streeter objected to the tender of any affidavits that Western Areas sought to rely on. The Master decided that, on the authority of the case of *Pinto v Kinkela* [2003] WASC 126 (*Pinto*), none of the evidence sought to be relied on was admissible. Western Areas then applied for leave to appeal to the Court of Appeal.

**Decision**

Western Areas' ground of appeal was that the Master erred in law in following the decision in *Pinto* and excluding from consideration all of the affidavit material filed by the parties. The issue centred around the operation of the following pieces of legislation:

(a) section 71(1) of the Act, which provides that, subject to section 71(3), evidence of anything said or done, or any written or oral communication, or any admission made in the course of or for the purposes of an attempt to settle proceedings by mediation under direction is not admissible in any proceedings before any court or tribunal; and

(b) section 71(3) of the Act, which provides that the prohibition in section 71(1) does not affect the admissibility of any evidence or document in proceedings if the proceedings relate to a 'costs application' (as defined in section 71(5) of the Act and under the Rules of the Supreme Court).

The Court also looked at Order 29 Rule 3 of the Rules of the Supreme Court and stated that that rule does not make provision for the admissibility of any evidence in connection with an application for the costs of mediation, except to the extent that it provides for a mediation registrar or a mediator to report to the court on any failure by a party to cooperate in a mediation conference.
Based on an analysis of the legislation and having regard to the second reading speech of the *Courts Legislation Amendment Act 2000* (WA), the Court held that evidence or documents relating to statements, communications and admissions made in the course of or for the purposes of an attempt to settle a proceeding by mediation under direction, will only be admissible:

(a) where the evidence or documents are sought to be given or tendered in proceedings relating to 'costs applications' as defined in section 71(5) of the Act; and

(b) where the Rules of the Supreme Court specifically permit the evidence or documents to be admitted.

The Court found that in this matter, no provision of the Rules of the Supreme Court specifically authorised the admission of the affidavits and as such held that Western Areas’ ground of appeal failed. The Court also stated that *Pinto* was not wrongly decided.

**Practical Implications**

Parties who undergo directed mediation are likely to encounter difficulties in recovering the costs of mediation due to the restrictions on the admissibility of evidence obtained during mediation in costs application proceedings. This decision has confirmed the authority of *Pinto* and has made it harder for parties to successfully recover costs incurred during, or because of, mediation.
Part 4: Security of payments legislation

Security of payments legislation exists in most Australian states and territories. This specific statutory regime is a distinguishing feature of the law covering construction contracts as opposed to other commercial agreements. In WA, it is contained in the Construction Contracts Act 2004 (WA). This legislation was intended to provide a mechanism for the speedy resolution of disputes about payments in the construction industry, and is designed to maintain cash flow for contractors. In the last year, as economic conditions deteriorated, the number of payment disputes referred to adjudication increased, with a corresponding increase in the number of appeals to the state administrative tribunals and courts. The economic downturn has, therefore, generated important case law on key aspects of the adjudication process, including the time limit for referral to adjudication and the grounds on which the decision of an adjudicator may be subjected to judicial review.

19. **Blackadder Scaffolding Services (Aust) Pty Ltd v Mirvac Homes (WA) Pty Ltd [2009] WASAT 133**

**Introduction**

In this decision, the State Administrative Tribunal of Western Australia (Tribunal) considered the following issues:

(a) when time starts to run for the purpose of determining the deadline for making an application for adjudication;

(b) when provisions in Schedule 1 of the Construction Contracts Act 2004 (WA) (Act) dealing with when and how to respond to a payment claim must be implied into the contract and their effect; and

(c) whether a non-complying notice of dispute (even one made orally) starts the clock running for making an application for adjudication.

Section 25 of the Act provides that if a payment dispute arises under a construction contract, any party to the contract may apply under the Act to have the dispute adjudicated, subject to certain exceptions that were not relevant in this case. Section 26 of the Act requires that a party wanting to have a dispute adjudicated must prepare and serve a written application in the manner prescribed within 28 days of the payment dispute arising. Section 31(2)(a)(ii) states that if the application is made out of time, the adjudicator must dismiss the application without making a determination of its merits.

Section 6(a) of the Act provides that a payment dispute arises and, therefore, the 28 day countdown starts to run, if:

by the time when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed;
A strict interpretation of section 6(a) of the Act would suggest that a payment dispute can only arise at the time when an amount claimed is due to be paid under a contract and not before.

If a contract does not specify when a payment claim is due, or how and when a payment claim is to be responded to, sections 17 and 18 of the Act imply the provisions in Schedule 1, Division 5 of the Act into the construction contract.

Facts

Blackadder Scaffolding and Mirvac were parties to a construction contract as defined by the Act.

On 18 December 2008, Blackadder submitted a payment claim for works completed. The contract provided that a payment claim submitted before the 25th of any month fell due at the end of the following month, in this case 31 January 2009. Ten days before the claim was due to be paid (ie, 21 January 2009), Mirvac disputed part of the payment claim. The contract did not provide for the manner in which a payment claim was to be rejected or disputed.

Decision

(d) Adjudicator's decision

The adjudicator found that the phrase 'by the time when the amount claimed in a payment claim is due to be paid under the contract' in section 6(a) qualifies only the words that follow, ie, 'the amount has not been paid in full'. Therefore, a payment dispute was found to arise when an amount claimed is not paid when due or, separately, when a claim is rejected or disputed in whole or in part.

As the payment claim was dated 18 December 2008 and Mirvac had rejected the payment claim on 21 January 2009, the adjudicator found that the last day for service of an adjudication application was 18 February 2009. As the application was served on 27 February 2009, the adjudicator dismissed the application without making a determination on the merits, on the basis that it had been made out of time.

The adjudicator found that, if the provisions about when and how to respond to a payment claim were implied into the contract, a proper notice of dispute was required within 14 days of the payment claim. The adjudicator found that the application was also filed out of time in that case, as it should have been made by 29 January 2009.

Blackadder applied to the Tribunal under section 46(1) of the Act for a review of the adjudicator's decision.

(e) Tribunal's decision on review

On the issue of when the payment dispute arose, the Tribunal agreed with the adjudicator's view of the construction of section 6(a) of the Act and held that a payment dispute can be triggered in two situations: either when the payment of a claim is not made when it falls due under the contract, or at the time a payment claim is rejected either wholly or in part.
The Tribunal appeared to be of the view that an interpretation based on the actual words and the application of the normal rules of punctuation in respect of section 6(a) would result in the words 'or the claim has been rejected or wholly or partly disputed' (relevant words) in the section having no utility and therefore an ambiguity arose. The Tribunal said:

Although the words (and punctuation) used do not make it entirely clear, we believe that the submission as to the utility of a separate reference to rejection or disputation of a claim, in circumstances where it would otherwise always be necessary for the parties to await the expiry of the payment period has much force. At the very least, the provision does give rise to an ambiguity of meaning, permitting reference to extrinsic material such as the second reading speech in accordance with s 19 of the Interpretation Act 1984 (WA).

Perhaps the drafters of the legislation believed that the relevant words were needed to address the circumstances where a payment claim is rejected, or wholly or partly disputed, but the principal pays the amount claimed by the due date so as to ensure that the contractor keeps on working, preferring to resolve the dispute by making an application for adjudication. Without the relevant words (even if the construction contract had the usual provision that payments are made on account), section 6 of the Act would not have allowed a principal to adopt this course.

Having found that the provision gives rise to an ambiguity permitting reference to extrinsic material, the Tribunal preferred an interpretation of section 6 to the effect that a payment dispute is triggered in two situations: either when the payment of a claim is not made when it falls due under the contract or at the time when a payment claim is rejected wholly or in part. The Tribunal preferred this approach because, in the Tribunal's view, it promotes the primary purpose of the Act. The Tribunal expressed the view that this interpretation most effectively enforces timely payment in line with the primary purpose of the Act, which is to keep the money flowing in the contracting chain.

This interpretation may encourage principals or their representatives to use the timing for making a decision on a contractor's claim as a strategic device. For example, if the contractor's claim (or other things) reveals that it is not well prepared, it may be better for the principal or its representative to immediately reject the claim, rather than call for further information to clarify. However, with this strategy comes the risk that a principal misses an opportunity to insist on full particulars of the payment claim being provided, which, if not provided in full or not forthcoming at all, would have added weight to the principal's rejection. On the other hand, if the contractor appears to be well prepared, the principal or its representative may do better to hold back on rejecting any part of the claim until immediately prior to the expiry of the time allowed under the contract in order to allow itself more time to prepare for an anticipated adjudication application.

The Act's purpose of enforcing timely payment would still be served if the provision were given the alternative meaning to the one adopted by the Tribunal. In fact, the Tribunal did not find that the alternative meaning did not achieve the Act's purpose: rather it found that the interpretation it preferred 'avoids a disputed claim being
delayed'. The alternative interpretation would involve the same timing as for a claim that is not paid by the due date (where the claim has not been rejected or wholly or partly disputed). This process would of course be considerably quicker than litigation or the usual (or even fast track) arbitration under the IAMA rules. If successful in the adjudication, the contractor would be entitled to be paid at the latest within 56 days of when it would have been entitled to be paid under the contract (assuming no agreed extensions). Furthermore, the contractor could make the process even quicker if it made its application in less than 28 days.

However, the Tribunal determined that, on its construction of section 6(a) of the Act, Blackadder's application should have been made within 28 days of 21 January 2009, which was when Mirvac partly disputed the payment claim. It remains to be seen whether the Supreme Court would determine the question of construction of section 6(a) of the Act in the same way as the Tribunal.

On the question of the implication of terms from Schedule 1 of the Act, the Tribunal determined that the entirety of clause 7 of Schedule 1 of Division 5 of the Act must be implied into the contract. This was because the contract did not specify how and when a payment claim was to be disputed. Although the Tribunal said that it was difficult to interpret the relevant provisions of the Act, the end result was that the notice of dispute should have been served by Mirvac within 14 days of Blackadder's payment claim. The Tribunal also expressed the view that 'the effect of the implied provisions is that the failure to give a written notice of dispute within the 14 day timeframe will result in an obligation to pay the claim in full' and '[a] notice of dispute given outside that time period has the effect stated above that the respondent to the adjudication will be obliged to pay the full amount of the claim'.

The Tribunal effectively ruled that a principal is not entitled to refuse to pay a disputed claim unless the principal has first, and within 14 days of the date of the claim, given the contractor a written notice of dispute. The alternative interpretation would have meant that a failure to issue the notice in accordance with the implied terms would be a breach of contract entitling the contractor to be paid any damages it may have suffered as a result of the breach.

**Practical implications**

Companies who have template construction contracts or are in the process of negotiating for a construction contract are encouraged to seek advice on whether their template or proposed construction contracts make adequate provision for the matters prescribed in the Act in order to avoid the implication of any of the terms specified in Schedule 1 of the Act. Parties currently working under a construction contract would do well to consider their processes for making, responding to and disputing payment claims to ensure that they allow for the findings of the Tribunal in this case.
20. *Nebmas Pty Ltd v Sub Divide Pty Ltd & Ors* [2009] QSC 92

**Introduction**

This decision concerns two key questions: when the 'date for payment' under the *Building and Construction Industry Payments Act 2004* (Qld) (*Act*) arises, and whether a notice advising of an intention to apply for adjudication must be served within time in order for the adjudication (and the decision made at the adjudication) to be valid.

**Facts**

*Nebmas Pty Ltd* (*Nebmas*) (the contractor) employed *Sub Divide Pty Ltd* (*Sub Divide*) (the subcontractor) under a construction contract.

Sub Divide submitted a payment claim on 21 December 2008. *Nebmas* did not pay that payment claim, nor did it serve a payment schedule on *Sub Divide*.

**Dispute**

*Sub Divide* served a notice of its intention to apply for adjudication, pursuant to section 21(2)(a) of the *Act*, on 10 February 2009.

Section 21(2)(a) of the *Act* states:

> An adjudication application to which subsection 1(b) applies cannot be made unless –
> (a) the claimant gives the respondent notice, within 20 business days immediately following the due date for payment, of the claimant’s intention to apply for adjudication of the payment claim; and
> (b) the notice states that the respondent may serve a payment schedule on the claimant within 5 business days after receiving the claimant’s notice.

There were two questions for the court:

(a) whether the section 21(2)(a) notice was served out of time; and

(b) if the notice was served out of time, whether the resulting adjudication (and the decision made by the adjudicator) was void.

**Decision**

To answer question (a), the court needed to decide when the relevant 'date for payment' was. The court turned to the parties’ contract, which stated that claims for progress payments could be submitted by *Sub Divide* on the 14th and the 28th of each month, and that *Nebmas* would have 14 days to pay those claims. *Nebmas* argued that this meant that the relevant date for payment was 14 days after the progress claim was submitted (ie, 6 January 2009). *Sub Divide*, however, argued that clause 42.1 of AS2124-1992 applied unless amended by the contract. This clause specified that the date for payment was 14 days after the issue of a certificate by the superintendent allowing the payment claim.

McMurdo J found that the specific clause in the contract overrode clause 42.1 of AS2124-1992, with the result that the relevant date for payment was indeed 14 days after the payment claim was submitted. Under the *Act*, if the claim was not paid within 14 days, *Sub Divide* then had 20 business days to serve a notice of intention to apply for adjudication.
McMurdo J held that the notice was due no later than 9 February 2009 (assuming that the payment claim was in fact lodged on 28 December 2009, as allowed for by the contract). As the notice was not sent until 10 February 2009, and not received until 12 February 2009, the notice was out of time.

The judge then turned to the second question: whether the fact that the notice was not given within the required time invalidated the adjudication and the adjudicator’s decision. Nebmas argued that a failure to comply with the notice requirement means that, in the words of the Act, an adjudication application ‘cannot be made’. Sub Divide argued that a valid notice was not necessarily a precondition to a valid adjudication.

The judge held that, although the Act made it clear that the requirement to serve the notice was mandatory, this did not necessarily mean that an adjudication held without a valid notice was void. The judge followed *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421, and ultimately held that the notice requirement was not an ‘essential precondition’ to a valid adjudication. The judge therefore declined to make a declaration that the decision made by the adjudicator was void, and also refused to grant an injunction prohibiting Sub Divide from filing the adjudicator’s certificate with a court for enforcement.

**Practical implications**

The Court will look to the parties’ contract to determine when the relevant ‘date for payment’ is for the purposes of the Act. The fact that a notice of a party’s intention to apply for adjudication was served out of time does not necessarily invalidate the adjudication, or the decision made by the adjudicator. The notice is not an ‘essential precondition’ to a valid adjudication.

**Introduction**

This judgment of Justice Beech, delivered on 6 February 2009, arose out of the construction of the South West Metropolitan Railway for the Public Transport Authority. The dispute was between the head contractor for the 'Package A works,' John Holland Pty Ltd and others trading as the RailLink Joint Venture (*RLJV*), and one of its subcontractors, O'Donnell Griffin (*ODG*). The case concerned how works variations should be treated in the adjudication of a payment dispute.

**Facts**

On 14 February 2005, ODG had subcontracted with RLJV for the supply and installation of electrical systems under the 'Package A works' for the sum of approximately $90 million. In January 2008, RLJV and ODG were in dispute over certain amounts payable under that subcontract.

On 14 January 2008, an adjudicator determined under the *Construction Contracts Act 2004* (WA) (*Act*) that RLJV was liable to pay ODG a sum in excess of $14 million. As a result, RLJV and ODG entered a 'Standstill Agreement' on 22 January 2008, under which ODG agreed not to enforce payment of the January adjudication or to take any other legal action against RLJV until 16 February 2008, except for an adjudication application in respect of RLJV's certification of the payment claim for December 2008. In return, RLJV agreed not to take any legal action against ODG until 16 February 2008. The Standstill Agreement additionally provided that, if ODG was satisfied that RLJV had complied with its obligations, the standstill period would be extended to 1 March 2008.

On 16 February 2008, ODG sent a demand for payment of the January determination. RLJV contended that the demand was a breach of the Standstill Agreement and, therefore, that the Standstill Agreement was terminated. On 18 February 2008, ODG applied for an adjudication under the Act claiming approximately $23 million due under progress claims submitted in December, which were due to be paid on 11 February 2008. The application did not identify how the amount claimed was calculated.

ODG contended that the matters in dispute now totalled approximately $28 million, including a claim for $4,118,429.73 for the 'reduced value of other unvaried work'. It is this claim that was the subject matter of RLJV's application.

On 18 March 2008, RLJV expressed concern that the amount claimed in the February application had increased in the further submissions. The adjudicator dismissed this objection on the basis that 'there was no necessity for the actual figure claimed in the skeleton application to be completely accurate' and, as a result, considered the total claim brought by ODG to be $28,153,561.49. RLJV contended in Supreme Court proceedings that that the adjudicator's ruling involved a jurisdictional error because the 'other unvaried works' claim was not made within 28 days of the payment dispute arising, as is required under section 26 of the Act.
Dispute

On 10 April 2008, the adjudicator determined the February application, finding that RLJV owed ODG approximately $18 million, which included the sum for the unvaried work. The adjudicator's reasons for determination did not address RLJV's submission that the adjudicator had no jurisdiction in respect of the other unvaried works claim. ODG applied to the Supreme Court for leave under section 43 of the Act to enforce the adjudication determination as a judgment of the court.

There were essentially two propositions that RLJV sought to rely upon in response to ODG's application for leave:

(a) first, that the adjudicator erred in failing to dismiss the February application in relation to the claim for the unvaried works ($4,118,429.73), on the ground that the claim was made outside the 28 day period under section 26(1); and

(b) secondly, that the error meant that the adjudicator had no jurisdiction and, therefore, that prerogative relief should be given in the form of a writ of certiorari quashing the adjudicator's determination.

Before the hearing, RLJV abandoned its other application, which was to quash the part of the adjudication determination which found that ODG was entitled to retain a sum of approximately $5 million.

Decision

Beech J examined the two propositions that RLJV sought to rely upon in turn.

In relation to whether the adjudicator erred in failing to dismiss the claim 'for other unvaried work' for non-compliance with section 26(1) of the Act, Beech J stated that for this argument to be accepted RLJV would have to show that the payment dispute in relation to the other unvaried work claim was a separate and distinct payment dispute from the payment dispute or disputes the subject of the February application. If the relevant dispute was part of a wider payment dispute, then ODG had complied with section 26(1). Beech J suggested that the question concerned the construction of the phrases 'payment dispute' in sections 6 and 26 and 'payment claim' in section 3 of the Act.

In outlining his preferred construction of 'payment claim' and 'payment dispute', Beech J stated that the best construction:

...enables the parties to identify the payment dispute or disputes arising from the rejection of a progress claim at the time of that rejection.

Beech J held that this construction is supported by the language of the Act as section 6 does not merely identify the time at which a payment dispute arises, it also identifies the content of the payment dispute. As a result, Beech J suggested that, 'at the time the amount claimed in a payment claim is due to be paid, the content of the payment dispute is then ascertainable'. Beech J held that such a construction of the phrase 'payment dispute' directs attention to the identification of the payment claim that gave rise to the dispute.

Beech J noted that a progress claim by a contractor will generally constitute one payment claim and not a series of payment claims, each constituted by individual component sub-
claims within the progress claim. In general, when a progress claim is rejected, that rejection will give rise to a single payment dispute.

Beech J noted in obiter that if, contrary to his view, 'payment claim' is construed to mean that individual component sub-claims of a progress claim are separate claims, that would still not assist RLJV as, on the facts, it was difficult to identify the unvaried work claim as a separate component of the December claim.

As a result of his construction of 'payment claim' and 'payment dispute', Beech J found that the unvaried work claim was not a separate payment claim from the payment claims comprising the December claim that was the subject matter of the February adjudication. As a result, there was no failure to comply with the time limit in section 26(1) of the Act and, therefore, the arbitrator had not erred when determining that section 26(1) did not oust his jurisdiction in respect of the other unvaried work claim.

However, Beech J noted that an applicant cannot, after the expiry of the 28 day period referred to in section 26(1), add additional claims to the progress claim. This is due to section 26(2)(c), rather than as a result of the construction of the phrases 'payment claim' and 'payment dispute'. Any omission, therefore, from the February application in respect of the unvaried work claim would have been a matter for complaint under section 26(2). In the event, RLJV made no complaint in the proceedings that ODG had not complied with section 26(2) of the Act and, therefore, such a claim was unavailable to RLJV.

RLJV failed on their first ground for complaint and, since there was no error by the adjudicator in relation to section 26(1), Beech J noted that RLJV's action should be dismissed, as their second proposition that there was a jurisdictional error could not arise. For the sake of completeness, however, Beech J considered the question of whether certiorari would lie in respect of an adjudication where the application for adjudication in fact failed to comply with subsection 26(1) of the Act.

Beech J noted that the legislation in the other States is materially different to Western Australia and applied the principles of the common law to the Act. Section 46(1) of the Act is important in determining whether certiorari is available in respect of an adjudication, as it permits a person who is aggrieved by a decision made under section 31(2)(a) to apply to the State Administrative Tribunal (SAT) for review of the decision. There is a 'decision' under that section for the purposes of subsection 46(1) of the Act if the adjudicator:

(a) dismisses the application without making a determination of its merits in reliance on section 31(2)(a); or
(b) rejects a submission of a respondent to an adjudication application that the application should be dismissed under section 31(2)(a).

Beech J noted that the object of the scheme created by the Act, as described in the explanatory memorandum and the Second Reading Speech, was to 'keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted disputes.' In such a context, Beech J stated that section 46:

(a) permits a right of review under section 46(1) in relation to questions arising under section 31(2)(a) of the Act; and
(b) excludes the availability of prerogative relief in relation to jurisdictional error said to be constituted by failure to dismiss an application under section 31(2)(a).

Therefore, Beech J concluded that section 46 excludes the availability of certiorari in respect of an error regarding compliance with section 26 of the Act. In addition, he noted that his approach was the same as that of Justice Mildren in Independent Fire Sprinklers (NT) Pty Ltd v Sunbuild Pty Ltd [2008] NTSC 46 and Basten JA in John Holland Pty Ltd v Roads and Traffic Authority of NSW [2007] NSWCA 19. Both cases confirmed that the question of whether there has been compliance with section 26(1) is a matter for the adjudicator and for the SAT on a review under section 46(1) and not a matter for objective determination by the court.

Beech J said that if he was wrong on this point, he would exercise his discretion to refuse relief on the basis that RLJV had failed to exercise its right of review under section 46(1).

RLJV’s application failed, which meant that ODG’s application for leave to enforce the determination under section 43(2) of the Act was granted.

**Practical implications**

The practical implications of this decision are that:

(a) the content of a payment dispute is ascertainable at the time when the payment dispute arises, as section 6 of the Act does not just indicate when a payment dispute arises, it also identifies the content of that payment dispute. Therefore, an argument by a party that, for example, the payment dispute involves the non-payment of a progress claim will not be entertained by the court where the progress claim was rejected on presentation;

(b) a court will presume, unless there is evidence to the contrary, that a progress claim constitutes a single payment claim and not a series of payment claims each made up of individual component sub-claims within the progress claim; and

(c) a determination is unlikely to be quashed by a court for non-compliance with the Act where the party seeking to have the adjudicator’s decision quashed has not first sought a review of the decision by the SAT.
22. Match Projects Pty Ltd v Arccon (WA) Pty Ltd [2009] WASAT 134

Introduction
The WA State Administrative Tribunal (SAT) made an order that an adjudicator's decision under the Construction Contracts Act 2004 (WA) (Act) could not be reviewed by the SAT. The adjudicator had declined to dismiss an application on the ground that it had not been properly served in accordance of section 26 of the Act. The SAT concluded that under the Act, and in particular section 46(2) of the Act, the SAT right of review was limited to a decision to dismiss an adjudication application on any of the grounds referred to in section 26 of the Act. The tribunal did not have a right to review a decision by the adjudicator not to dismiss an application under the Act.

Facts
A payment dispute arose between Match Projects and Arccon and an application was made under the Act for adjudication. Match Projects sought to have the application dismissed on the grounds that notice had not been properly served in accordance with section 26 of the Act. The adjudicator declined to dismiss the application and carried on to make a determination on the merits.

Dispute
Match Projects applied to the SAT to have this decision reviewed. In doing so it relied on the recent Supreme Court decision of O'Donnell Griffin Pty Ltd v John Holland Pty Ltd [2009] WASC 19 (John Holland) in which it was held that a wider right of review existed under section 46(1) of the Act than was previously understood.

Further issues to be determined by the SAT were:
(a) whether section 26 of the Act, which outlines the manner in which an application for adjudication must be prepared and served, requires strict compliance;
(b) whether the application for adjudication was served in accordance with section 26; and
(c) whether the application for adjudication was prepared in accordance with section 26.

Decision
The SAT decided that it was not bound by the views expressed by the Supreme Court in the John Holland case. The SAT viewed the opinion as obiter because it wasn't necessary for the purposes of the Court's decision. In John Holland it was held that section 46 of the Act gives the Court the right to review a decision by a adjudicator not to dismiss an application under section 31(2)(a) of the Act, as well as the traditional right to review a decision to dismiss an application under section 31(2)(a) of the Act.

The SAT commented that 'the court had not had the benefit of any argument on that particular issue'. For these reasons, and given the fact that this opinion was obiter, the SAT respectfully decided not to follow the Supreme Court's decision. Accordingly, the SAT concluded that the only decision reviewable by the SAT is a decision to dismiss an...
application for adjudication under section 31(2)(a). The SAT stated that the object of the Act, which was 'maintaining the flow of money', can be easily frustrated if a review under section 46(1) includes the review of a decision not to dismiss on any of the grounds stated in section 31(2)(a).

On the remaining issues, the SAT was of the opinion that section 26 of the Act requires strict compliance. In the present case service was effected in accordance with section 26 of the Act.

The final issue for determination was whether the adjudication application was prepared in accordance with section 26 of the Act. There is no prescribed form for an application and in the circumstances the SAT held that the adjudication application was prepared in accordance with section 26 of the Act and the Construction Contracts Regulations 2004 (WA).

**Practical implications**

In making an application for adjudication, care must be taken to ensure that section 26 of the Act is complied with. This is because section 26 requires strict compliance.

There are now conflicting decisions by the SAT and the WA Supreme Court regarding section 46 of the Act. The *John Holland* case demonstrates that currently the Supreme Court considers that there is a wider right of review under section 46 of the Act than was previously believed to be the case. The SAT, the tribunal that undertakes this review, has now determined that the right of review is more limited. This creates uncertainty as to whether there exists a right of review on a decision by the adjudicator not to dismiss an application. Parties must treat carefully the Supreme Court decision and presume at the present that the SAT will not be willing to hear reviews of decisions by the adjudicator not to dismiss an application under section 31(2)(a) of the Act.
Introduction

The applicant (Walton) challenged the jurisdictional basis of an adjudicator's decision made under the Building and Construction Industry Payments Act 2004 (Qld) (Act). The Court held that where an undertaking is in the form of a payment guarantee, section 3(3)(c)(ii) of the Act has the result that the guarantor is only obliged to pay what and when the principal debtor must pay, and should not be subject to an adjudication by which the guarantor's liability could be different. This decision also confirmed the power of the Court to declare an adjudicator's decision void.

Facts

Walton was engaged to perform construction work at a childcare centre. Walton entered into a subcontract with Eastwing Contracting Pty Ltd (Eastwing) for the carpentry and plastering work. Eastwing then subcontracted the plastering work to Salce.

In mid-November 2007, Salce went to work on the site. By 21 December 2007, Salce had sent three invoices to Eastwing and had received only one payment. Salce submitted that at this point, he entered into an arrangement directly with Walton to complete the remaining plastering work and in return, Walton agreed to pay Salce for that remaining work and the amount that he was owed by Eastwing (Arrangement).

Walton denied entering into the Arrangement and refused to pay Salce.

Salce sought to enforce the Act. An adjudicator acting under the Payments Act held that the Arrangement was a construction contract and ordered Walton to pay Salce $102,227.50.

Dispute

The first issue for the Court to determine was whether it had jurisdiction to review the adjudicator's decision. Salce argued the Court did not have jurisdiction to review the validity of the adjudicator's decision and Walton argued that the Court did have jurisdiction.

The second issue for the Court to determine was whether the adjudicator himself had the jurisdiction to make the decision in question. If the adjudicator did not have jurisdiction, then the decision would be void. Walton argued that the adjudicator did not have jurisdiction because:

(a) there was no 'construction contract' for the purposes of the Act; and

(b) the Arrangement pleaded by Salce was a guarantee and enforcement was precluded under the Act.

Decision

The Court first looked at whether it had the power to review the validity of the adjudicator's decision. The Court held that it did have the power to declare an adjudicator's decision void, independent of the operation of the Judicial Review Act 1991 (Qld).

The Court reasoned that:
(a) where a necessary condition of an adjudicator’s power had not been met; and
(b) an adjudicator erroneously decided that it had been satisfied,
such an error results in the adjudicator’s decision being void and it may be declared so.

The Court then turned to the issue of whether the decision in question was in fact void. The Court stated that the operation of the Act is predicated on the existence of a construction contract to which the Act applies. The Court then considered Salce’s evidence regarding the creation of the construction contract and noted that there were some inconsistencies. However, based on the available affidavits, the Court accepted that Salce undertook to carry out construction work. Walton submitted that despite such an undertaking, an arrangement to pay a subcontractor’s account by a person not a party to the subcontract does not by itself amount to a construction contract. The Court rejected Walton’s arguments, finding that Salce had made a construction contract with Eastwing, and later with Walton.

However, the Court held that Walton’s undertaking was in the form of a guarantee because it was a collateral undertaking to answer for the debt or default of Eastwing and therefore the Act did not apply to Walton’s undertaking. As a result, the adjudicator did not have jurisdiction to hear the dispute and his decision was void.

**Practical Implications**

Contracting parties should ensure that their contracts fulfil the requirements of a construction contract under the security of payments legislation and that they are not subject to the exceptions, otherwise parties could find themselves without the option of adjudication under the legislation to resolve their disputes.

Parties should also note that this decision confirmed the power of the Court to rule on the validity of an adjudicator’s decision and therefore parties must be aware that an adjudicator’s decision is not necessarily ‘final’.
24. **Trans Australian Constructions Pty Ltd v Nilsen (SA) Pty Ltd and Ford**

[2008] NTSC 42

**Introduction**

This case confirms that the existence of a valid payment claim is an essential requirement of the adjudication process described in the *Construction Contracts (Security of Payments) Act (NT)* (*Act*).

**Facts**

Trans Australian Constructions Pty Ltd (*Transcon*), the contractor under a head contract with Alcan, entered into a subcontract with Nilsen (SA) Pty Ltd (*Nilsen*). Under the subcontract, Nilsen was to perform electrical and instrument installation works. From time to time it rendered invoices and progress claims for the work performed.

Transcon had not paid Nilsen's last three invoices, so Nilsen made an application for adjudication under the *Act*. The head contract was terminated for convenience, and three days later Transcon terminated the subcontract. Termination of the subcontract was effective after the date of the last outstanding invoice from Nilsen.

**Dispute**

At the adjudication, it was held that the amount owing plus interest was payable immediately. Transcon did not pay, and Nilsen registered the adjudicator's determination as a judgment of the court.

Transcon sought orders quashing or declaring void the adjudicator's decision, alleging that the adjudicator had failed to properly consider the matter before him, and that there was no payment dispute because Nilsen had not made a valid payment claim.

**Decision**

On appeal from the adjudicator's decision, Transcon was unsuccessful, and judgment was entered for Nilsen.

Justice Southwood held that the adjudicator did not fail to determine the payment dispute submitted to him for determination, and did not fail to consider whether a payment claim or claims existed. As the adjudicator found that Nilsen's three unpaid invoices were payment claims under the subcontract, he did not have to consider whether Nilsen's letter dated 21 July 2008 was a payment claim.

A general principle of contract law is that rights that accrue to a party under a contract before its termination remain enforceable after termination. Therefore, as the three unpaid invoices were all rendered prior to Transcon's termination of the subcontract, Nilsen retained its right to claim payment on account for the invoices, even after termination of the subcontract.

Justice Southwood held that the existence of a valid payment claim is an essential requirement of the adjudication process. An adjudicator is bound to consider whether there is a valid payment claim before him or her. A payment claim will be valid if:

(a) it is made pursuant to a construction contract (not some other contract);
(b) it is in writing;
(c) it is a bona fide claim (not a fraudulent claim);
(d) it states the amount claimed; and
(e) it identifies and describes the obligations that the contractor claims to have performed and to which the amount claimed relates, in sufficient detail for the principal to determine whether the payment claim should be paid, part paid or disputed.

These requirements are consistent with the basic requirements of procedural fairness.

Whether a payment claim is due and payable is a matter for an adjudicator to determine. Issues about the intervals at which payment claims may be made, the number of payment claims that may be made in any interval, and the manner in which the amount claimed has been calculated are all relevant to this question.

On the facts, the essential requirements of the adjudication process had been complied with. Therefore, the adjudicator’s determination was valid. Nilsen’s three unpaid invoices together with the related progress claim documents contained sufficient detail to identify the amounts claimed by Nilsen and to identify and describe the obligations that Nilsen claimed to have performed under the subcontract to which the amounts related.

**Practical implications**

A document need not necessarily be described as a ‘payment claim’ in order to constitute a payment claim under the Act. An invoice or other method of claiming for work done will usually suffice, provided that it identifies with sufficient detail the work done and the amounts claimed.
25. **Holdmark v Melhemcorp [2009] NSWSC 305**

**Introduction**

The NSW Supreme Court confirmed that an adjudicator's determination may be overturned for an error of mathematical reconciliation and an injunction may be sought to restrain enforcement of the incorrect award.

**Facts**

Holdmark engaged Melhemcorp to undertake site remediation and landscape works. During these works, Holdmark made a number of payments directly to subcontractors engaged by Melhemcorp. Melhemcorp knew of and authorised these payments. In its final payment to Melhemcorp, Holdmark retained money for amounts that it had paid directly to subcontractors allegedly pursuant to an agreement with Melhemcorp.

**Dispute**

As part of its application, Melhemcorp submitted a series of calculations detailing the amounts it considered to be owing from Holdmark. The adjudicator then used those calculations to arrive at the final sum owing from Holdmark. This dispute arose in relation to the provision that the adjudicator made for the sums that had been paid by Holdmark directly to the contractors.

Holdmark argued that the adjudicator had accidentally included certain sums that had been paid directly to contractors in the amount that he found to be owing from Holdmark, and that the amount owing should be reduced to exclude those amounts. Melhemcorp argued that the adjudicator had correctly interpreted the figures and decided that the other payments made to subcontractors were outside the parties' agreement and did not form part of the payment claim.

Holdmark argued that the adjudicator had an obligation to exercise bona fide the power to determine an adjudication application. It was submitted that this obligation extended to exercising the power under section 22(5) of the *Building and Construction Industry Security of Payment Act 1988* (NSW) (*Act*) to correct a determination at the adjudicator's own initiative. Section 22(5) of the NSW Act relevantly provides:

> If the adjudicator's determination contains:
>  
> (a) …
>  
> (b) an error arising from an accidental slip or omission, or
>  
> (c) a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or
>  
> (d) …
>  
> the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination.

(This provision is mirrored in section 41(2) of the *Construction Contracts Act 2004* (WA).)
Decision

Macready AsJ followed Einstein J's judgment in Procorp Civil Pty Ltd v Napoli Excavations & Contracting Pty Ltd [2006] NSWSC 205. His Honour considered it appropriate to grant injunctive relief against the enforcement of an adjudication determination that contained a material miscalculation. The Court subtracted from the sum owing from Holdmark the amounts that had already been paid to the contractors, and issued an injunction restraining Melhemcorp from enforcing the adjudicator's award, as it contained mathematical errors.

Practical implications

This decision is persuasive authority for how the Western Australian courts would interpret section 41(2) of the Construction Contracts Act 2004 (WA).

Therefore, companies operating in Western Australia or entering into construction contracts with Western Australian or New South Wales governing law should be aware that part of an adjudication determination may be overturned on review where the adjudicator makes an error of mathematical reconciliation. If the adjudicator does not properly consider all of the factors affecting his or her decision, or does not give reasons supporting his or her conclusion, the reviewing court may correct the error by granting an injunction restraining the enforcement of the adjudicator's award, either in whole or in part.
26. **Thiess Pty Ltd & Anor v Zurich Specialties London Ltd & Anor [2009]**  
**NSWCA 47**

**Introduction**

In this case, the Court of Appeal of the NSW Supreme Court held that, although a contract might require building works to be conducted in certain circumstances, such a contract will not necessarily be a 'construction contract' for the purposes of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (*Act*).

**Facts**

Thiess Pty Ltd was the builder of the Lane Cove Tunnel in Sydney. Zurich Specialties London Ltd was the insurer of the project, under a *Construction Risks Insurance Policy* (*Policy*). Clause 18 of the Policy provided:

18. Project Deeds Compliance

Insurers agree that they are aware of the obligation imposed on Insureds #1 and #3 by the project deed and other contracts for the Project that specifies that Insureds #1 and #3 must – following loss or damage to the Subject Matter Insured for Section 1:

(a) subject to allowing reasonable time for inspection by Insurers, take immediate steps to clear any debris and begin initial repair work;

(b) promptly consult with Insured #2 and carry out such steps as are necessary to ensure the prompt repair or replacement of the Subject Matter Insured so that it complies with contractual requirements, disruption of the Project is minimised and Insureds #1 and #3 continue to comply with their contractual obligations to the greatest degree possible.

Notwithstanding the above, the Insured shall take and cause to be taken all reasonable precautions to safeguard the Subject Matter Insured and to prevent loss or damage. The Insured shall also afford reasonable facilities for Insurers' representatives to examine any of the Subject Matter Insured.

**Dispute**

The preliminary question the Court was asked to decide was whether the Policy contained a 'construction contract', as defined in the Act.

The judge at first instance (*Zurich Specialties London Ltd v Thiess Pty Ltd* [2008] NSWSC 1010) found that the Policy did not contain a construction contract. Her Honour held:

The first paragraph of clause 18 is an agreement by the insurers that they are aware of the obligations imposed on the defendants by the project deed and other contracts for the Project following loss or damage. The second paragraph of clause 18 commencing 'notwithstanding' imposes on the defendants the obligation to take the reasonable precautions. The clause must be read to give effect to the commercial purpose of the contract: *Legal & General Insurance Australia Ltd v Eather* (1986) 6 NSWLR 390 at 405 per McHugh JA (as His Honour then was). The commercial purpose of this Policy was to provide indemnity for the insured on the terms and conditions included in the Policy. The second paragraph of clause 18 was the imposition of a condition on the insured, which had to be satisfied prior to indemnity being available. It was not an agreement by the insured to
carry out construction work for the insurer, but an agreement by the insured that in carrying out the construction work for the principals/owners they had to do so in a particular manner, that is, taking the reasonable precautions, in order to qualify for indemnity under the Policy.

Decision

In the Court of Appeal, Macfarlan J, with whom Allsop J and Sackville AJA agreed, agreed with the primary judge’s decision and her reasons.

Macfarlan J noted that the ‘critical question’ was

whether the requirement in clause 18 for the insured to take ‘reasonable precautions’ for the purpose specified simply constitutes a condition precedent to the insured’s right to indemnity under the Policy or whether instead, or as well, it embodies a contractual promise by the insured to take the steps.

Macfarlan J answered this question by saying that the requirement was merely a condition precedent for indemnity, and did not in itself entitle the insurers to sue for damages if the insureds failed to take those steps. Macfarlan J noted that the commercial purpose of the Policy was to provide indemnity against certain loss and damage. The commercial purpose was not to enable to insurers to procure the performance of construction work.

Practical implications

Construction insurance policies may contain a requirement that the contractor remedy any damage caused to the works. It is unlikely that these insurance policies will constitute ‘construction contracts’ for the purposes the Act.
Part 5: Insurance and Indemnity

The management and allocation of risk is one of the key features of a construction contract. Parties to construction contracts carry particular types of insurance that reflect the risks they are taking on in connection with the project. While the focus of the parties is often on making the deal, recent decisions such as \textit{BHE} suggest that the scope of cover should be given as much attention as the obligation to take out insurance. Similarly, federal regulation of insurance contracts, in the form of the \textit{Insurance Contracts Act 1984} (Cth), raises additional complex questions of enforceability where insured risks eventuate in the multi-party settings that are typical of a construction project.

27. \textit{Baulderstone Hornibrook Engineering Pty Ltd v Gordian Runoff Ltd & Ors} [2008] NSWCA 243

Introduction

This case contains some useful guidance on the interpretation of insurance policies in the construction context and the distinction between design and construction obligations.

Facts

A dispute arose between the Sydney Airports Corporation (\textit{SACL}) and Baulderstone Hornibrook Engineering Pty Ltd (\textit{BHE}) about the adequacy of the construction of the reinforced earth walls forming the perimeter of the third runway at Sydney Airport and the adjacent area.

BHE had a several insurance policies, for the benefit of itself and all consultants undertaking the design and construction of the runway. Gordian Runoff Ltd (\textit{Gordian}) provided one of the layers of insurance under this program, insuring $10 million. The other respondents, HIH Casualty and General Insurance Ltd (in liquidation) and CGU Insurance Ltd, also provided layers of insurance. The insurance policies covered professional indemnity risks and not construction risks.

BHE was the head contractor on the project and engaged subcontractors in relation to the design and engineering of reinforced earth walls. Work commenced in early 1993 with practical completion in August 1994. By late 1996, it was found that backfill behind the facing panels of the reinforced earth walls had subsided.

SACL sued BHE for damages and on settlement of these proceedings in June 2004, BHE undertook to rectify the defects. BHE sought indemnity from its insurers. In December 2003, BHE commenced proceedings against the insurers, including Gordian.

Dispute

The appeal concerned the construction of a number of clauses of the insurance policies (the wording of which was common to Gordian’s and the other respondents’ policies).

The named insureds in the policy included BHE and the subcontractors for the design and engineering work on the reinforced earth walls.
Under the 'primary insuring clause', the policy indemnified the insureds against claims for breach of professional duty arising out of the 'conduct and execution of the Professional Activities and Duties'. In the endorsement, 'Professional Activities' was defined to include engineering, project management, surveying, designing, geotechnical, environmental monitoring, construction management and certification.

There were a number of exclusions from the policy. Clause 1(p) of these exclusions was for claims 'arising out of construction work performed involving the means, methods, techniques, sequences, procedures and use of equipment, of any nature whatsoever which are employed by the Insured's contracting staff or others in executing any phase of any Project'.

'Special Provision 2' further provided that the coverage provided by the policy extended to indemnifying the insureds against legal liability for claims 'arising out of any act, error or omission in the conduct of professional activities or duties committed by specialist designers or consultants acting on the Insured's behalf pursuant to any contract for service and for whom the Insured are responsible'.

At first instance, Justice Einstein held that the Gordian policy did not respond in the circumstances because the liability of BHE for SACL's claim under the design and construction contract arose out of (uninsured) construction risks and not out of (insured) professional indemnity risks.

BHE's argument on appeal was that the primary judge had erred in holding that:

(a) special provision 2 was not engaged;

(b) the primary insuring clause was not engaged; and

(c) exclusion 1(p) was engaged.

BHE argued that the primary judge had erroneously failed to recognise the important design role for BHE in the reinforced earth wall construction. It further argued that the contract documents and the design documents and directions prepared and issued under the contract required adherence to instructions, with which BHE as contractor had to comply, that were fundamentally flawed. According to BHE, if the design instructions were followed, the reinforced earth walls would necessarily fail in the manner that they did. It was wrong, therefore, to criticise BHE as constructor for failing to experiment and alter the design to achieve a more structurally sound final product.

The insurers argued that the case about the mandatory nature of the directions in the design documents was never run at trial.

**Decision**

The Court of Appeal dismissed BHE's appeal. It found that while the primary judge had erred in concluding that BHE was not a designer of the reinforced earth walls, the relevant documentation did not require BHE as constructor to compact only after specified layers of uncompacted backfill had been placed. Further, experimentation and testing required under the contract was not carried out by BHE. The court therefore rejected BHE's construction (referred to above) of what was required by the design documents. As a
result, the Court rejected BHE’s argument that the claim against it by SACL (which it sought indemnity from under the insurance policies) arose out of design failures.

The Court found that, for similar reasons, neither special provision 2 nor the primary insuring clause were engaged. BHE, particularly given its experience and reputation as a major project constructor, could not provide sufficient evidence that any failure in the design process, either by the subcontractors or BHE itself, led to its inadequate construction work. Further, on the evidence, the Court was not persuaded that the subcontractors fell within the definition of ‘engineers’ nor that their acts, errors or omissions fell within the definition of ‘professional activities and duties’.

As regards exclusion 1(p), the court held that the exclusion was operative. This conclusion would have applied even if there were some design related failing that, along with poor construction, gave rise to the claims against BHE. The court commented that the commercial purpose of the clause was to exclude the risk of defective construction performance. It applied previous authority to the effect that where there are two or more causes, one falling within an insuring clause and another falling within the exclusion, an insurance policy will not respond (although ultimately the question is a matter of construction). The court agreed with the conclusion of the trial judge that BHE’s liability had arisen from poor construction practices.

**Practical Implications**

Major project disputes often involve claims for loss caused by both design and construction related failures. Parties responsible for both design and construction work should be aware of the risk that a professional indemnity policy may not respond to a claim made against them in such cases, particularly where the policy includes an exclusion for defective construction work.
28. **Speno Rail Maintenance Australia Pty Ltd v Metals & Minerals Insurance Pte Ltd [2009] WASCA 31**

**Introduction**

This decision of the Court of Appeal of the WA Supreme Court involves a complicated chain of claims and cross-claims between a principal and contractor, and their insurers. It serves as a reminder of the importance of ensuring not only that parties are not under-insured, but also that they are not over-insured, or double-insured.

**Facts**

Speno Rail Maintenance Australia Pty Ltd (Speno) and Hamersley Iron Pty Ltd (Hamersley) entered into a contract under which Speno was to provide rail grinding services to Hamersley. Under the contract, Speno indemnified Hamersley against any liability for personal injury to Speno's employees. Speno took out insurance with Zurich Australian Insurance Ltd (Zurich). The Zurich policy covered both Speno and Hamersley, including for personal injury claims. Hamersley was also insured by Metals & Minerals Insurance Pte Ltd (MMI) against personal injury claims. Hamersley's policy with MMI contained an 'underlying insurance' clause, so that if Hamersley was insured under another policy then the MMI policy would only cover the excess that Hamersley had to pay under the other policy.

Two Speno employees were injured as a result of Hamersley's negligence. The total cost of this incident was $1,259,969.07. Hamersley successfully claimed indemnity for this amount from Speno (under the contract) and Zurich (under the Zurich policy). Hamersley did not make a claim under the MMI policy.

**Dispute**

Zurich then commenced proceedings against MMI for a contribution (Contribution Action). Zurich claimed that section 45 of the *Insurance Contracts Act* 1984 (Cth) (Act) rendered the underlying insurance clause in the MMI policy inoperative. Section 45 of the Act invalidates a provision that has the effect of limiting or excluding the liability of the insurer under the contract because the insured has entered into another contract of insurance. In response, MMI claimed that section 45 of the Act was not applicable because Hamersley had not 'entered into' the policy with Zurich, as Speno had entered into the policy with Zurich on behalf of Hamersley.

Alternatively, MMI claimed that if it was obliged to pay a contribution to Zurich, it was entitled to recover that amount from Speno by exercising a right of subrogation in respect of Hamersley's contractual indemnity (Subrogation Action).

Zurich was successful in the Contribution Action in the WA Supreme Court, and MMI successfully claimed the amount of the contribution from Speno under the Subrogation Action. On appeal to the Court of Appeal the issues were:

(a) Was MMI liable for contribution to Zurich on the basis that Hamersley was doubly insured?
(b) If MMI was liable to contribute, and was successful in its Subrogation Action, was Zurich prevented from seeking that contribution because it would be a breach of the duty of good faith owed by Zurich to Speno?

**Decision**

The Court of Appeal found that, on the proper construction of section 45 of the Act, the underlying insurance clause was void, at least in part. Because section 45 of the Act only applies to insurance contracts entered into by the insured and not to insurance taken out by a third party on the insured's behalf, the void part of the clause could be severed and the remainder continue to operate. The effect of this was that the MMI policy would only cover the excess that Hamersley was required to pay, but not the full amount, and hence there was no double insurance. As a result, MMI was not liable to pay a contribution to Zurich (because the MMI policy would not have responded if Hamersley had claimed against it).

Because the other grounds of appeal were contingent on MMI being liable for contribution, those other grounds of appeal fell away, but the Court considered them nonetheless.

On the second issue, MMI (and Speno) argued that Zurich was prevented from seeking a contribution because it would breach the duty of good faith owed by Zurich to Speno under the Zurich policy. This was because, if Zurich successfully claimed against MMI, MMI would then claim against Speno, which would mean, in effect, that Zurich was being indemnified by its insured, Speno. Under section 13 of the Act, there is an implied term requiring each party to an insurance contract to act towards the other party with the utmost good faith. However, Beech JA found that the duty of good faith did not extend to requiring Zurich to subjugate its interests to those of Speno.

**Practical implications**

Section 45 of the Act will operate to invalidate a provision that has the effect of limiting or excluding the liability of the insurer under the contract because the insured has entered into some other contract of insurance. However, section 45 of the Act will not operate in this manner where the insured is covered by a policy of insurance that has been entered into by a third party on its behalf. If a policy contains both these provisions, the invalid portion can be severed from the contract.

Section 13 of the Act does not operate to prevent an insurer from claiming against another party, even if to do so may leave the insured liable to pay under an indemnity. This outcome is not a breach of the insurer's duty of good faith to the insured.

**Introduction**

This case considers the principles governing contributions between insurers where there is double insurance.

**Facts**

Dabserv Pty Ltd (*Dabserv*) was the tenant of commercial premises in Melbourne. Dabserv contracted with Probuild Pty Ltd (*Probuild*) to do the fit-out of its premises. Probuild then subcontracted with Commercial Interiors Australia Pty Ltd (*Commercial Interiors*) to complete some parts of the fitout works.

Probuild had insurance through Lumley that covered both Probuild and its subcontractors, including Commercial Interiors (*Lumley Policy*). Commercial Interiors, meanwhile, had insurance through QBE that covered both Commercial Interiors and its principals, including Probuild (*QBE Policy*).

After Dabserv moved into the new premises, an employee of Commercial Interiors accidentally set off a fire sprinkler. The water released by the sprinkler caused considerable damage.

Probuild repaired the damage and claimed the cost of doing so under the Lumley Policy. Lumley paid this claim. Lumley then requested a contribution from QBE in respect of the claim, but QBE refused to pay.

**Dispute**

Lumley claimed that QBE was liable to contribute half of the amount that it had paid out to Probuild. QBE refused to make a contribution.

**Decision**

The Court held that an insurer (*First Insurer*) is entitled to contribution from another insurer (*Second Insurer*) if all of the following requirements are met:

(a) both the First Insurer and the Second Insurer insure a common insured. It does not matter that:

   (i) one or both insurance policies also insure another person or that not all the insureds are covered by both insurance policies; or

   (ii) the common insured is a party to one insurance policy and is not a party to the other insurance policy (so long as the common insured is entitled to indemnity under the second insurance policy);

(b) the common insured has suffered a loss or incurred a liability that is covered by both policies in whole or in part;

(c) the First Insurer has indemnified the common insured in respect of the loss or liability in whole or in part in accordance with its obligations under its policy; and
(d) the Second Insurer has not indemnified the common insured in respect of the loss or liability in whole or in part in accordance with its obligations under its policy.

The Court also held that the Second Insurer’s liability to contribute is not extinguished simply because the First Insurer has agreed to indemnify the common insured. However, if the loss or liability falls within an exclusion provision of the Second Insurer’s policy, then the First Insurer is not entitled to claim contribution from the Second Insurer.

Applying the above principles, the Court held that QBE was liable to contribute to Lumley because:

(a) the damage to the fitout was caused by the negligence of Commercial Interiors and Commercial Interiors was liable to Dabserv for the rectification costs;

(b) Commercial Interiors paid a premium to QBE and was the principal insured under the QBE Policy, which covered Commercial Interior’s negligence;

(c) Probuild paid a premium to Lumley and was the principal insured under the Lumley Policy;

(d) Commercial Interiors was also an insured under the Lumley Policy by virtue of being a subcontractor of Probuild and without having paid any part of the premium under the Lumley Policy;

(e) Commercial Interiors’ liability to Dabserv was covered under both the Lumley Policy and the QBE Policy;

(f) Lumley had paid the rectification costs except for the deductible amount applicable under the Lumley Policy; and

(g) if Lumley had not paid the rectification costs under the Lumley Policy, QBE would have been obliged to do so under the QBE Policy.

**Practical implications**

If loss or liability arises, and that loss or liability is covered by two different insurance policies, an insurer who pays out the claim will, in most circumstances, be entitled to a contribution from the other insurer.
30. Godfrey Spowers (Victoria) Pty Ltd (ACN 005 950 505) v Lincolne Scott Australia Pty Ltd (ACN 005 113 468) [2008] VSCA 208

Introduction

This decision of the Victorian Supreme Court states that for the purposes of the Wrongs Act 1958 (Vic) (Act), a concurrent wrongdoer is not prohibited from claiming contribution of a settlement sum from other concurrent wrongdoers, if that sum reflects more than his or her liability for the plaintiff's loss.

Facts

Surrowee Pty Ltd and Green Projects Pty Ltd (Principals) engaged Godfrey Spowers Ltd (Godfrey) and Hansen Yuncken Pty Ltd (Hansen) as architect and builder respectively on a building project in Carlton, Victoria. The Principals later brought an action against Godfrey and Hansen for breach of contract and negligence in relation to defective works. Godfrey then brought third party proceedings against the engineer, Lincolne Scott Australia Pty Ltd (Lincolne), and the building surveyor, Wilsmore Consulting Pty Ltd (Wilsmore) who were employed to provide engineering and building surveying services on behalf of the Principals.

The action between Godfrey and the Principals was settled for $3.9 million, on condition that the Principals undertake to discontinue their action against Hansen, Lincolne and Wilsmore. Godfrey, however, sought contribution for this settlement amount from Lincolne and Wilsmore. Lincolne and Wilsmore sought to have the claim summarily dismissed.

Dispute

The dispute was whether Godfrey could claim contribution towards the settlement sum from Lincolne and Wilsmore as alleged concurrent wrongdoers. The key question to be determined was whether Part IVAA of the Act prohibited a concurrent wrongdoer who had settled an apportionable claim from claiming this contribution from alleged concurrent wrongdoers.

At first instance, it was held that section 24 AJ of the Act prevented Godfrey from seeking contribution towards the settlement sum from other concurrent wrongdoers. Under s 24AJ, a concurrent wrongdoer cannot be required to contribute to the damages awarded against another concurrent wrongdoer nor to indemnify another concurrent wrongdoer in respect of such an award.

Godfrey appealed this decision to the Court of Appeal of the Victorian Supreme Court.

Decision

On appeal, Godfrey was found to be able to pursue its contribution claim against Lincolne and Wilsmore.

It was held that no provision in Part IVAA of the Wrongs Act 1958 (Vic) prevented a defendant from settling with a plaintiff for more than its proportionate share and subsequently claiming contribution for part of that sum from other alleged concurrent wrongdoers.
Justice Ashley held that section 24AJ of the Act would only operate to prohibit contribution or indemnification where:

(a) the defendant is a concurrent wrongdoer;
(b) the claim is an apportionable claim; and
(c) there is a judgment on behalf of the plaintiff against the defendant.

Since no judgement had been delivered on behalf of the Principals against Godfrey, it was found that section 24AJ of the Act did not prohibit Godfrey from seeking contribution towards the settlement sum from Lincolne and Wilsmore.

Since Godfrey settled with the Principals on the condition that the Principals release Lincolne and Wilsmore from liability, they were seen to have purchased and provided consideration for this release.

Consequently, Ashley JA found that Godfrey had settled for more than its own proportionate liability, and was therefore entitled to claim contribution of the settlement sum from Lincolne and Wilsmore.

**Practical implications**

The decision suggests that a defendant who settles an apportionable claim with a plaintiff can seek contribution from other defendants or third parties, if the settlement price reflects more than the settling wrongdoer's proportionate liability, despite the Act. This decision may encourage parties to settle before judgment, on the understanding that they have a right to seek contribution from concurrent wrongdoers.