DECONSTRUCTING CONSTRUCTION CONTRACTS
(and other jagged shards of rock)

CPD Paper for *LegalWise Seminars,* 31 JULY 2020

Presented by
Sydney Jacobs, LL.M (Cam)
Barrister& Mediator
13 WENTWORTH

LATEST APPROACH OF THE HIGH COURT TO GENERAL PRINCIPLES OF CONSTRUCTION OF CONTRACT

1. The objective theory of contract was articulated by Oliver Wendell Holmes in an address for the dedication of a new Hall at Boston University School of Law in 1897, as follows:[1]

   "The making of a contract depends not on the agreement of two minds in one intention, but on the agreement of two sets of external signs, – not on the parties' having *meant* the same thing but on their having *said* the same thing."

2. The purpose of contractual interpretation is to establish what the parties "intended" their contract to mean. When the contract has been wholly reduced to writing, the intention of the parties to the contract is established by determining what a reasonable person in the position of the parties would have understood the terms of the contractual document to mean: see e.g. *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at 179 [40]; *Pacific Carriers v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22]. This establishes the objective intention of the parties. In the context of a commercial contract, the reasonable person is a reasonable businessperson: *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35].

3. The intention of the parties is not established by considering the subjective beliefs or understandings of each party at the time they entered into the contract. Evidence of a party's subjective understanding of the contract is ordinarily inadmissible: see e.g. *Toll (FGCT)* at [35]*; DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 429.[2]

4. Since the intention of the parties is established by determining what a reasonable person in the position of the parties would have understood the terms of the contractual document to

[1] Cited in the paper by the hon Roslyn Atkinson AO "Recent Developments in Commercial Litigation" , presented to the Qld Law Society Symposium 2016, Bne Convention and Exhibition Centre (QSC) [2016] QldJSchol 2 (viewed online July 2020) ("Justice Atkinson's Address"). This paper is, with respect, a treat – a *judges* view of cases on the topic of construction of contracts; and additionally, a treasure trove of recent Australian authorities.
[2] Exceptions include where the case is one for rectification or in deceit.

mean, in interpreting the meaning of the words used in a written document, *the recent trend* , despite the "true rule" associated with the famous *Codelfa* case, and its apparent endorsement by the HC in *Jireh*, is for the courts to have regard to the "surrounding circumstances" or "factual matrix" or "context" (these phrases being used interchangeably).

The "surrounding circumstances" include the commercial purpose of the contract, the genesis of the transaction between the parties, and the background, the context, and the market in which the parties were operating.

See *Pacific Carriers* at [22]; *Electricity Generation* at [35]; *Walker Group Constructions Pty Ltd v Tzaneros Pty Ltd* [2017] NSWCA 27.

5. "So, our heads begin to spin!", bemoans Prof McLaughlin, in the task of working out what this all means. [3] He continues:

"Is it true to say that the law of contract is primarily concerned with finding a correspondence of external signs and that it treats the parties' actual intentions as irrelevant, except in the 'limited circumstances' mentioned? Can there really be a binding contract that neither party intends, because it is only what the parties said that matters in the law of contract, not what they meant? My answer will be an emphatic no....."

But that aspect is for another seminar.

Canons of construction

6. Various canons of construction are applied by to arrive, objectively, at the common intention of the parties e.g.
--The text is to be given its plain, natural or ordinary meaning.
--Courts construe the words so as to avoid making a commercial nonsense of the contract or working commercial inconvenience

See more fully my paper on *Reasonable Endeavours* (November 2015) which is available on the 13th Wentworth Floor website.

Jagged shards of rock, and the ambiguity of ambiguity

7. In June 1972, Mr and Mrs Fisher, residents of Weerona Ave in Woollahara, supported by the Council and other residents, brought a 2 lb, jagged shard of rock to the Equity Division and tendered it in aid of an injunction against State Rail Authority and its contractor, CODELFA Coya Roche, against their 24/7 blasting schedule for the eastern suburbs railway line.

[3] In the learned article, *The Contract That Neither Party Wants* 3 VUWLRP 6/ 2013, viewed online July 2020

It must have travelled over 150 feet from the site of the explosion to the garage of Mrs Reynolds, a resident. As HH observed, it was fortunate that this did no more damage than breaking roof tiles.

It was a powerful case in nuisance , according to Street J, having regard to the flying stones and debris, vibrations which damaged property and ongoing noise . There was evidence of homes shaking, pictures flying off walls, crockery shaken out of kitchen cupboards and disrupted sleep.

The case for *Codelfa* was that it had taken all reasonable care and moreover, they needed to proceed with the minimum of delay in this important project.

Citing from Ash J in the unreported injunction decision:

" It is not extravagant to say that none of the defendant's evidence effectively answers the silent, but compelling , evidence of the dangerous -looking stone recovered by Mrs Reynolds from her garage roof, and brought by her to this Court.....the minimum of delay does not import a licence to disregard the safety, comfort and convenience of persons, ...in the vicinity of this construction work to the degree that the evidence proves to have taken place in this case."

8. We all remember *Codelfa Construction v State Rail Authority* (1982) 149 CLR 337 as the leading authority on implied terms and frustration. The question of frustration arose because of the following circumstances: under the contract, *Codelfa* was bound to complete all works within 130 weeks. On the basis of legal advice the parties believed that the work would be exempt from injunction and that they had Crown immunity (by reason of s 11 of the *City and Suburban Electric Railways (Amendment) Act 1967* (NSW).

9. In 1972 *Codelfa Construction* commenced the work in three shifts each day for seven days a week. However, the noise generated by their underground drilling led the Fishers and Council to seek an injunction. On 28 June 1972, Ash J granted the injunction, commenting on the silent but compelling testimony of the jagged sharp of rock.

The injunction restricted the blasting schedule, leading *Codelfa* to incur significantly additional costs to complete within the contractual timeframe.

10. HH gave short shrift the attempt by *Codelfa* to seek refuge in the privative clause in the legislation, saying it applied only to the Commissioner of Railways, and did not extend to their *independent contractor (*i.e. *Codelfa*). In so doing, HH commented on the moral obligation of the State; words seriously worth reading.

If the rebel Dick the Butcher in Henry VI had had his ironic way , and the first thing was to kill all the lawyers, then who would there be to stand between citizen and State when the

jagged shards of rock are blasted through the air?

11. The procedural history of the litigation tells its own story — eminent lawyers from the arbitrator, through to the trial judge, through to the NSWCA, to the HC, all having their differences as to the correct approach as issues including: whether there was an implied term to the effect that *Codelfa*'s deadline could be extended if workable hours varied; and whether the contract had been frustrated. [4]

12. The arbitrator, trial judge and NSWCA held that a term was implied into the contract that addressed the situation (though the exact articulation of that implied term changed along the way). As such, there was no frustration.

13. However, the HC held against the implication of a term, because it could not be formulated with sufficient clarity and precision, and even if it could, it was not so obvious that it went without saying ; and concluded there had been frustration.

14. In that context, Sir Anthony Mason enunciated the "true rule" as to the construction of contracts:

> "The true rule is that evidence of surrounding circumstances is *admissible* to assist in the interpretation of the contract if the language is ambiguous or susceptible of more than one meaning. But it is not admissible to contradict the language of the contract when it has a plain meaning."[5] (my emphasis)
>
> "The practical limitation flowing from the *Codelfa* true rule is that surrounding circumstances cannot be relied on to give rise to an ambiguity that does not otherwise emerge from a consideration of the text of the document as a whole, including whatever can be gleaned from that source as to the purpose or object of the contract."[6]

15. *Objective approach – subjective intention not relevant:*

> "When one speaks of the intention of the parties to the contract, one is speaking objectively – the parties cannot themselves give direct evidence of what their intention was…Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties." Extract from a 1976 UK case, *Reardon Smith Line / Hansen-Tagen,* cited with approval by Sir Anthony Mason in *Codelfa Construction v State Rail Authority* (1982) 149 CLR 337.

---

[4] See the with respect, excellent summary in Wikipedia, https://en.wikipedia.org/wiki/Codelfa_Construction_Pty_Ltd_v_State_Rail_Authority_of_NSW

[5] *Codelfa Construction v State Rail Authority* (1982) 149 CLR 337, p 352

[6] *Hancock Prospecting Pty Ltd v Wright Prospecting Pty Ltd* [2012] WASCA 216 [76] - [79]

16. *Extrinsic evidence of surrounding circumstances is admissible where:*

(i) Where there is ambiguity in the wording of the contract, and to resolve it

(as per *Codelfa*, above)

(ii) *to demonstrate ambiguity in the text.*

This was also the *apparent* approach of the HC in *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 (construction of letters of indemnity) and *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165.

(iii) To identify the *meaning of a descriptive term* and to explain the *genesis or aim of a transaction.*

McCourt v Cranston [2012] WASCA 60 at [36] per Pullen and Newnes JJA; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) NSWLR 603.

17. *UK position on ambiguity*

English courts admit evidence of surrounding circumstances without any prior requirement to establish ambiguity : *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50.

So—beware the uncritical application of UK decisions on this topic.

18. *The ambiguity of ambiguity*

There had been a tension between various courts as to whether one had to demonstrate ambiguity before evidence as to background was admissible (this is what *Codelfa* says); or whether , as per the UK position, one could refer to background for the purpose of demonstrating ambiguity.

The matter came before the HC in *Western Export Services Inc v Jireh International Pty Ltd* (2011) HCA 45 -- the Gloria Jeans case. The case involved the correct approach to the construction of a franchising agreement. [7]

19. The learned trial judge held that ambiguity did not need to be demonstrated before background circumstances could be considered relevant. The CA reversed the decision, but on the ground that the learned trial judge had disregarded unambiguous language in order

[7] If you want to know more about this case, please see my 2015 article "The Deconstruction of Western Exports v Jireh", co -authored with Wai Kaey Soon, also for LegalWise, and available on the 13Wentworth website.

to give a more commercial and business-like operation to the agreement.

20. Unusually for a special leave application, the HC's reasons are published in the ALR. Three judges on the HC held there was *no* occasion to revisit *Codelfa* but also said various other judgments, which had *not* said that there needed to be ambiguity before background facts were admissible, were still good law, viz *Pacific Carriers Ltd v BNP Paribas*, *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*, *Wilkie v Gordian Runoff Ltd* and *International Air Transport Association v Ansett Australia Holdings Ltd*.

21. A question provoked by *Jireh* was whether it evinces any binding ratio or is merely obiter: see e.g. *McCourt v Cranston* [2012] WASCA 60. The WASCA concluded that there was no attempt to overturn the "true rule" in *Codelfa*, but that the expression of "ambiguous or susceptible of more than one meaning" could also just mean "difficult to understand": at para [24].

Electricity Generation Corporation v Woodside Energy **(2014) 251 CLR 640** [8]

22. This case supports the argument that there is no "ambiguity gateway" for the admissibility of evidence of surrounding circumstances. It seems to step back from *Jireh*.

23. The controversy in *Woodside* was as to the true construction of a supply clause in a "take or pay" gas contract. In this context, the High Court dealt with a 'reasonable endeavours' clause, see paras [40-43]. The plurality observed that three general observations can be made about obligations to use reasonable endeavours to achieve a contractual object.[9]

    Many (if not most) construction contracts will contain a clause obliging a contractor to use its reasonable endeavours to (for example) achieve practical completion (or some other milestone/es), by given dates. That topic is more fully ventilated in my paper *Reasonable Endeavours*, available on my 13th Wentworth Chambers website.

24. This case provides a further example of a court on appeal taking a different view to what a lower court held on the issue of construction; and indeed, an example of where judges on the same court took different views, as well. The HC split 4-1 in reversing the WASCA's judgment.

[8] These cases are discussed in the with respect, insightful article by Maha Chaar, *Construction of Contracts: The Ambiguity Gateway and the Current State of the Law* [2018] UWALaw Rw 28 (viewed online July 2020). I have been assisted by that article in drafting my paper.

[9] [2014] HCA 7 at [41]; (2014) 251 CLR 640 at [41].

25. The majority said this in para [35]:

"The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean…As reaffirmed, it will require consideration of the language used by the parties*, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'*…unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the parties… intended to produce a commercial result'. A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience (emphasis added)."

26. "It is unclear from the above passage whether the High Court was intending to disapprove or revise the 'true rule', which in turn has led to a strong divergence of views – with WA, Queensland and Victoria remaining on the status quo side of the debate, but NSW and the Full Federal Court seemingly aligned against that position. Moreover, by affirming that the surrounding circumstances must be considered, the High Court in Woodside *added to the confusion by suggesting that it is not necessary to make a finding of ambiguity in the text of the agreement before a court can admit surrounding circumstances*.....

The controversy sparked by the decision of the three justices of the High Court in Jireh was necessitated by the cavalier approach to contract interpretation of some intermediate appellate courts.....

The first opportunity the High Court had was in Woodside but that created more uncertainty....." [10]

***Mainteck Services Pty Ltd v Stein Heurtey SA* (2014) 310 ALR 113**

27. The NSWCA opined that the HC in *Woodside:*

"confirms that not only will the language used "require consideration" but so too will the *surrounding circumstances and the commercial purpose or objects*. ... It cannot be that the mandatory words "will require consideration" used by four Justices of the High Court were chosen lightly, or should be "understood as being some incautious or inaccurate use of language."

[10] Extracts from diverse parts of the with respect, insightful and helpful article of Maha Chaar (ibid, UWALawRw, [2018])

28. As Chaar observed in her article:

"In other words, the Court formed the view that *Woodside* had revised the true rule set down in *Codelfa*. The controversy over the fate of the 'true rule' intensified dramatically from that date."

***Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104**

29. It is to be noted that in this case, it was common ground that the relevant clause was ambiguous; as such it was unnecessary to decide whether the "ambiguity gateway" still existed. The point did not seem to be subject to submissions by the parties; however all seven judges commented on the issue to some extent.[11]

30. The $130m (yes — you read that sum correctly) question in the case came down to whether MBM was obliged to pay royalties to Wright Prospecting and Hancock Prospecting ("Hanwright") in respect of iron ore mined in two areas of the Pilbara region of Western Australia known as "Eastern Range" and "Channar".

Under a 1970 Agreement, MBM acquired from Hanwright, the "entire rights" to the "MBM area", a term defined by reference to certain "temporary reserves" granted under the WA *Mining Act.* These "temporary reserves" were indicated by block number on a map attached to the Agreement (a matter that was "of overwhelming significance" [12] to the constructional issues).

MBM had to make royalty payments on iron ore to Hanright if two conditions were satisfied:

(i) The ore was won from the 'MBM area'; and

(ii) The ore was won by MBM or by "the successors and assigns of MBM and all persons or corporations deriving title through or under MBM to any areas of land in respect of which an obligation to pay a royalty had arisen or may arise."

The years passed, and the area the subject of the litigation ended up in the hands of 3rd party joint venturers and the WA Government.

One major issue before the HC was whether MBM was obliged to pay royalties on ore won by the 3rd party joint venturers. MBM's position was that *first*, that the mining operations were not within the 'MBM area' , which meant not a physical area, but rather , rights of occupancy attaching to an area and *second* , that the entities which derived ore from the disputed area did not derive title 'through or under' MBM.

[11] As observed in the helpful article by Hall & Wilcox, 13/11/15 "Is it time to revisit the "true rule" in *Codelfa*?", on their website, viewed July 2020.

[12] The characterisation of the hon Mrs Justice Atkinson at p 6 of her seminar paper referred to herein and published in [2016] QldJSchol 2.

The consequence of this construction would be that Eastern Range and Channar did not fall within the "MBM area" and royalties would not be payable on iron ore extracted therefrom.

The Supreme Court of New South Wales rejected MBM's claims and held that royalties were payable in respect of iron ore extracted from both Eastern Range and Channar. On appeal, the NSWCA held that royalties were payable in respect of Eastern Range but not Channar A. By grant of special leave, each of the parties appealed to the High Court.

"The High Court held that the term "MBM area" referred to the physical area of land that had been transferred to MBM and was not limited to the rights under the tenements that affected that land at the time of the 1970 Agreement. The Court further held that iron ore was being won from Channar A by entities "deriving title through or under" MBM. The exploitation of Channar A was carried on under a title the derivation of which was facilitated by the deployment by MBM of its own title".[13]

So much for the facts. Turning now to the issue of construction:

"[47] In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable businessperson would have understood those terms to mean. That enquiry will require consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.

[48] Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.

[49] However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals."

Later on, their honours held:

"These observations are not intended to state any departure from the law as set out in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* and *Electricity Generation Corporation v Woodside Energy Ltd*. We agree with the observations of Kiefel and Keane JJ

[13] Citing from the HCA's Case Summary [2015] HCA 37

with respect to *Western Export Services Inc v Jireh International Pty Ltd*".

Per French CJ, Nettle and Gordon JJ at paras [47] – [52] of *Mount Bruce*

"Th[e] question is whether ambiguity must be shown before a court interpreting a written contract can have regard to background circumstances. Until that question is squarely raised in and determined by this Court, the question remains for other Australian courts to determine on the basis that *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*…remains binding authority."

Per Kiefel and Keane JJ in *Mount Bruce* at paras [118]-[119]

The trial judge's judgement against MBM for $130,816,256.83 was restored.

Chaar concludes on ambiguity, in her 2018 article cited above:

"In summary, the High Court confirmed that where a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances cannot be adduced to contradict that plain ordinary meaning. However, the question of whether ambiguity must be identified in the language of a contract before a court may have regard to the circumstances surrounding the transaction has been left unanswered."

Is Códelfa still the "true rule"?

The learned author/s of the Wikipedia note on *Codelfa* say this:

"Decisions such as *Electricity Generation Corporation v Woodside Energy Ltd*,[17] and *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*,[16] have involved the High Court applying the approach set out in *Investors Compensation Scheme Ltd v West Bromwich Building Society*,[4] despite affirming the 'true rule' in *Western Export Services Inc v Jireh International Pty Ltd*.[15] This suggests that *Codelfa* may no longer be good law in Australia. The New South Wales Supreme Court has taken the view that *Codelfa* no longer represents the view of the court and as such has moved towards accepting the English approach laid out in *Investors Compensation Scheme Ltd v West Bromwich Building Society*...."

31. It will be recalled that the "true rule" in *Codelfa* spoke about no evidence being *admissible* etc. As observed by Campbell JA in *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, this is in itself ambiguous. If evidence is admitted for one purpose e.g. background and context, or perhaps to demonstrate misleading or deceptive conduct (a wide field of inquiry) then perhaps it can then be used to demonstrate ambiguity.

THE PREVENTION PRINCIPLE

See generally my loose leaf service *Commercial Damages* (ThomsonReuters) para [32.1830] ff.

32. The prevention principle was summarised as follows in *Hunyor v Tileli* (1997) 8 BPR 15,629:

"[W]here there were two independent causes of non-completion of the works by the due date under a building contract, comprising (i) defaults of the builder, and (ii) acts of the owner (permitted by the contract), each a sufficient cause in itself of such non-completion, the acts of the owner constitute a legally operative cause of non-completion by the due date, precluding the owner from relying on contractual rights conditional on such non-completion, notwithstanding that the defaults of the builder would have prevented completion by the due date regardless of the acts of the owner."

33. The "prevention principle" has come under attack in cases when the owner has a unilateral discretion to extend time, even though the contractor does not avail itself of the contractual mechanism to seek an EOT. If the beneficiary of the liquidated damages clause is the principal, the principal cannot then insist the contractor completes by the contractual date for completion.

There is substituted an obligation to complete within "a reasonable time" i.e. time is then "at large".

34. A foundational case in this area is *Peak Construction (Liverpool) Ltd v McKinney Foundation Ltd* [1970] 1 BLR 111. Peak was the main contractor. It had contracted with the owner, Liverpool Corp, for the construction of high-rise buildings. McKinney was a nominated sub-contractor, and it constructed the foundations in a defective manner. The usual wrangling ensued between all parties and by the time Liverpool Corp ordered McKinney to continue with rectification work, there had been delay of 58 weeks. Liverpool Corp sought liquidated damages from Peak; and Peak in turn claimed liquidated damages from McKinney. Liverpool Corp failed in its claim; and thus the claim by Peak fell as well.

35. The keys to understanding the case were:

(a) the finding that Liverpool Corp had contributed to the delay through its own acts and was therefore unable to recover liquidated damages from Peak.

and

(b) that the extension of time clause which allowed the architect to extend time "*as to him may seem reasonable"* by reason of variations and other unavoidable circumstances *did not allow Liverpool Corp to extend the date for completion for its*

> *own conduct and that accordingly there was no date from which liquidated damages could run*. In such circumstances the principal:
>
> [I]s left to his ordinary remedy … to recover such damages as he can prove flow from the contractor's breach. No doubt if the extension of time clause provided for a postponement of the completion date on account of delay caused by some breach or fault on the part of the employer, the position would be different.....

36. Where the builder has a contractual entitlement to seek an EOT but does not do so, it cannot then complain about the principal's acts of delay and time is not then at large: *Turner Corp Pty Ltd v Austotel Pty Ltd* (1997) 13 BCL 378.

37. It is a controversial topic, because (depending on the contract) a contractor might disregard with impunity any provision making proper notice of an EOT a condition precedent; and by this tactic, the contractor could set time at large; a result that was labelled commercially absurd by Davies J in *Steria Ltd v Sigma Wireless Communications Ltd* [2007] EWHC 3454 (TCC).

38. I trace the major cases in my *Commercial Damages* book, at [32.1810] ff. One of the matters I emphasise is that much can turn on the *form* of contract used, and whether there are any bespoke changes. That is because the prevention principle, like any contractual matter, involves matters of construction.

39. With that in mind, I now wish to fast forward to a recent case where the prevention principle was considered, *AGC Industries Pty Ltd v Karara Mining Ltd* [2019] WASC 140. AGC provided fabrication and other services to mines; Karara mined iron ore.

    They entered into an Early Works Contract and a Main Works Contract. Disputes arose, and one of the various claims brought by AGC was on the basis of the prevention principle. It asserted that it lost the opportunity to earn a higher rate of Corporate Overhead and Profit (COP) as a result of Karara directing Variations to the Main Works Contract which prevented AGC from meeting milestones pursuant to an incentive scheme in the Contract.

    Karara denied the claims; it also relied upon:

    -- a contractual exclusion of liability for consequential loss arising out of or in connection with the Main Works Contract;

    -- two contractual time bars.

40. Under the Main Works Contract,

    -- AGC was to carry out structural, mechanical, and piping work (SMP works);

-- AGC was to be reimbursed its costs together with an agreed rate of COP.

41. The COP was an incentive to get a revenue-generating part of the plant operational by a given date, so that it could do Dirty Concentrate Work. There were five milestone dates "along the way", none of which were met.

42. Significant parts of the judgment are devoted to setting out the terms of the Early Works Project, the negotiations for the Main Works Project and then the terms of the Main Works Contract.

43. It was noted by the Court that the terms of the Early Works Contract were relevant to two matters:

(i) the circumstances in which discussions were held and as such, to the claim for misleading or deceptive conduct under the ACL;

(ii) "part of the objective factual circumstances in which the Main Works Contract was to operate." [14]

44. The court set out a chronological narrative of the negotiations, including mark ups of proposed contracts passing between the parties,[15] with considerable focus on how the COP (incentive) was to work, what the %'s would be, whether milestone dates were achievable, whether there was to be an EOT clause, and the like.

45. As to the *ACL* claim, AGC's claim was that had pre-contract representations, made at two meetings, not been made 'and the true state of affairs been known to AGC' it would have sought to negotiate and been awarded a different contract (the Alternative Contract). AGC put forward four alternative contracts, two of which themselves had alternatives. For this purpose, the court considered the whole of the conduct of the parties, [16] including as follows:

-- the court admitted a file note of an AGC officer of one of the negotiations as to contract terms , including the COP, and the email that followed.[17]

-- in negotiations, the General Conditions were also revised 'to give effect to the deal'. Changes included the deletion of liquidated damages for delay, and the removal of clauses dealing with extensions of time: para [94].

46. What is interesting, in my view, in a case dealing with claims based on the *ACL* and also involving contractual construction, is that there was cross examination as to the pre-contract negotiations , and the court made credit findings in this regard, concluding that AGC had not

[14] Para [42]
[15] Paras [53]-[73]; and then again, at paras [114] ff
[16] As noted in para [158]
[17] See Para [87]-[88]

proven that the representations it complained of, had been made. [18]

47. A significant theme of the judgment as regards these negotiations was that AGC's relevant witness did not a clear, independent recollection of key matters, *and additionally, his file notes of meetings were not detailed* , but rather thematic, i.e. they recorded topics discussed , but not exact words. See for example the file note extracted in the judgment [19]. The learned trial judge considered the key witnesses evidence to have been "loaded" with "many assumptions" , and this left the court uncertain as to what extent he was testifying about what was said, and to what extent his evidence was a composite of what was discussed with his own assumptions and expectations, not necessarily made known to the other negotiating party.

48. Pausing to consider for a moment, in my experience, it would not be practical for a senior officer to take his/her own notes of a negotiation; and a take away from this aspect of the case, is that it may well be prudent for officers / directors who negotiate deals to have an assistant, skilled in old-fashioned short-hand, to accompany them.

49. AGC's claim under the *ACL* was dismissed [20] and HH then went on to consider the contractual claims. But remember — by now, the evidence of background circumstances had been exhaustively canvassed.

50. The Court set out in detail the contractual provisions, including for delay and EOT's, and observed as follows [21]:

"A contractor obliged to complete works by a specified date, may be in breach for failure to achieve that date and liable to pay damages. Those damages may be liquidated or unliquidated. Commonly, the contract will provide for liquidated damages. The contract will, however, remain on foot notwithstanding the breach by the contractor. The contractor will be required to complete the work under the contract, and the principal will be liable to pay the contractor in accordance with the agreement.

Construction contracts also commonly include extension of time clauses. These clauses have been described as representing 'an aspect of the parties' agreement under the building contractors to how the risk of delay and its financial consequences should be apportioned between them'.

.....

Although AGC was not liable for liquidated damages, it could suffer loss by losing its entitlement to a higher rate of COP on its Direct Costs for completion of the Dirty

[18] [85]-[113]
[19] [129]
[20] [216]
[21] [304]-[309]

Concentrate Works by the prescribed Milestone Dates. That loss, however, is different in kind from liability for damages resulting from breach.....”

AGC v Karara: the prevention principle claim

51. HH then dealt with AGC’s claim put on the basis of the prevention principle.

52. “AGC asserted that it was delayed or prevented by Karara in meeting the contractual milestones, and referred to the principle commonly referred to as the 'prevention principle'. Where that principle applies, a party cannot insist on the performance of a contractual obligation by the other party if the first party is itself the cause of the other party's non-performance”.

HH then went to summarise the principle, and then said the following:

“Schedule 2J, cl 1.7, provided for [Karara] 'acting reasonably' to adjust the milestones where a Force Majeure Event had occurred, or where [AGC] had been requested to suspend carrying out the Contractor's Responsibilities. AGC did not, however, bring a claim based on failure by Karara to act reasonably in exercising the power under this clause.

Counsel for AGC was unable to point to any authority where the prevention principle had been the basis of liability, rather than a matter excusing performance. I am not aware of any. I doubt that the prevention principles can ground a cause of action. But it is not necessary to decide that question, because the claims made by AGC that are based upon the principle are all claims for consequential loss. The liability of Karara for those claims is subject to the exclusion agreed by the parties in GC 28.2.”

AGC v Karara: the limitation of liability defence

53. HH noted that GC 28.2 provided “starkly”

In no event will the Company be liable for the Contractor's Consequential Loss arising out of or in connection with the Contract.”

54. Consequential Loss was defined as:

loss or damage arising out of or in connection with the Contract including:

(a) loss of opportunity;

(b) loss of revenue;

(c) loss of profit or anticipated profit;

(d) loss of contracts;

(e) loss of goodwill;

(f) loss arising from business interruption; or

(g) any indirect loss.

55. Citing from the case (with footnotes excised):

"[326] The meaning of an exclusion or limitation clause is to be determined 'by construing the clause according to its natural and ordinary meaning, read in light of the contract as a whole'. Whether a clause excluding liability applies to particular breaches of contract is a matter of construction. .....

[327] The construction of a clause limiting liability depends on the language used, read in context, and not on assumptions that particular events were not to be protected. The exclusion of liability may still apply even where those events may defeat the main object of the contract

[328] GC 28 should not be approached on the assumption that it was not intended to apply to acts or events which prevented AGC completing the Dirty Concentrate Works by the milestone dates and affected AGC's opportunity to earn increased COP. Reading GC 28.2, incorporating the definition of consequential loss, the following matters are important."

HH then went on to note at [328] –[333] , four distinct matters relevant to the true construction of GC 28.2 ; and I commend reference to that analysis to those who draft these types of clauses

True construction of the Main Works Contract

56. AGC's claim for loss of entitlements based on Milestone Dates required a consideration of true construction of the Main Works Contract , including whether there were implied terms as contended for by AGC (it will be recalled that in *Codelfa*, terms were also sought to be implied in a huge construction contract, as to extra costs to being paid to the contractor in certain events).

57. The point I wish to make is that when it came to the constructional aspect, the court quoted wholly and exclusively from *Mount Bruce Mining Pty Ltd* 116 [46] - [51] ; but referred in a

general way to *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7 [35].

58. When analysing the provisions about payment, a conventional approach was taken, with reference only to the terms of the contract. No surrounding / background circumstances were referred to on this score.[22]

59. There were also contests regarding critical path analysis , delay, and variations which will be of interest to all construction lawyers.

60.

FURTHER READING

Catterwell, Ryan, *The "indirect" Use of Evidence of Prior Negotiations and the Parties' Intentions in Contractual Construction: Part of the Surrounding Circumstances* (2012) 29 *Journal of Contract Law* 183.

McLauchlan, David, *The Contract that Neither Party Intends* (2012) 29 *Journal of Contract Law* 26

Carter, JW; Courtney, W & Tolhurst, *G, Reasonable Endeavours in Contract Construction* (2014) 32 *Journal of Contract Law* 36.

Jacobs, Sydney with Soon*, Wai Kaey The Deconstruction of Western Exports v Jireh* available on the 13Wentworth website.

Jacobs, Sydney *Reasonable Endeavours* , available on the 13Wentworth website

Jacobs, Sydney *Commercial Damages* (loose-leaf, ThomsonReuters)

Chaar, Maha *Construction of Contracts : The Ambiguity Gateway and the Current State of the Law* [2018] UWALaw Rw 28 (viewed online July 2020).

[22] Paras [340] ff