Contract Law Case Update

Robert A. Quirk, Barrister

[1] When you're doing a contract law update one of the most difficult things is to decide which cases to review. Sometimes cases select themselves. The High Court case of *Mann v Paterson Constructions Pty Ltd* (***Mann***)[1] was one such case. The Victorian Court of Appeal had upheld a claim for restitution far in excess of contract price.[2] In it the High Court clarifies the law relating to when restitution and damages can be claimed in respect of the termination of a contract.

[2] The other cases are:

a. *Allen v G Developments Pty Ltd* (***Allen***)[3] – construction of a commercial contract – loan deed.

b. *SHA Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd* (***SHA***)[4] – construction of a design and construction contract.

c. *Bettson Properties Pty Ltd & Anor v Tyler* (***Tyler***)[5] – contract for the purchase of land including a restrictive covenant.

Mann v Paterson Constructions

Introduction

[3] *Mann* involved a building contract for two units. There were mutual allegations of repudiation first from the owners and then from the builder, based on the owners alleged termination based on the asserted builder's repudiation.[6]

[4] The court was split. It is best to describe the outcome as a four: three decision, with the four comprising Nettle, Gordon and Edelman JJ (**plurality**) and Gageler J (together the **majority**). The minority, Keifel CJ, Bell and Keane JJ, would have limited the claim (most cases) to a claim for damages for breach of contract.

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[1] [2019] HCA 32.
[2] *Mann*, [139], [146] (Nettle Gordon Edelman JJ)
[3] [2019] QCA 287.
[4] [2019] QCA 201.
[5] [2019] QCA 176. Special leave refused [2020] HCASL 11.
[6] *Mann*, [124]-[126], [137] (Nettle Gordon Edelman JJ).

[5] The plurality and Gageler J maintained the right to bring a restitutionary claim based on what might be described as incrementalism of the common law. They considered that only clarification, and limitation of the position, at law, was required.

[6] In deference to the minority their position should be briefly referred to and is best represented by the following:

> *'It may be that in some cases justice will not be done without a restitutionary claim. Different considerations may apply in cases where advance payments are sought to be recovered by restitutionary claims for money paid, although it may be that the law of contract adequately provides for such cases. "There will generally be no need to have recourse to a remedy in restitution" where a claim in contract is available. In the present case, there is no good reason to consider that damages for breach of contract would fail to meet the justice of the case such that a restitutionary claim for quantum meruit should be available. It is not necessary to consider the position in other contexts or with respect to other restitutionary claims as the present case is concerned only with a claim for remuneration for work and labour done under a contract terminated for repudiation or breach.'*

Background

[7] The contract price was $971,000, and it related to 2 units.[7] During the work there were 42 oral variations in relation to unit one and 31 with respect to unit two, which were carried out by the builder.[8]

[8] The Tribunal ultimately resolved the competing claims of repudiation in favour of the builder, holding held the owners had wrongfully repudiated, as recorded in the judgment of the plurality:[9]

> *'After a hearing extending over some 20 sitting days and including an on-site inspection and evidence by 11 expert witnesses and 11 lay witnesses, VCAT (Senior Member Walker) found that the appellants had wrongfully repudiated the contract and that the repudiation was accepted by the respondent on 28 April 2015 as bringing the contract to an end.'*

[9] The Tribunal allowed a claim based on quantum meruit, which provided for a payment of $660,000 despite the builder having already been paid $945,000.[10]

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[7] *Mann*, [111]-[115] (Nettle Gordon Edelman JJ).
[8] *Mann*, [120] (Nettle Gordon Edelman JJ).
[9] *Mann*, [137].
[10] [*Mann*, [138]-[140] (Nettle Gordon Edelman JJ).

[10] There was specific legislation dealing the the variations which applied in Victoria. That legislation was construed quite restrictively but those matters were ultimately remitted for the Tribunal to determine 'accordingly to law'.[11]

[11] In any particular state, you will need to consider the legislation applying to variations to determine if a particular variation can be claimed.

[12] It is also important to look at the nomenclature used. The plurality said:[12]

> *'**A matter of nomenclature***
>
> *As Professor John Chipman Gray once said, although people "are very ready to accept new ideas, provided they bear old names", a "loose vocabulary is a fruitful mother of evils". The issues on this appeal, as at first instance and before the Court of Appeal, were described in terms of "quantum meruit", sometimes on the assumption that the phrase identifies a species of restitution for unjust enrichment. But the Latin may mislead. It means only "as much as he deserved", and as such refers to a sum certain which represents the benefit of services. As is explained in what follows, it was a label given to a form of action which fell into desuetude, superseded by counts in indebitatus assumpsit, even before the abolition of the forms of action. In its historical use, the form of action was truly contractual, describing an implied price of a reasonable sum for work done. To plead a claim today merely by reference to that language of the form of action tells a lawyer very little, and a layperson nothing at all, as to (i) whether the cause of action is one to enforce the contract, seeking payment of a reasonable price implied into the contract, (ii) whether it is an asserted claim for a restitutionary remedy for breach of contract, or (iii)* ***whether it is a remedy arising by operation of law in that category of actions concerned with restitution in the category of unjust enrichment. This litigation has only ever been concerned with the final category****.'* ***(emphasis added****)*

Issues

[13] There were two central issues that provide the basis for the made by the majority. These issues are referred to in Gageler J's judgment:[13]

> *'(2) work done by the Builder in respect of the plans and specifications set out in the Contract for which the Builder had*

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[11] *Mann*, [151]-[161] (Nettle Gordon Edelman JJ), [58]-[59] (Gageler J).
[12] *Mann*, [150].
[13] *Mann*, [57].

accrued a contractual right to payment under the Contract at the time of its termination; and

(3) work done by the Builder in respect of the plans and specifications set out in the Contract for which the Builder had not yet accrued any contractual right to payment under the Contract at the time of its termination.'

[14] The former may be referred to as an accrued claim and the later the unaccrued claim.

Accrued claim

[15] In relation to the accrued claim, Gageler J dealt with this is in short order:[14]

> *'The correct outcome in relation to work done within category (2) is that a non-contractual quantum meruit is not available to the Builder. …*
>
> *There can be no doubt about the outcome in relation to work done within category (2). The result of the Builder's acceptance of the Owners' repudiation is that the Builder still has in respect of that work the same accrued contractual right to payment under the Contract as the Builder had up until the time of termination of the Contract. The Builder can enforce that accrued contractual right in a common law action in debt.*
>
> *The continuing existence of a contractual right to payment, enforceable by an action in debt, leaves no room to recover payment by another action in debt on a non-contractual quantum meruit. …*
>
> *… The continuing application of the regime of rights and obligations set out in the Contract to govern the mutual rights and obligations of the parties in respect of payment for the work has the result that the law of restitution simply "has no part to play in the matter".'*

[16] Both sets of reasons comprising the majority relied on Dixon J's reasoning in *McDonald v Dennys Lascelles Ltd* (***McDonald***)[15].[16] The plurality summarised the law and referred to the relevant part of Justice Dixon's judgment:[17]

> *'At least since the decision of Dixon J in McDonald v Dennys Lascelles Ltd, it has been accepted that, where a party to a contract elects to accept the other party's repudiation of the contract, both parties are released from contractual obligations which are not yet due for performance, but*

[14] *Mann*, [61], [62]-[64].
[15] (1933) 48 CLR 457, 476-7.
[16] *Mann*, [62] (Gageler J), [165] (Nettle Gordon Edelman JJ).
[17] *Mann*, [165].

existing rights and causes of action continue unaffected. Dixon J explained the position thus:

> *"When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning.* ***Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected.*** *When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach."' (****emphasis in original****)*

[17] Unsurprisingly, the plurality's conclusion was to the same effect:[18]

> *'Generally speaking, a construction contract which is divided into stages, and under which the total contract price is apportioned between the stages by means of specified progress payments payable at the completion of each stage, is viewed as containing divisible obligations of performance. In that event, where at the point of termination of the contract by the builder's acceptance of the principal's repudiation some stages of the contract have been completed,* ***such that progress payments have accrued due in respect of those stages, there will be no total failure of consideration in respect of those stages.*** *The builder will have* ***no right of recovery in restitution in respect of those stages, and the builder's rights in respect of those completed stages will generally be limited to debt for recovery of the amounts accrued due or damages for breach of contract.*** *But if there are any uncompleted stages, there will be a total failure of consideration in respect of those stages due to the failure of the builder's right to complete the performance and earn the price. In that event, there will be nothing due under the contract in relation to those stages,* ***and restitution as upon a quantum meruit will lie in respect of work and labour done towards completion of those uncompleted stages.' (emphasis added)***

[18] *Mann*, [176].

[18] Accordingly, there can be no doubt that for an accrued claim, the applicant is limited to their rights under the contract.

Unaccrued claim

[19] In relation to this type of claim the majority recognised that there was an element of policy in how to resolve issues before the court. Justice Gageler said:[19]

> *'More difficulty attends the outcome in relation to work done within category (3).* ***Determining the outcome requires this Court to make a choice.*** *Should the Builder be restricted in respect of that work to enforcing the Builder's undoubted entitlement to recover damages for loss occasioned to the Builder in consequence of the termination of the Contract? Or should the Builder be able to elect to recover instead an amount representing the value of the work by way of restitution on a non-contractual quantum meruit?*
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> *No decision of this Court is directly in point. …' (**emphasis added**)*

[20] The plurality dealt with the argument against restitution as follow:[20]

> *'As the law stands in Australia, as it does in England, New Zealand, Canada and the United States, upon termination for repudiation of an uncompleted contract containing an entire obligation (or, as will be seen, divisible stages) for work and labour done,* ***the innocent party may sue either for damages for breach of contract or, at the innocent party's option, for restitution in respect of the value of services rendered under the contract****. …*
>
> ***By further contrast, if the obligation to perform work is divisible into several entire stages, then, upon termination of the contract for repudiation****: (i) the contractor so terminating the contract will have accrued rights under the contract for those stages that have been completed; (ii) there will be a total failure of consideration in respect of the stages that have not been completed, because the contractor's right to complete the performance and earn the price will have failed and nothing will be due under the contract in respect of those uncompleted stages; and (iii)* ***restitution will lie as upon a quantum meruit in respect of the work and labour done towards completion of the uncompleted stages as an alternative to damages for breach of contract****.*
>
> ***Essentially, the arguments against retention of the alternative restitutionary remedy conduce to two principal propositions. The first is that****, where a contract is terminated for breach after the innocent*

[19] *Mann*, [65]-[66].
[20] *Mann*, [166], [174], [192], [197]-[200].

party has partially completed the work for which the contract provides, the proper characterisation of the basis or condition on which the work was performed can only ever be the other party's promise to perform the contract (as opposed to the objective basis of the other party's performance of it), and, because the promise is enforceable by an action for damages, there is no failure of consideration. ***The second is that****, if it is correct to characterise the basis or condition on which the work has been undertaken as being the other party's performance of that party's contractual obligations (as opposed to being limited to that party's promise to perform them), the other party's failure to perform them yields a contractual remedy which is appropriate and adequate to put the innocent party in the position in which he or she would have been if the contract had been performed; and, therefore, there is no need or justification for the imposition of an alternative restitutionary remedy.*

The first proposition is at odds with long-accepted learning in England and in this country and should be rejected. …

With respect, that is no doubt so, but the fact that courts have historically calculated damages on the basis of some such assumption is in no sense opposed to the conclusion that it is the law as opposed to the contract as such that imposes the obligation to pay damages for anticipatory breach of contract. Rather, it tends to confirm it. … In the end, the parties' consensual allocation of rights and obligations says nothing about the existence of concurrent remedies following termination for repudiation; ***"in the absence of ... agreement, the law must decide"****.*

Theoretically, the second proposition has more to commend it. … ***Coherence does not depend on singularity. Coherence can be, and often is, achieved through other mechanisms****.*

Moreover, as Gummow J was at pains to point out in Roxborough v Rothmans of Pall Mall Australia Ltd, ours is not a system in which the theory of unjust enrichment comes first and decisions must then be made to comply with it. ***It is a common law system of stare decisis that develops over time and through which general principle is derived from judicial decisions. Unjust enrichment may be conceived of as a "unifying legal concept" which serves a "taxonomical function" that assists in understanding why the law recognises an obligation to make restitution in particular circumstances. But it is in no sense an all-embracing theory of restitutionary rights and remedies*** *pursuant to which existing decisions are to be accepted or rejected by reference to the extent of their compliance with its proportions.* ***Consequently, where a doctrine of the common law has grown up over several centuries – as has the availability of restitutionary relief for work and labour done under a partially completed entire obligation following termination of a contract for breach – and the doctrine remains principled and coherent, widely accepted and applied in kindred***

> ***jurisdictions, it can hardly be regarded as a sufficient basis to discard it that some of the conceptions which historically informed its gestation have since changed or developed over time. Whatever doubts might remain about the theoretical underpinnings of the doctrine by reason of the problematic nature of its origins or subsequent developments in the law of contract, it is too late now for this Court unilaterally to abrogate the coherent rule simply in order to bring about what is said to be a greater sense of theoretical order to the range of common law remedies***.
>
> *Admittedly, there is* ***cause for concern about the potential for disparity between the amounts recoverable by way of restitution for work done under a contract which is terminated for breach and the amounts recoverable by way of damages for breach of contract****.* ***That phenomenon – alarmingly widespread*** *in domestic building disputes of the kind in issue, as it appears –* ***implies a need for development of the law in a manner which better accords to the distribution of risks for which provision has been made by contract.*** *But, as will be explained, that is a problem which may be addressed with less far-reaching measures than abrogation of the rule of recovery and* ***more consistently with the accepted techniques of common law development****. Ground 1 must be rejected.' (****emphasis added****)*

Limitation on restitution

[21] As can be seen, the plurality indicated that it intended to deal with restitution/ damages disparity by development of the common law rather than wholesale change. In this regard, their Honours laid down the following rule:[21]

> *'… For just as a contract may inform the scope of fiduciary and other equitable duties,* ***the price at which a defendant has agreed to accept the work comprising an entire obligation*** *is logically significant to the amount of restitution necessary to ensure that the defendant's retention of the benefit of that work is not unjust and unconscionable.* ***In point of principle, deference to contract as a reflection of parties' agreed allocation of risk is at least as appropriate in Australia as it is in England****.*
>
> *…* ***It is consistent with the Australian understanding of restitutionary remedies that a contract, although discharged, should inform the content of the defendant's obligation in conscience to make restitution where the failed basis upon which the work and labour was performed was the contractor's right to complete the performance and earn the price according to the terms of the contract.*** *It is, therefore, appropriate to recognise that, where an entire obligation (or entire divisible stage of a contract) for work and labour (such as, for example,*

[21] *Mann*, [214]-[216].

an entire obligation under or an obligation under a divisible stage of a domestic building contract) is terminated by the plaintiff upon the plaintiff's acceptance of the defendant's repudiation of the contract, ***the amount of restitution recoverable as upon a quantum meruit by the plaintiff for work performed as part of the entire obligation (or as part of the entire divisible stage of the contract) should prima facie not exceed a fair value calculated in accordance with the contract price or appropriate part of the contract price****.*

*So to recognise does not exclude the possibility of cases where, in accordance with principle, the circumstances will dictate that it would be unconscionable to confine the plaintiff to the contractual measure. One such possibility is arguably afforded by the infamous case of Boomer v Muir, which has been explained on the basis of the defendant's continuing breaches being responsible for a cost overrun that rendered the contract unprofitable. As Dooling J observed in that case, the question whether the plaintiff could recover in excess of the contract price "****depends upon whether it is equitable to permit****" the plaintiff to depart from the pricing structure agreed with the defendant. Nonetheless, as Lord Neuberger of Abbotsbury PSC observed in Benedetti, in many such cases* ***it would appear wrong that a claimant should be entitled to a better result in restitution than would have been available to him or her under contract****.'*

[22] Justice Gageler stated his conclusion succinctly:[22]

'**The preferable outcome, in my opinion, is accordingly that the Builder can recover from the Owners by way of restitution** on a non-contractual *quantum meruit* an amount in respect of the work done by the Builder for which the Builder had accrued no contractual right to payment under the Contract at the time of its termination. The amount recoverable is a liquidated amount representing reasonable remuneration for the work. **That amount cannot exceed the portion of the overall price set by the Contract that is attributable to the work**.'

Differences in practice and procedure

[23] There are differences in claiming restitution versus a claim for damages, as Justice Gageler observed:[23]

'One practical consequence which flows from a non-contractual quantum meruit being "in the theory of the law" an action for a debt is that the action can have significant procedural advantages to an innocent party over an action for damages for breach of contract under procedural rules in Australian courts. Typically, ***those advantages include a capacity to obtain default judgment****.*

[22] *Mann*, [105]-[107].
[23] *Mann*, [86]-[87].

> *More importantly, a non-contractual quantum meruit has the advantage that **proof of the value of services rendered is almost invariably more straightforward than proof of contractual loss. Questions of causation and remoteness play no part**. The availability of the action allows the innocent party to choose to adopt the course of quickly and cheaply obtaining judgment for an easily quantifiable liquidated amount instead of embarking on a long and more expensive and more uncertain pursuit of a potentially larger judgment for unliquidated damages. **Choice by the innocent party to adopt that course has the flow-on systemic advantage of shortening trial and pre-trial processes**.' (**emphasis added**)*

[24] The plurality also acknowledged that proceeding by way of *quantum meruit* may have practical advantages:[24]

> *'But the remedy is one of considerable practical value. A claim for restitution is a liquidated demand which, by contrast to an unliquidated claim for damages, may provide easier and quicker **recovery including by way of summary judgment**. And as Leeming JA observed in Fistar v Riverwood Legion and Community Club Ltd, "**there is nothing foreign** to the Australian legal system in a **plaintiff having alternative claims** arising out of the same facts". Further, as United Australia Ltd v Barclays Bank Ltd shows, **the law has mechanisms for deciding when a plaintiff becomes committed to one rather than the other remedy**.' (**emphasis added**)*

Conclusions

[25] The court allowed the appeal with costs and remitted the matter to VCAT to determine the matter according to law. The court held:

a. The ability to proceed by way of a claim for restitution remains.

b. It is generally limited by the price of the contract, or the relevant part.

[26] The takeaways include:

a. A claim based on a *quantum meruit* can be pleaded as an alternative to one for damages.

b. There may be procedural reasons for pursuing one claim or the other.

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[24] *Mann*, [198].

Allen v G Developments Pty Ltd

Introduction

[27] *Allen* involved the construction of a loan deed.[25] The lead judgment was given by Mullins AJA (as her Honour then was), with Morrison and Philipides JJA, agreeing. [26] The findings of the learned trial judge were not substantially challenged in this appeal except for the 'short point of construction'.[27]

Background and issue

[28] The construction point was whether there was an obligation to pay interest after the first year, and at trial it was determined adverse to Mr Allen, a trustee of a trust, who provided the finance.[28] Two joint venture companies had borrowed the money and it was to enable them complete the purchase and/or development of land at Bundamba.[29]

[29] The loan deed was based on a precedent document that included extensive provisions that were not necessary for the transaction.[30]

[30] The appellant also made submissions as to the effect of subsequent conduct on the interpretation of the loan deed which the court found it unnecessary to deal with.[31]

[31] The salient clauses of the loan deed were clauses 4 and 5:

> *'Clause 4*
>
> *"(a) The Borrower covenants that the Borrower will pay interest on the Secured Monies computed at the rate of twenty five percent per annum and payable on the date referred to in Item 8 of the Schedule being on one year from the date of drawdown or project completion whichever is earlier (hereinafter called '**the due date**') (hereinafter called ('**the date of first payment**') at the fixed rate namely the rate referred to in Item 5 of the Schedule (hereinafter called '**the fixed rate**').*
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> *(b) The parties further agree if the Secured Monies is repaid at any time prior to the first anniversary date of the initial drawdown, a minimum*

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[25] *Allen*, [31].
[26] *Allen*, [1] and [2].
[27] *Allen* [2019] QCA 287, [31].
[28] *Allen*, [5].
[29] *Allen*, [5], [6].
[30] *Allen*, [30].
[31] *Allen*, [40].

payment of twenty-five percent of the loan amount is payable as interest. The parties agree that the total payment incorporates a penalty amount in compensation for the opportunity costs of the lenders entering into this agreement and is fair and reasonable in the circumstances.

*(c) At the expiration of the period referred to in Item 6 of the Schedule (hereinafter called '**the minimum period**') the Lender may at its discretion at any time and from time to time thereafter give notice in writing to the Borrower varying the rates of interest payable hereunder and may in such notice prescribe a new rate. The new rate of interest so prescribed shall become effective from the date of the notice and thereupon the Borrower shall be liable under the covenants to pay interest at the new rate and this Deed shall be deemed to be varied accordingly.*

Clause 5

*(a) The Borrower covenants that the Borrower will repay the Loan Amount and any other monies owing to the Lender pursuant to the provisions hereof on or before the date referred to in Item 7 of the Schedule (hereinafter called '**the repayment date**')*

(b) The Borrower further covenants that the Borrower will repay the Principal Sum forthwith upon written demand being made at any time after the happening of any of the following events:
(i) Default being made by the Borrower in the due or punctual payment of any monies which comprise part of the secured monies or in the due or punctual observance or performance of any other obligation on the part of the Borrower under this Deed:

*[**Other events of default which do not affect the construction of the loan deed are then listed**]*
...
*(c) It is hereby agreed and declared that all monies received by the Lender in reduction of the secured monies shall be applied by the Lender firstly in reduction of any interest due but unpaid and secondly in reduction of the remainder of the secured monies"' (**emphasis in original**)*

[32] Justice Mullins noted that the loan deed was 'poorly drafted' and gave rise to respectable arguments for and against whether interest was payable after the first year of the loan.[32] The summaries of the parties' submissions are set out in her Honour's reasons.[33]

[32] *Allen*, [39].
[33] *Allen*, [32], [33].

Relevant construction principles

[33] Central to Justice Mullins reasoning were the principles relating to commercial contracts, her Honour said:[34]

> *'The loan deed must be construed as an agreement between commercial parties, as set out at [25] of the reasons:*
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> > *"The transaction between the parties to the Loan Deed was commercial in nature. It follows that: the terms of the Loan Deed are to be understood as a reasonable business person would have understood them; the commercial purpose or objects to be achieved are to inform such an understanding; an appreciation of the purpose or objects is facilitated by understanding the genesis of the transaction, the background, the context and the market in which the parties are operating; and* ***the court is entitled to assume the parties intended to produce a commercial result which makes commercial sense****: Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640 at 656-7 [35]."*
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> *The principles relevant to the construction of commercial contracts were summarised in the joint judgment of French CJ and Nettle and Gordon JJ in Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104 at [46]- [51]. That judgment endorsed the principles referred to in Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640 at [35], noting at [51]:*
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> > *"Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption '****that the parties ... intended to produce a commercial result****'. Put another way, a* ***commercial contract should be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience****."' (****emphasis added****)*

[34] As will be seen, the commerciality/ lack of commerciality of the competing constructions, was central to the court's determination of the appeal, as were issues of internal consistency and meaning.

[35] Justice Mullins stated that the fact that the loan deed contained many extraneous provisions did not change the approach to the construction of the document as embodying a transaction between commercial parties.[35]

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[34] *Allen*, [28]-[29].
[35] *Allen*, [30].

[36] Justice Mullins reasons as to resolving the matter were as follows:

> *'In the circumstances where the loan was procured to be made by the appellant to the first respondent where the first respondent had been unable to obtain finance to complete the purchase of the land for the development proposed by the joint venture,* ***the respondents' construction of clause 4(a) that denies the lender the right to claim interest on the amount of the loan outstanding when the borrower defaulted*** *in repaying the loan on the first anniversary of the loan (when the project was still incomplete at that time)* ***does not suggest an agreement between commercial parties*****.** ***It would take the clearest language in a commercial agreement to deny the lender the right to pursue the borrower for interest*** *on the principal outstanding, after default in repayment of the principal was made. For the reasons that follow, the proper construction of clause 4(a) is that it includes a covenant to pay interest at the fixed rate in Item 5 of the schedule, if the loan was not repaid within one year of the date of drawdown.* ***Clause 4(a) should be read and construed****, as if the word "***and***" were inserted before, and the word "***thereafter***" was inserted after, the words "at the fixed rate". Clause 4(a) contains the covenant to pay interest up to one year from the date of drawdown and a covenant to pay interest at the fixed rate after the expiry of that year. Although it is awkward that clause 4(a) should be read by inserting those words,* ***it would be more awkward to construe clause 4(a), as if the words*** *"at the fixed rate namely the rate referred to in Item 5 of the Schedule" and the content of Item 5 simply repeated the obligation earlier set out in clause 4(a) to pay interest up to one year from the date of drawdown* ***and were therefore effectively meaningless****.*
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> *Clause 4 has three paragraphs that deal with the payment of interest. Clause 4(a) contains the covenant to pay interest. Clause 4(b) deals with the specific circumstance of the minimum payment of interest that was required, if the secured monies were repaid at any time prior to the first anniversary date of the initial drawdown. Clause 4(c) allows for the variation of the rate of interest after the expiration of the period referred to in Item 6 of the schedule that is defined as the minimum period and which was the earlier of one year (after the date of drawdown) or project completion date.*
>
> ***Clause 4 must be construed in the context of the loan deed as a whole and as embodying a transaction between commercial parties and to avoid commercial nonsense****. Pursuant to clause 2.1(f) of the loan deed, a schedule to the deed forms part of the deed. That means that the contents of the schedule which are the items that are incorporated by reference into the loan deed must be considered in construing the deed. If the appellant's contention that clause 4(a) makes no reference to the payment of interest after the expiry of the earlier of one year from the*

*date of drawdown or project completion were correct, **it leaves no reason for the specification of the fixed rate in Item 5**. If the only interest that were payable was that calculated at 25 per cent of the loan amount for one year, **there would be no purpose in identifying the fixed rate in clause 4(a) as shown in Item 5 of the schedule**. The plain meaning of Item 5 is for the purpose of specifying the interest rate that applies, if the loan were not repaid within 365 days or if there were other amounts outstanding under the loan (such as costs and expenses chargeable to the borrower under clause 6 of the loan deed). **There would otherwise be little point in specifying in Item 5 as to what the fixed rate of interest was, if interest did not accrue after the first year**. Similarly, clause 4(c) refers to the minimum period specified in Item 6 of the schedule which can be either one year or the project completion date (whichever is the earlier) before which the interest rate could be varied. **That one year could be the minimum period also suggests that it was anticipated by the parties that the obligation to pay interest at the fixed rate would continue after that period of one year**. The fact that the primary judge by an example could show that clause 4(c) could be given effect, if the project were completed before the first anniversary of the drawdown of the loan, does not displace that clause 4(c) by its terms **was intended to operate also at the expiration of one year** from the drawdown of the loan.*

*Although it is common ground that clause 4(c) does not itself impose an obligation to pay interest, but provides the mechanism for varying the rate of interest payable under the loan deed at the expiration of one year or the project completion date, whichever is the earlier, **clause 4(c) is consistent only with there being an obligation under another provision for the payment of interest after the expiration of the minimum period. That assists in construing clause 4(a) as imposing that obligation**.*

*… but the closing words of clause 4(a) in conjunction with the balance of the clause can be construed as also containing a covenant by the borrower to pay interest on the secured monies at the fixed rate referred to in Item 5 after the first year. It is not essential that rests be stipulated for the calculation of interest after the first year, because as the primary judge noted at [39] of the reasons **that is otherwise an agreement to pay simple interest**. **The obligation to pay interest after the first year was in respect of the secured monies that remained outstanding**. The loan deed specified when the interest for the first year was payable, but there was no express provision as to when interest that continued to accrue on the secured monies payable**. In the absence of such provision, a demand was required for payment of that interest**.' (**emphasis added**)*

Conclusions

[37] The appeal was allowed with costs. The respondents were ordered to pay almost $2,000,000.

[38] The takeaways include:

a. Commerciality is a touchstone for construing contracts.

b. Attention should be paid to documenting transactions.

c. Any saving in legal costs at the front end through short cuts will be far exceeded, if litigation ensues (the parties had two counsel at trial and on appeal, as well as their solicitors).

SHA Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd

Introduction

[39] *SHA* involved the construction of a design and construction contract.[36] The principal judgment was given by Morrison JA, with Sofronoff P and Flanagan J, agreeing.[37]

Background and issues

[40] The central issue was whether SHA could appoint itself as 'Superintendent' under the contract.

[41] The construction of the contract in the appeal went to the validity of a payment claim under BCIPA determined adverse to SHA and proceeded on the basis that if SHA could not nominate itself then the response to the payment claim was not efficacious and the judgments below could not be sustained.[38] SHA had been ordered to pay just over $400,000, including interest.[39]

[42] There was an issue identified on appeal as to whether a term should be implied that where the Principal does not appoint a Superintendent that it

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[36] *SHA*, [2].
[37] *SHA*, [1] and [45].
[38] *SHA*, [25], [43]. Morrison JA thought there was a 'substantial basis' upon which to doubt the correctness of the concession.
[39] *SHA*, [3].

must perform the obligation itself.[40] Justice Morrison concluded that the contract was efficacious without the implication of such a term.[41]

[43] In relation to this case, the reference to the relevant provisions will be limited as there is more to be gained from the reasoning of Justice Morrison with respect to those provisions, however, some of them are required for context. His Honour's judgment included the following:[42]

> *'By clause 3 of the Formal Instrument of Agreement, the contract was agreed to comprise:*
> *(a) the Formal Instrument of Agreement;*
> *(b) AS 4902-2000 General Conditions of Contract for Design and Construct; and*
> *(c) the Construction Programme and documents listed in a schedule annexed to the contract.*
> *…*
> *Clause 1 of the general conditions defines various terms for the purpose of the contract. The term "Principal" is defined to mean "the Principal stated in Item 1". In turn, Item 1 in Part A of the Annexure to the general conditions identifies the "Principal" as "S.H.A. Premier Constructions Pty Ltd ACN 056 777 318 ABN 62 031 586 582".*
>
> *Clause 1 defines the term "Superintendent" to mean:*
>
>> *"the person stated in Item 5 as the Superintendent or other person from time to time appointed in writing by the Principal to be the Superintendent and notified as such in writing to the Contractor by the Principal and, so far as concerns the functions exercisable by a Superintendent's Representative, includes a Superintendent's Representative."*
>
> *Part A of the Annexure to the general conditions7 identifies the "Contractor" as being "Niclin Constructions P/L ACN 614 074 065".* ***Item 5 then identifies the Superintendent as follows****:*
>
>> *"S.H.A. Premier Constructions Pty Ltd nominated person … ACN 056 077 318 ABN 62 031 586 582".*
>
> *Clause 20 of the general conditions makes provision in respect of the Superintendent. As this clause assumed some significance in the hearing before this Court it is necessary to set out its full terms.8*
>
>> *"**The Principal shall ensure that at all times there is a Superintendent for the purpose of the Contract**.*

[40] *SHA*, [27].
[41] *SHA*, [32].
[42] *SHA*, [5]-[14].

The Principal shall endeavour to ensure that the Superintendent performs honestly and fairly *its functions under clause 34.3 (assessment of EOTs), clause 34.6 (issue of the certificate of practical completion), clause 36.4 (pricing of variations), clause 37.2(a) (pricing of progress certificates), clause 37.4 (issue of final certificate) and in making cost assessments.*

The Superintendent may carry out its functions under the Contract *(other than those referred to in in the paragraph above):*
(a) as agent and representative of the Principal; and
(b) in accordance with instructions given to it by the Principal (acting in its absolute discretion unless the Contract expressly requires otherwise).
…

The Contractor agrees that the Principal and the Superintendent may exercise their discretions and rights under the Contract in whatever way the Principal or Superintendent decide in the Principal's interests only and without being under any obligation to do so.

*… ."' (**emphasis added**)*

[44] Morrison JA resolved the construction of the contract in the following way. First, his Honour referred to the provisions which on their face distinguish between 'Superintendent' and 'Principal':[43]

> *'**The contract contains numerous provisions which, on their face, draw a distinction between the Superintendent and the Principal, or impose obligations and duties on the Superintendent in a way which requires the Superintendent to act as a form of adjudicator as between the Contractor and the Principal. The following examples suffice to show the degree to which the contract draws relevant distinctions**:*
>
> *(a) the contract identifies a particular party as "the Principal" on the face of the Formal Instrument of Agreement, and in the definition of "Principal" which refers to Item 1 of the Annexure;*
>
> *(b) the Contractor is separately identified in the Formal Instrument of Agreement, in the definitions in clause 1 and in Item 3 of the Annexure;*
>
> *(c) **the Superintendent is the subject of a separate definition in clause 1, referring to the person stated in item 5** as the Superintendent, or other persons who are from time to time appointed by the Principal; that*

[43] *SHA*, [5], [6].

*goes together with Item 5 which refers to the Superintendent as "**S.H.A. Premier Constructions Pty Ltd nominated person**";*

(d) numerous clauses require the Superintendent to assess the cost of work or costs incurred by the Contractor, and whether it can be recovered against the Principal: for example, clauses 3, 11.2, 12, 13, 14.2, 16A, 19.2, 19.5(b), 20, 24.3, 25.2, 26.3, 27, 29.3, 32, 33, 34.3, 34.9, 37.1, 37.4, 39.6, 39.9 and 41.3;

(e) the Superintendent is also given contractual obligation to assess extensions of time, a function where the interests of the Contractor and the Principal may conflict: clauses 34.4 and 34.5;

*(f) given that the contract separately defines the "Principal" and the "Superintendent", **the contract contains numerous provisions where a particular obligation falls to be performed by the Superintendent, but not the Principal**; those provisions include: … ;*

*(g) bearing in mind the separate identification and definition of the Principal, Contractor and Superintendent, **the contract contains numerous clauses where requirements fall on or for the benefit of both** the Superintendent and the Principal: … ;*

*(h) bearing in mind the separate identification and definition of Principal, Contractor and Superintendent, the **contract contains provisions which otherwise differentiate between them**: … .' (**emphasis added**)*

[45] Second, having regard to those matters and what had been specified in Item 5 of the contract, (the Superintendent – 'S.H.A. Premier Constructions Pty Ltd nominated person'), Justice Morrison resolved the construction question:[44]

*'The foregoing is sufficient to demonstrate that the **contract proceeds on the basis that the Superintendent will be a separate entity from the Principal**. The obligations falling on the Superintendent, such as to assess costs, extensions of time and deal with progress claims, **all require the Superintendent to exercise obligations where the rights of the Contractor and the rights of the Principal are distinct and may conflict**. … . However, the contract expressly provides that **apart from those functions**, the Superintendent can carry out its duties as an agent and representative of the Principal, and in accordance with the Principal's instructions.*

Whilst it might be theoretically possible for the Principal to act in some capacity as a Superintendent, the contract clearly contemplates that the Superintendent will be a separate entity from the Principal as it is

[44] *SHA*, [16]-[20].

> *required to deal with issues where the interests and rights of the Contractor and Principal may be in conflict.*
>
> *… Construction of the words in Item 5, in the context of the contract as a whole,* ***admits of only two possibilities****.* ***First****, the words should be read as though the word "****or****" appeared between the Principal's name and the words "nominated person". That is the construction found by the learned primary judge,* ***with the consequence that the Principal nominated itself*** *as the Superintendent at all times.* ***The second is that the phrase should be read as*** *"S.H.A. Premier Constructions Pty* ***Ltd's*** *nominated person".*
>
> *In my respectful view, the first alternative to the construction of that phrase should not be adopted.* ***To insert the word "or" in the middle of the phrase is to say no more than the definition of "Superintendent" does in any event****.* ***Further, it results in the highly unlikely presumed intention of these two commercial parties, that the Principal would be entitled to be appointed as its own Superintendent****. Given the difficult obligations of a Superintendent in those respects where it stands between the competing interests of the Principal and the Contractor, and the need for it to perform those duties "****honestly and fairly****", it is in my respectful view,* ***fanciful to conclude that the parties intended for the Principal to act as Superintendent****.*
>
> *In my view, the preferred construction is that the identified Superintendent in Item 5 is the Principal's nominated person from time to time. … .' (****emphasis added****)*

[46] Justice Morrison also referred to the case of *Devaugh Pty Ltd v Lamac Developments Pty Ltd* (***Devaugh***).[45] While the construction issue was different in that case there were a number of provisions that mirrored those under consideration in *SHA*.[46] For that reason, Morrison JA referred to the reasons of Parker J, which stated:[47]

> *'If AS2545 1993 is considered alone, as a complete document, given that the term main contractor's representative is expressly and exhaustively defined in cl 2, I am not persuaded that as a matter of construction of the document itself, the view taken by the Master can be sustained. Indeed, when considering as a complete document and in isolation,* ***the preferable view would appear to be that its operation depended critically upon the appointment of an MCR who, despite the word 'representative', has functions under the conditions which are to be performed with a measure of independence from the main contractor so that fairness is done both to the subcontractor and the main contractor****. … I am* ***unable to see in the language*** *of AS2545 1993, when*

[45] [1999] WASCA 280; *SHA*, [21]-[24].
[46] *SHA*, [21]-[24].
[47] *SHA*, [24], referring to *Devaugh*, [100].

read in isolation as a complete document, ***adequate scope for a construction which would allow reference to the MCR to be references to the main contractor****.' (****emphasis added****)*

Conclusions

[47] The appeal was allowed with costs. The respondents were ordered to pay almost $2,000,000.

[48] The takeaways include:

a. Commerciality is a touchstone for construing contracts.

b. Attention should be paid to documenting transactions.

c. Any saving in legal costs at the front end through short cuts will be far exceeded, if litigation ensues (the parties had two counsel at trial and on appeal, as well as their solicitors).

Bettson Properties Pty Ltd & Anor v Tyler

Introduction

[49] The contract in *Tyler* was a standard form contract for the purchase of land that included a number of restrictive covenants as special conditions. One of those related to the requirement to obtain the vendors' approval before installing solar panels on the roof.

[50] The court comprised Sofronoff P, Fraser JA and Mullins J (as she then was). Fraser JA gave the lead judgment with the other justices agreeing.[48]

Background and issue

[51] Tyler purchased land form the Appellants' estate. The restrictive covenant included cl 1. 26 which related to solar panels provided:[49]

> *'The Buyer shall submit to the Seller, plans for covenant approval indicating the size, number and location of any solar panels. Any panels that are considered by the Seller to cause a visual impact or are not aesthetically pleasing, will not be approved.*
>
> ***The Buyer shall not proceed with affixing solar panels to any roof or structure until it has received the consent in writing*** *for the same from the Seller and then only in accordance with terms of the Seller's consent.'*

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[48] *Tyler*, [1], [31].
[49] *Tyler*, [4].

[52] Contrary to the covenant Tyler installed solar panels on her roof without submitting the required plans to the sellers or obtaining their consent.[50] A retrospective application for approval in the actual location was refused, although, consent was given for another location.[51] At one point before the trial, Tyler had agreed to remove the solar panels before becoming aware of the provisions, that were to become central to the dispute, set out below.[52]

[53] As with most aspects of modern law, legislation impacts on the common law. Such was the situation in this case. There is no doubt that statutory interpretation has long been a required skill for modern common law lawyers.

[54] Chapter 8A of the *Building Act 1975* included provisions that supported sustainable housing. Justice Fraser referred to the relevant parts and provisions:[53]

> *'The purpose of Part 2 of Chapter 8A of the Building Act 1975 (Qld) is expressed in s 246L as being "to regulate the effect of particular instruments on stated activities or measures likely to support sustainable housing." For present purposes the relevant provisions are sections 246Q and 246S in Division 2 of Part 2. The primary judge concluded that s 246Q applied to deprive cl 1.26 of any force and effect and, if s 246Q did not have such an effect, s 246S precluded the appellants from withholding their consent to the installation of the solar panels in the location chosen by the respondent. Those sections provide:*
>
> > *"**246Q Restrictions that have no force or effect—other restrictions***
> >
> > *(1) This section applies to a relevant instrument that, but for this section, would have the effect of **restricting** the location on the roof or other external surface of a prescribed building where a solar hot water system or photovoltaic cells may be installed.*
> > *(2) For a restriction in subsection (1), the relevant instrument has **no force or effect** to the extent the restriction—*
> > *(a) applies merely to enhance or preserve the external appearance of the building; and*
> > *(b) **prevents** a person from **installing** a solar hot water system or **photovoltaic cells on the roof** or other external surface of the building.*

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[50] *Tyler*, [5].
[51] *Tyler*, [5].
[52] *Bettson Properties & Anor v Tyler* [2018] QSC 153, [9].
[53] *Tyler*. [7].

Example of restriction applying for other than a purpose mentioned in subsection (2)—
The installation of a solar hot water system at a particular location on a roof may be restricted to maximise available space for the installation of other hot water systems or to prevent noise from piping associated with the system causing unreasonable interference with a person's use or enjoyment of the building.

246S When requirement to obtain consent for particular activities can not be withheld–other matters

*(1) This section applies if, under a relevant instrument, the **consent** of an entity is required to install a solar hot water system or photovoltaic cells on the roof or other external surface of a prescribed building.*
*(2) The entity **can not withhold consent** for an activity mentioned in subsection (1) merely to enhance or preserve the external appearance of the building, **if withholding the consent prevents** a person from installing a solar hot water system or photovoltaic cells on the roof or other external surface of the building.*
(3) A requirement under this section to not withhold consent—
*(a) is **taken to be a requirement under the relevant instrument**; and*
*(b) **applies to the relevant instrument despite any other provision of the instrument**."' (**emphasis added**)*

[55] Those provisions, if enlivened, affect how the relevant instrument, in this case, the contract, operated, either to include a further term for s 246S or to make the provision of no force or effect for s 246Q.

[56] The trial judge had found s 246Q applied and cl 1.26 prevented Tyler from installing the solar panels, and as a result was of no force and effect.[54]

[57] The breach of the contract, independent of the Building Act provisions, was admitted. The issue for the trial judge and the Court of Appeal in the appeal was the effect of those provisions.

[58] There was an explanatory note (there usually is). It relevantly provided:

'The primary judge found some confirmation of that construction in a statement in the explanatory notes to the Building and Other Legislation Amendment Bill 2009 (Qld). The explanatory notes include a statement that a policy objective of the Bill is to "ban the banners" by stopping

[54] *Bettson Properties & Anor v Tyler* [2018] QSC 153, [33].

bodies corporate and developers from restricting the use of sustainable and affordable design features such as light coloured roofs, single garages, smaller houses and solar hot water systems. Under the heading "Policy rationale" and a sub-heading "Ban the banners", the explanatory note states that the "policy aims to stop bodies corporate and developers from restricting the use of sustainable building elements and features" and:

> *"[t]his will be achieved by rendering invalid new covenants and body corporate statements/by-laws which restrict owners or bodies corporate from using selected sustainable and affordable features such as light roof colours, smaller minimum floor areas, fewer bedrooms and bathrooms, types of materials and surface finishes to be used for external walls and roofs, single garages and the* ***appropriate location for solar hot water systems and photovoltaic cells****.*
>
> *...*
>
> *While the overriding provisions cannot be varied merely for the purpose of preserving or enhancing the external appearance of the building, a body corporate will remain able to apply appropriate operational controls over the use of sustainability features to reduce any adverse impacts on affected neighbours. For example, bodies corporate may require roof finishes to have "low reflectivity" in cases where neighbours may be affected by glare or they may require that split solar hot water systems be used where the weight of roof storage units may not be supported by the roof members."' (**emphasis added**)*

[59] There was evidence before the trial court about the effect of the parties' relative contentions:

> *'The primary judge referred to evidence of a solar panel expert that if the solar panels were relocated to the south-eastern quadrant of the roof they would still be viable but would be up to about* ***20 per cent less efficient****. The appellants' director deposed that he was concerned that if the solar panels were not in a location on the roof where they would not* ***adversely affect the aesthetics of the estate the value of the estate and land and houses in it would be diminished, resulting in significant but not easily quantifiable lost revenue for the appellants and lost capital value for owners of houses in the estate****.' (**emphasis added**)*

[60] Justice Fraser resolved the issue primarily in a contextual way, including the language:

> *It appears from the terms of sections 246O, 246Q and 246S that each of them is designed to be the exclusive form of regulation of the kind of provision described in it. Some relevant instruments may contain different provisions falling within more than one of those sections, but* ***the better view appears to be that cl 1.26 is a provision only of the kind***

__described in s 246S__. Upon that view, there is no room for the operation of s 246Q. That result is consistent with the effect of s 246S. Where the purpose and effect described in s 246S(2) exist, the effect of s 246S(3) is that the relevant instrument is taken to require that an entity in the position of the appellants can not withhold consent. It follows that if the only relevant effect of the instrument is to require the consent of an entity to the installation, the instrument could not have the effect described in s 264Q(1).

It is not necessary to extend that analysis. The determinative question is instead whether the expression used in sections 246Q and 246S "prevents a person from installing a solar hot water system or photovoltaic cells on the roof or other external surface of the building" comprehends a case in which the result of the restriction (s 246Q) or the withholding of consent (s 246S) is that the photovoltaic cells may be installed only at a location where they will remain viable but will operate at about 80 per cent of the efficiency that would be achieved if they were instead installed at the proscribed location. __The critical word is "prevents"__. As the primary judge considered, and as is common ground between the parties, __"prevents" must bear the same meaning in both sections__. At least one of those sections must apply if "prevents" comprehends the result of the application of cl 1.26 in this case and neither section could apply if that result does not amount to prevention.

[61] In relation to language Justice Fraser said:

'Sections 246Q and 246S do not use expressions of the kind used elsewhere in the same Part of the Act which convey a much broader meaning. In certain circumstances s 246P deprives of force or effect a restriction upon the use in a prescribed building of an "energy efficient" window that does not "unreasonably prevent or interfere with" a person's use and enjoyment of the building or another building, whereas sections 246Q and 246S operate only where the restriction or withholding of consent "prevents" the installation. The same distinction between "prevents" and "interferes with" appears in the limitation of the operation of the relevant provisions in s 246T, in Division 3 of the same Part of the Act; relevantly, s 246T(2) provides that the operation of the Part does not create an entitlement to install a hot water system or photovoltaic cells "in a way that unreasonably prevents or interferes with a person's use and enjoyment of any part of the building". Furthermore, s 246O(1)(c)(iii) (see [9] of these reasons) refers to a requirement of an instrument that would result in "a less energy efficient building", whereas the immediately following provision, s 246O(1)(d), confines the operation of s 246O(3) to prohibitions of the installation of a solar hot water system or photovoltaic cells.

It is difficult to accept that the legislative purpose extended to proscribing restrictions upon or the withholding of consent for the installation of a solar hot water system or photovoltaic cells which

> ***merely interfere** with their operation or render it less energy efficient **when terminology of that kind was eschewed** and sections 246Q and 246S instead require for their operation that the restriction or withholding of consent "prevents" the installation of a solar hot water system or photovoltaic cells.' (**emphasis added**)*

[62] His Honour also looked to the practicalities to discern the meaning:[55]

> 'What seems likely to be much more common though are cases where, although a restriction or refusal of consent creates no such impediment to the installation, it leaves available only a part of the roof which receives less sunlight because of its aspect (as in this case) or because of shading by foliage, other natural features of the landscape, or structures. In such cases there will be a reduction in energy efficiency and a corresponding reduction in the potential economic benefit of installing the solar hot water system or photovoltaic cells. **If the adverse impact is significant it would tend to discourage the installation**. In these circumstances, the statutory purpose expressed in s 246L ("to regulate the effect of particular instruments on stated activities or measures likely to support sustainable housing") **encourages a liberal construction of the expression "prevents a person from installing" in sections 246Q and 246S such that it comprehends a case where the adverse impact is so substantial as to make it impractical to acquire and install a solar hot water system or photovoltaic cells**.
>
> **The respondent did not prove that this is such a case.** As I have indicated, the evidence is to the effect that at the location required by the appellants the photovoltaic cells will remain viable although **they will operate somewhat less efficiently than they would operate in the location where the respondent caused them to be installed. The evidence does not support any finding more favourable to the respondent** and the primary judge did not find that installation at the location required by the appellants **would be impractical, whether from an economic perspective or for any other reason**.
>
> The construction question then is whether "prevents a person from installing" in sections 246Q and 248S connotes not only "makes it impossible, impracticable or impractical for the person to install", but also less significant adverse effects, such as "less energy efficient for the person to install".
>
> **The construction of these sections must be sourced in the statutory text understood in its context, which includes the statutory purpose**. As the primary judge observed, an interpretation that will best achieve the purpose of an Act is to be preferred to any other interpretation and that purpose "resides in its text and structure" and also may appear "by appropriate reference to extrinsic materials". **Dictionary meanings** of

[55] *Tyler*, [19]-[22].

such a simple and commonly used English word as "prevent" **provide no real assistance** in determining the proper construction of these statutory provisions.' (**emphasis added**)

[63] The explanatory memorandum did not provide the court with assistance.[56]

[64] The Court of Appeal concluded:

> 'My conclusion is that the word "prevents" in sections 246Q and 246S bears its **common primary meaning of "stops from happening", which comprehends cases where the result of the relevant restriction or withholding of consent is that it is impossible, impracticable, or impractical to install a solar hot water system or photovoltaic cells**. In my respectful opinion there is **no ambiguity** in those provisions such as would allow for a construction under which "prevents" comprehends a less significant adverse result such as "less advantageous for the person to install". …'

Conclusions

[65] As a result, as s 246S did not 'prevent' Tyler from installing the solar panels and she was not absolved from the admitted breach of the restrictive covenant.

[66] The Court of Appeal allowed the appeal and, amongst other things, made the declaration of breach as well as ordering that the panels either be removed or relocated to the location where consent.

[67] The takeaways include:

a. The modern law of contract is impacted by to a large degree by legislation at both the State and Federal levels.

b. Legislation can not only affect the operation of contractual provisions, including the availability of remedies.

Robert A. Quirk
Chambers

5 March 2020

[56] *Tyler*, [29].