Recent decisions, trends and minimising the risk of disputes & prevailing when a dispute does arise

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Synopsis

1. In looking at the issues raised in this session I will review some recent cases, discuss the takeaways from them and the lessons for disputes, and then see what trends, if any, flow from the decisions.

Dyco Hotels Pty Ltd & Ors v Laundy Hotels (Quarry) Pty Ltd [2021] NSWCA 332 (*Dyco*)

Introduction

2. This is one of those cases where four judges considered the issues, they split 2:2 on the result, and the trial decision was reversed on appeal. The equal number of judges on either side of the outcome highlights the fact that the best minds can differ on these matters.

3. The appeal concerned a contract dated 31 January 2020 for the sale of the Quarrymans Hotel, situated in Pyrmont. The contract included a clause that the vendor/ respondent was to maintain the business 'in the usual and ordinary course as regards its nature, scope and matter' as at the date of the contract (**cl 50.1**). The contract also provided that the risk was not to pass until settlement (**cl 57**). The contract, in parts, was to settle on 30 and 31 March 2020.

4. On 23 March 2020 a public health order came into effect that significantly affected the trade of the hotel. It continued past the relevant settlement date and until the contract was terminated by the vendor.

5. There was various correspondence between the parties raising many issues, including frustration. At trial the court found there was no frustration, and this was not challenged on appeal. The issues raised by the purchasers included the inability of the vendor to complete. Ultimately, the vendor gave a notice to complete. On the same date, the purchasers commenced a proceeding in the Supreme Court claiming frustration, and alternatively, a declaration that the vendor was not entitled to issue a notice to complete, and in the further alternative, that while the business was not trading as going concern the vendor was not ready, willing and able to complete and issue the notice. The vendor then gave a notice of termination. The purchasers said that if the contract was not frustrated the notice of termination was a repudiation which was accepted.

6. At trial, the Court held cl 50.1 was subject to an implied limitation to carry on the business to the extent permitted by law and awarded damages to the vendor on the basis of the purchasers' refusal to settle and vendor's termination.

7. The Court of Appeal allowed the appeal as:

   a. it was not appropriate to imply the term limiting the obligation under cl 50.1;
   b. the vendor gave a notice to complete when they were not entitled to do so because they were in breach; and
   c. its purported termination was a repudiation which was accepted by the purchasers.

8. The reasoning of the majority, Bathurst CJ and Brereton JA, is illuminating.[1]

Chief Justice Bathurst

9. The Chief Justice said of cl 50.1 and the phrase 'nature, scope and manner':

> '[41] … it must be remembered that what was referred to in cl 50.1 was the usual and ordinary course of the defined Business. The clause was focusing on how the particular business was conducted, not the usual course of a hotel business generally, much less the usual course of businesses referred to in statutes of general application.
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> [42] That is also made clear by the succeeding words in cl 50.1, "as regards its nature, scope and manner". "Nature" refers to the type of business, a hotel business, "scope" refers to the extent that business is carried on and "manner" refers to how it is carried on. It can be readily inferred that all these matters were known to the parties having regard to the terms of the Information Memorandum.'

10. Bathurst CJ said with respect to the learned trial judge's construction:

> '[45] There are, with respect, a number of difficulties with this construction. First, it is not what the clause says. Second, it ignores the fact that cl 50.4 provided the obligation in cl 50.1 could be varied with the written consent of the purchaser. Third, it carries with it the possibility that cl 50.1 could be complied with irrespective of whether what is carried out as a result of the restriction imposed bears any resemblance to the usual or ordinary course of the business of the Quarrymans Hotel as regards its nature, scope and manner. In my opinion, that does not conform with the objective intention of the parties having regard to the purpose of the transaction.'

11. His Honour also said that the implied term was not reasonable, nor in the context of the contract, one that went without saying.[2] A significant factor in the Court's reasoning was that when an illegality is temporary, the relevant obligation is suspended rather than discharged (which also depends on the construction of the contract).[3]

12. The Chief Justice said that the vendor wasn't able to compel completion when it couldn't deliver possession of the business as a going concern.[4] Bathurst CJ also stated that there was no repudiation based on the appellants' argument as to the

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[1] Bathurst CJ, [1] and Brereton JA, [141]; Basten JA [86], in dissent. There was an issue of severability which was dealt with and rejected by the Court but which is not dealt with herein.
[2] *Dyco*, [51].
[3] *Dyco,* [64] and [71].
[4] *Dyco*, [72]-[77].

construction of the contract, as they were willing to accept an authoritative exposition of the correct interpretation of the contract.[5]

13. In the result, the purchasers were entitled to rely on the vendor's purported termination as a reputation and terminate the contract.[6]

Justice of Appeal Brereton

14. Brereton JA agreed with the Chief Justice's reasons, however, given the differences in the Court, decided to state his essential reasoning.

15. Brereton JA said that the vendor was not entitled to give a notice to complete for two related reasons: they were in default of cl 50.1 and they were not ready, willing and able to convey a hotel business of substantially the same nature, scope and manner as at the date of contract.[7]

16. Justice Brereton said of the trial judge's construction of cl 50.1:

> '[152] In my judgment, words to the effect "so far as is legally permissible from time to time" cannot be read into Additional Clause 50.1. The purpose of the clause was to ensure that upon completion the Purchasers acquired a business in the same condition "as regards its nature, scope and manner" as it was at the date of contract. The primary judge's construction involves the reading into Additional Clause 50.1 of words which do not appear in it and which have a radical impact on its operation in assuring to the Purchasers the transfer of a business in the condition in which it was sold.'

17. His Honour also said of cl 57:

> '[158] The purpose of provisions such as Additional Clause 57 is to reverse the position that obtained at common law, so as to visit such risks, if they materialise before completion, on the vendor. …'

18. Brereton JA said of the parties' common intention and the issue of implication:

> '[160] Additional Clause 50.1 was not expressed to be subject to any similar qualification. Given the prima facie position described by Latham CJ in Scanlan's, and the agreement that risk would pass upon completion, it would not accord with the objective common intention of the parties to read into Additional Clause 50.1 words that limited the Vendors' obligation to carry on the business to oblige them to do so only to the extent that it was lawful. As the Purchasers submitted, it could not be said that, had a term to that effect been proposed, the parties would have accepted it as of course, and it would be inconsistent with the tenor of the contract. While the exercise of contractual construction is not the same as that of finding an implied term, the former still involves the ascertainment of the objective common intention of the parties, and those considerations tell against reading into Additional Clause 50.1 such words. In short, there is no reason to attribute to the parties a common intention that, inconsistently with the purpose of Additional Clause 50 of assuring to the Purchasers the business in its condition as sold, and inconsistently with the allocation of risk to the Vendors by Additional Clause 57, the Purchasers were to bear the risk of a supervening legal impediment to the performance of Additional Clause 50.1.'

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[5] *Dyco*, [83]-[84].
[6] *Dyco*, [85].
[7] *Dyco*, [146].

19. Justice Brereton said that the vendor was in breach of cl 50.1 and not entitled to give notice to complete:

> '[164] In the present case, the "terms and surrounding circumstances" enable the question to be resolved by their allocation of the risk of supervening illegality prior to completion, consistently with Additional Clause 57, to the Vendors. In other words, the supervening illegality did not excuse the Vendors from performance of Additional Clause 50.1 if they wished to insist upon completion by the Purchasers. ...'

20. Brereton JA said the same conclusion could be based on the reasoning that the subject matter of the contract which the vendors were obliged to convey upon completion was an operating hotel business of substantially the same nature, scope and manner as at the date of contract, and not some scaled down version.[8]

Justice of Appeal Basten (in dissent)

21. Basten JA made a number points in dissent that are worthy of revisiting given what I said in the introduction to this case.

22. First, there is a fine line between implication of a term and the orthodox exercise of construction.[9] In this way his Honour construed cl 50.1, having regard to the contract,[10] as being understood as the 'nature, scope and manner permitted by law.' Basten JA indicated this meant that the appeal should fail.

23. Second, Basten JA did not consider in the setting of the contract that cl 50.1 imposed a condition precedent on completion or an essential condition. There were a myriad of factors his Honour said pointed to this conclusion.[11]

Takeaways

24. The construction of a contract 'requires consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or object to be served by the contract'.[12] It is not always a straightforward or easy task.

25. It also seems that the litigation might have been avoided if the contract had included a material adverse change or effects clause that provided for termination or compensation. Or, as was pointed out by Basten JA, that cl 50.1 could have also have been identified as being essential (possibly within an agreed range). These matters certainly would have reduced the risk of a dispute.

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[8] *Dyco*, [166]-[168].
[9] *Dyco*, [124] referring to *BP Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 180 CLR 266, 283 (Lord Simon)
[10] *Dyco*, [125], including with reference to the heavily regulated nature of the industry and the other provisions in the contract.
[11] *Dyco*, [128]-[140].
[12] *Dyco*, [38] and High Court authorities therein.

26. In *Dyco* the Chief Justice said in relation to repudiation:

> '[82] I do not think this conduct amounted to repudiation of the contract. A party repudiates a contract when he or she evinces an intention no longer to be bound by the contract or fulfil it in a manner substantially inconsistent with that party's obligations. The test is whether the conduct of one party is such as to convey to a reasonable person in the position of the other party renunciation either of the contract as a whole or a fundamental obligation under it: Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd (1989) 166 CLR 623 at 647; [1989] HCA 23; Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 115; [2007] HCA 61 at [44].
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> [83] However, repudiation is not to be inferred lightly. As was pointed out by the plurality in DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423 at 432; [1978] HCA 12, although there are cases in which a party, by insisting on an incorrect interpretation of a contract, evinces an intention that he or she will not perform the contract according to its terms, there are others in which a party, though asserting a wrong view of the contract because he or she believes it to be correct, **may be willing to accept an authoritative exposition of the correct interpretation. The plurality stated that in those circumstances an intention to repudiate will not be attributed to that party**.
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> [84] **The present case falls within the latter category.** The appellants were correct in asserting that they were not required to complete the contract and sought a declaration raising that question in addition to the question of frustration. There is no reason to suggest they would not have accepted the Court's conclusion on these issues. In these circumstances their conduct did not amount to a repudiation of the contract.'

27. This is an interesting conclusion because it means that avoiding the 'wrong end of the stick' with respect to repudiation can be avoiding by an indication of being willing to 'accept an authoritative exposition of the correct interpretation'. The purchasers' legal advisers clearly did enough in the view of the Court even if they had been wrong on the interpretation point. It is also to be remembered that the original decision was given on 10 May 2021, less than two months after completion was meant to occur. The appeal decision was handed down on 21 December 2021.

28. It shows that you can win on repudiation even if you lose on the construction point.

29. The involvement of legal advisors early, if things start to wobble, can help mitigate risks in litigation and lead to a win even if you 'lose'.

Carter v Mehmet [2021] NSWCA 286 (*Carter*)

Introduction

30. The Court in this matter also considered the issue of repudiation. The Court comprised Meagher, Gleeson and Payne JJA (they delivered a joint judgment). There were a number of issues raised in the appeal,[13] however, the issue of repudiation based on an incorrect interpretation of the contract is of most interest in terms of general contract law.

31. The alleged repudiation in dealt with by the Court was:

[13] *Carter*, [58].

'[150] On appeal, the parties' submissions were confined to whether the vendors repudiated the contract by failing to withdraw their claim for default interest. There was no further contention raised in relation to the validity of the notices to complete, or any allegation that the vendors' insistence that the purchasers comply with such notice was repudiatory.'

32. The trial judge found for the purchaser on another basis but dealt with this issue and would have held for the purchaser on this issue as well.[14]

The Court

33. The Court said of the parties' conduct:

'[154] These communications show that both parties had overlooked the effect of special condition 21, and neither of them at any relevant time maintained that the time by which completion was to take place as stipulated in special condition 21(c) had not commenced. As is apparent from their exchanges on 23 and 24 September 2015, each was proceeding on the basis that the contract had provided for completion on 5 August 2015. The vendors' position, completion not having occurred on that date, was that the parties were obliged to complete within a reasonable time. As there was no attention to special condition 21(c), there was no attention to whether the provision on 4 August 2015 of a copy of the transfer executed by Mr Carter as registered proprietor and "Certified correct for the purposes of the Real Property Act" satisfied, or was to be treated as satisfying, the requirement in that paragraph for notice of registration of the transmission application.

[155] Although the purchasers now contend that the vendors' insistence on the payment of default interest constituted repudiatory conduct, **at no point in the communications set out above did the purchasers dispute the correctness of the vendors' interpretation of special condition 8** of the contract, which provided for the payment of default interest, or the vendors' calculation of that interest.' (**emphasis added**)

34. Their Honours referred to the relevant principles:

'[156] In *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 432; [1978] HCA 12, Stephen, Mason and Jacobs JJ said:

"No doubt there are cases in which a party, by insisting on an incorrect interpretation of a contract, evinces an intention that he will not perform the contract according to its terms. But there are other cases in which a party, though asserting a wrong view of a contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognize his heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. In either event, an intention to repudiate the contract could not be attributed to him. As Pearson LJ observed in *Sweet v Maxwell Ltd v Universal News Services Ltd* [1964] 2 QB 669 at p 734:

> 'In the last resort, if the parties cannot agree, the true construction will have to be determined by the court. A party should not too readily be found to have refused to perform the agreement by contentious observations in the course of discussions or arguments…"

See also *Green v Sommerville* (1979) 141 CLR 594 at 611 (Mason J); [1979] HCA 60.

[157] In an oft-cited caution against too readily finding that a party has evinced an intention no longer to be bound by a contract, Wilson J said in *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 633; [1982] HCA 47:
"Repudiation of a contract is a serious matter and is not to be lightly found or inferred."'

[14] *Carter*, [148].

35. The Court said the following in conclusion and dismissing the claim of repudiation:

> '[158] This is a case in which **it should not be concluded that the vendors repudiated the contract**. **Both parties** proceeded on the basis that the date fixed for settlement was 5 August 2015, and the only point of contention was whether the purchasers did "not complete [the] purchase by the completion date, without default by the vendor[s]" (special condition 8).
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> [159] The view that 5 August 2015 was the settlement date nominated by the contract was an erroneous one. Special condition 21(c) prevailed and required that completion take place within 14 days after notification of the registration of the Transmission Application.
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> [160] In argument before this Court, the vendors contended that the provision of the duly executed transfer identifying Mr Carter as transferor (and therefore registered proprietor) was sufficient to satisfy special condition 21(c). The purchasers contended that it was not. It is unnecessary for us to decide that question.
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> [161] **In acting in the way they did, and insisting on payment of default interest calculated from 5 August 2015, the vendors proceeded on a mistaken view as to the date for completion.** That view was **shared by the purchasers, who never identified or confronted the vendors with that error.** Nor did the purchasers suggest that the completion date had not arrived, **merely asserting that they were not in default**.
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> [162] ... **The purchasers did not suggest that the parties seek an authoritative ruling about the correct interpretation of the contract in relation to the payment of default interest**.
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> [163] **In these circumstances, the vendors' insistence on the payment of default interest calculated from 5 August 2015 did not amount to repudiation of the contract. They did not insist on settlement with an incorrect view of the contract in the face of a clear explanation of the true position.** At the same time, they had a reasonable basis for maintaining that completion had not proceeded on 5 August without their default.'

Takeaways

36. These recent cases in relation to repudiation clarify a number of matters if a claim of repudiation involving an incorrect interpretation of a contract:

    a. It is necessary to be particular in correspondence;
    b. Where both parties make the same mistake on a related issue that may weaken the claim;
    c. Seeking to approach to approach the Court with respect to a particular construction issue, and seeking agreement to do so, while potentially expensive, can help a party in making or defending an allegation of repudiation.

CFMMEU v Personnel Contracting Pty Ltd [2022] HCA 1 (*CFMMEU*) & ZG Operations Australia Pty ltd v Jamsek [2022] HCA 2 (*ZG Operations*) (*Independent Contactor Cases*)

Introduction

37. The Independent Contractor Cases clarify the law relating to contracts of service versus contracts of service reinforcing the primacy of the contract in the characterising the relationship. Beyond that they also explain what evidence is admissible not just with respect to those types of contracts but contracts generally.

38. In *CFMMEU* all justices agreed in the orders, except Steward J. In *ZG Operations*, all justices agreed on the outcome.

CFMMEU

Chief Justice Kiefel, Justice Keane and Justice Edelman

39. The plurality, Kiefel CJ, Keane and Edelman JJ outlined the facts and observed:

> '[15] A number of observations may be made here about the terms of the ASA. First, Recital A might be said to suggest that Construct was engaged merely in seeking out business opportunities for Mr McCourt. But the operative terms of the ASA and the factual matrix in which it was made make it clear that Construct's business was more substantial than introducing labourers to builders. Under cl 2(a), Construct was empowered to fix Mr McCourt's remuneration, subject to the possibility that he might negotiate extra benefits from Hanssen. And under cll 1(d) and 5(a), Construct assumed the obligation to pay Mr McCourt for his work with Hanssen.
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> [16] Once Mr McCourt accepted an offer of work, his core obligation pursuant to cl 4(a) was to "[c]o-operate in all respects with Construct and [Hanssen] in the supply of labour to [Hanssen]". This included, pursuant to cl 4(c), the obligations to attend Hanssen's worksite at the nominated time, and to supply labour to Hanssen "for the duration required by [Hanssen] in a safe, competent and diligent manner".
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> [17] Similar obligations were contained in Construct's Contractor Safety Induction Manual signed by Mr McCourt. By that document, which was found by the Full Court to have contractual force between Mr McCourt and Construct, Mr McCourt agreed, inter alia: to follow all worksite safety rules and procedures given by Construct's "host client", and to report any safety hazards, incidents or injuries to the site supervisor or administrator and to Construct.
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> [18] Before both the primary judge and the Full Court, the facts surrounding the work practices of Construct and Hanssen, and the specific arrangements vis-à-vis Mr McCourt, were canvassed at length. **Given there was no challenge to the validity of the ASA nor any suggestion that the contract had been varied by conduct, a review of how the parties went about discharging their obligations to each other after execution of the ASA was unwarranted.** It is unnecessary and inappropriate to replicate that fact-finding exercise in this Court. To the extent that this discussion of post-contractual performance had a bearing upon the reasoning of the courts below, it is sufficiently apparent from the reasons given for their decisions.' (**emphasis added**)

40. Their Honours said:

> '[35] In this Court, the appellants submitted that the question whether a labourer is conducting his or her own independent business, as distinct from serving in the business of the employer, provides a more meaningful framework to guide the characterisation of the parties' relationship. There is force in that submission. …
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> [39] While the "central question" is always whether or not a person is an employee, and while the "own business/employer's business" dichotomy may not be perfect so as to be of universal application for the reason that not all contractors are entrepreneurs, the **dichotomy usefully focusses attention upon those aspects of the relationship generally defined by the contract which bear more directly upon whether the putative employee's work was so subordinate to the employer's business that it can be seen to have been performed as an employee of that business rather than as part of an independent enterprise.** In this way, one may discern a more cogent and coherent basis for the time-honoured distinction between a contract of service and a contract for services than merely forming an impressionistic and subjective judgment or engaging in the mechanistic counting of ticks on a multifactorial checklist.' (**emphasis added**)

41. The plurality stated that where the contract is wholly in writing it is the determining factor:

> '[43] While there may be cases where the rights and duties of the parties are not found exclusively within a written contract, this was not such a case. In cases such as the present, where the terms of the parties' relationship are comprehensively committed to a written contract, the validity of which is not challenged as a sham nor the terms of which otherwise varied, waived or the subject of an estoppel, **there is no reason why the legal rights and obligations so established should not be decisive of the character of the relationship**.
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> [44] Not only is there no reason why, subject to statutory provisions or awards, **established legal rights and obligations in a contract that is entirely in writing should not exclusively determine the relationship between the parties but there is every reason why they should. The "only kinds of rights with which courts of justice are concerned are legal rights".** The employment relationship with which the common law is concerned must be a legal relationship. It is not a social or psychological concept like friendship. There is nothing artificial about limiting the consideration of legal relationships to legal concepts such as rights and duties. By contrast, there is nothing of concern to the law that would require treating the relationship between the parties as affected by circumstances, facts, or occurrences that otherwise have no bearing upon legal rights.' (**emphasis added**)

42. Their Honours said that subsequent conduct is irrelevant in determining the nature of the relationship except where it relates to variation of the contract.[15] They said that there was no decision of the Court that had ever adopted any such departure.[16]

43. The plurality confirmed the confinement of the relevant inquiry:

> '[59] Where the parties have comprehensively committed the terms of their relationship to a written contract the validity of which is not in dispute, the characterisation of their relationship as one of employment or otherwise proceeds by reference to the rights and obligations of the parties under that contract. Where no party seeks to challenge the efficacy of the contract as the charter of the parties' rights and duties, on the basis that it is either a sham or otherwise ineffective under the general law or statute, **there is no occasion to seek to determine the character of the parties' relationship by a wide-ranging review of the entire history of the parties' dealings. Such a review is neither necessary nor appropriate because the task of the court is to enforce the parties' rights and obligations, not to form a view as to what a fair adjustment of the parties' rights might require**.
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> [60] In this respect, **the principles governing the interpretation of a contract of employment are no different from those that govern the interpretation of contracts generally**. The view to the contrary, which has been taken in the United Kingdom, cannot stand with the statements of the law in Chaplin and Narich.' (**emphasis added**)

44. Kiefel CJ, Keane and Edelman JJ also said that it was up to the Court to characterise the relationship and the opinion of the parties is irrelevant.[17]

45. Their Honours concluded:

> '[89] Under the ASA, Mr McCourt promised Construct to work as directed by Construct and by Construct's customer, Hanssen. Mr McCourt was entitled to be paid by Construct in return for the work he performed pursuant to that promise. That promise to work for Construct's customer, and his

[15] *CFMMEU*, [45]-[46].
[16] *CFMMEU*, [47], [55].
[17] *CFMMEU*, [66].

entitlement to be paid for that work, were at the core of Construct's business of providing labour to its customers. The right to control the provision of Mr McCourt's labour was an essential asset of that business. Mr McCourt's performance of work for, and at the direction of, Hanssen was a direct result of the deployment by Construct of this asset in the course of its ongoing relationship with its customer.

[90] In these circumstances, it is impossible to conclude other than that Mr McCourt's work was dependent upon, and subservient to, Construct's business. That being so, Mr McCourt's relationship with Construct is **rightly characterised as a contract of service rather than a contract for services. Mr McCourt was Construct's employee**.' (**emphasis added**)

Justice Gageler and Justice Gleeson

46. Gageler and Gleeson JJ took a different view of the law. Their Honours said:

'[142] The assumption on which lower courts have mostly proceeded is, in our opinion, correct. The italicised words in the first of the three principles stated by the Privy Council in Narich did not accord with the prevailing understanding of the common law in Australia when Narich was decided. To the extent of the inclusion of those words, that first principle was wrong when Narich was decided. That principle has not grown to be either correct or workable with age: it should not be accepted to be part of the common law of Australia.

[143] **The true principle, in accordance with what we understand to have been the consistent doctrine of this Court until now, is that a court is not limited to considering the terms of a contract and any subsequent variation in determining whether a relationship established and maintained under that contract is a relationship of employment. The court can also consider the manner of performance of the contract.** That has been and should remain true for a relationship established and maintained under a contract that is wholly in writing, just as it has been and should remain true for a relationship established and maintained under a contract expressed or implied in some other form or in multiple forms.' (**emphasis added**)

47. In summary, their Honours concluded:

'[158] The aspects of the relationship that existed in fact between Mr McCourt and Construct during each of the two relevant periods most pertinent to the legal characterisation of the relationship can be summarised as follows. **First**, Mr McCourt was engaged by Construct under the ASA to supply nothing but his labour to Hanssen, which he in fact did and for which he was paid an agreed hourly rate by Construct. **Second**, by supplying his labour to Hanssen, Mr McCourt was at the same time supplying his labour to Construct for the purposes of Construct's business. He was not in any meaningful sense in business for himself. **Third**, and most importantly, when supplying his labour to Hanssen, Mr McCourt was subject to the direction and control of Hanssen through the back-to-back operation of his obligation to Construct under the ASA and Construct's obligation to Hanssen under the LHA. Those aspects of the relationship made it a relationship of employment.' (**emphasis added**)

Justice Gordon

48. Gordon J said:

'[173] **It follows that, in the case of a wholly written employment contract, the "totality of the relationship" which must be considered is the totality of the legal rights and obligations provided for in the contract. To ascertain those legal rights and obligations the contract in issue must be construed according to the established principles of contractual interpretation.** The statutory command to give "employee" and "employer" their ordinary meanings requires no less and permits no more.

[174] **The task is to construe and characterise the contract made between the parties at the time it was entered into.** The nature of the contracting parties, such as where a contracting party is a separate entity or a partnership, rather than an individual, may suggest that the relationship between the parties is not that of employer and employee. The way that the contractual terms address the mode of remuneration, the provision and maintenance of equipment, the obligation to work, the hours of work, the provision for holidays, the delegation of work, and where the right to exercise direction and control resides may together show that the relationship is not one of employer and employee.' (**emphasis added**)

49. In terms of principles of construction, her Honour referred to 'subsequent conduct' stated:

'[176] **One "general principle" of construction of contracts is that "it is not legitimate to use as an aid in the construction of [a] contract anything which the parties said or did after it was made" (what might be described as "subsequent conduct").** The rationale of the general principle, identified by Lord Reid in James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd, is to avoid the result "that a contract meant one thing the day it was signed, but by reason of subsequent events meant something different a month or a year later". **The general principle may permit exceptions. No party contended that any exception should be recognised in this appeal**.' (**emphasis added**)

50. Of the exceptions Gordon J catalogued them:

'[177] Of course, the general principle against the use of subsequent conduct in construing a contract wholly in writing says nothing against the admissibility of conduct for purposes unrelated to construction, including in relation to: (1) **formation** – to establish whether a contract was actually formed and when it was formed; (2) **contractual terms** – where a contract is not wholly in writing, to establish the existence of a contractual term or terms; (3) **discharge or variation** – to demonstrate that a subsequent agreement has been made varying one or more terms of the original contract; (4) **sham** – to show that the contract was a "sham" in that it was brought into existence as "a mere piece of machinery" to serve some purpose other than that of constituting the whole of the arrangement; and (5) **other** – to reveal "probative evidence of facts relevant to rectification, estoppel or any other legal, equitable or statutory rights or remedies that may impinge on an otherwise concluded, construed and interpreted contract". The relevance of subsequent conduct for the purposes of a particular statutory provision, legislative instrument or award was not in issue in this appeal.' (**emphasis added**)

51. Her Honour went on:

'[183] The better question to ask is whether, by construction of the terms of the contract, the person is contracted to work in the business or enterprise of the purported employer. That question is focused on the contract, the nature of the relationship disclosed by the contract and, in this context, whether the contract discloses that the person is working in the business of the purported employer. It invites no inquiry into subsequent conduct. A consequence of a negative answer to that alternative question may be that the person is not an employee. Another consequence may be, but does not have to be, that they have their own business. As five judges of this Court said in Hollis v Vabu Pty Ltd, both employees and contractors can work "for the benefit of" their employers and principals respectively, and so that, "by itself", cannot be a sufficient indication that a person is an employee (emphasis added). That does not detract from the fact that **where the contract is oral, or partly oral and partly in writing, subsequent conduct may be admissible in specific circumstances for specific purposes – to objectively determine the point at which the contract was formed, the contractual terms that were agreed or whether the contract has been varied or discharged**. …

[188] **The multifactorial approach was applied not merely without any central principle to guide it but also by reference to a roaming inquiry beyond the contract. It allowed consideration of what**

had happened after the entry into the contract to characterise the nature of "the status or relationship of parties". That is not appropriate. Such an inquiry slips away from – slips over – **the critical consideration that the relationship between the parties is the relationship established by contract. Conduct may be looked at to establish the formation, variation or discharge by agreement and the remaking of a contract. But evidence that is relevant to inquiries of those kinds is limited by the purpose of the inquiry. The evidence of what was done is relevant only if and to the extent that it shows or tends to show that a contract was made between the parties or a contract previously made between the parties was varied or discharged**.' (**emphasis added**)

52. Gordon J concluded:

'[198] As is apparent, Construct was owed obligations by Mr McCourt which enabled it to carry on its labour hire business, and the discharge of those obligations by Mr McCourt was a necessary condition of Mr McCourt receiving payment for his work. The contractual terms also reveal that the contract was for Mr McCourt's personal performance of work and his mode of remuneration was consistent with that of an employment relationship. …

[201] **Nothing in the context objectively known to the parties at the time of making the ASA detracts from that characterisation of that relationship as one of employer and employee.** Rather, the context of an individual on a working holiday visa being contracted to perform labouring work as directed by Construct and required to provide nothing but basic personal protective equipment reinforces that characterisation. Given that both parties accepted that the contract between Construct and Mr McCourt was wholly in writing (relevantly, in the ASA), **it is neither necessary nor appropriate to look at how the ASA was performed. In this appeal, subsequent conduct is irrelevant**.' (**emphasis added**)

Justice Steward

53. Steward J agreed that the principles outlined by Gordon J but would have dismissed the appeal on the basis that the established principles from *Odco* (with similar arrangements to the current case) should not be overruled because of reliance on them and the consequent unfairness.[18]

ZG Operations

Chief Justice Kiefel, Justice Keane and Justice Edelman

54. The plurality in this case (the same as in *Personnel Contracting*) summarised the facts, as follows:

'[2] The respondents were initially engaged as employees of the company and drove trucks provided by the company. However, in late 1985 or early 1986, the company insisted that it would no longer employ the respondents, and would continue to use their services only if they purchased their trucks and entered into contracts to carry goods for the company. The respondents agreed to the new arrangement and each of Mr Jamsek and Mr Whitby set up a partnership with his wife. Those partnerships purchased trucks from the company and executed a written agreement with the company for the provision of delivery services. Thereafter, the respondents made deliveries as requested by the company. Each partnership invoiced the company for the delivery services provided, and was paid by it for those services. Part of the revenue earned was used to meet the partnerships' costs of operating the trucks. The net revenue earned was declared as partnership income and split between husband and wife for the purposes of income tax.'

[18] *CFMMEU*, [203]-[223].

55. In terms of the scope of the inquiry involved their Honours said:

> '[9] In addition, as a practical matter of the due administration of justice, the task of raking over the day-to-day workings of a relationship spanning several decades is an exercise not to be undertaken without good reason having regard to the expense to the parties and drain on judicial time involved in such an exercise. The claims made by the respondents in this case did not give rise to an occasion for such an exercise, **those claims involving no suggestion that any aspect of the day-to-day performance of the contract superseded the rights and duties established by the contract.** That having been said, however, in order to aid an understanding of the reasons of the courts below and of the arguments in this Court, it is desirable to summarise the salient aspects of the history of the dealings between the parties.'

56. Kiefel CJ, Keane and Edelman JJ went on:

> '[61] **On the orthodox approach to the interpretation of contracts, regard may be had to the circumstances surrounding the making of a contract.** The 1986 contract between the partnerships and the company came to be made because of the company's insistence that the only ongoing relationship between the respondents and the company would be that established by the 1986 contract and that the partnerships would own and operate the trucks which would transport the company's deliveries. Given that the genesis of the contract was the company's refusal to continue to employ the respondents as drivers, and the respondents' evident acceptance of that refusal, it is difficult to see how there could be any doubt that the respondents were thereafter no longer employees of the company.
>
> [62] The circumstance that this state of affairs was brought about by the exercise of superior bargaining power by the company weighed heavily with the Full Court; **but that circumstance has no bearing on the meaning and effect of the bargains that were struck between the partnerships and the company**. … In Australia, claims of sham cannot be made by stealth under the obscurantist guise of a search for the "reality" of the situation.'

Justice Gageler and Justice Gleeson

57. Gageler and Gleeson JJ said:

> '[80] Faced with claims of that type, to the extent necessary to adjudicate the issues in dispute, courts and tribunals applying common law principles have been **astute to ascertain what the real relationship between the company and the worker was following the signing of the contract and to characterise that relationship in its totality**. They have not always been astute to distinguish contractual variation from contractual performance. That has been unsurprising given that contractual performance and any contractual variation will have occurred within the same matrix of fact. The distinction, moreover, has not always been seen to have mattered, since the terms of the contract as varied and the manner of its performance have both been understood to have borne on the ultimate question of characterisation. That has been so whether the ultimate question of characterisation has been framed more in terms of whether the worker was supplying subordinated labour under the control of the company or more in terms of whether the worker was carrying on his or her own business.'

58. Their Honours went on:

> '[87] Leaving more equivocal indications to one side, two features of the relationship that existed in fact between Mr Jamsek and the company point inexorably to it having been a relationship within which Mr and Mrs Jamsek in partnership provided carriage services to the company using their own

truck as distinct from a relationship within which Mr Jamsek provided personal service to the company as a truck driver.

[88] The **first** is that Mr and Mrs Jamsek were obliged to, and did, maintain the truck which was used to perform the 1993 contract. A relationship of employment is a relationship of personal service. Personal service is not inherently inconsistent with the individual who provides service being responsible for the physical means by which his or her service is provided. Bicycle couriers were found to be employees in Hollis v Vabu Pty Ltd despite having used their own bicycles, just as Mr McCourt has been found to be an employee in CFMMEU despite having purchased and presumably used his own hard hat. But acceptance by the plurality in Hollis that motor vehicle couriers and motorbike couriers in contractual arrangements similar to the bicycle couriers might not have been employees shows that questions of scale can be important and even decisive. Where work contracted for, actually performed by an individual, and paid for, involves use of a substantial item of mechanical equipment for which the provider of the work is wholly responsible, the personal is overshadowed by the mechanical. That was recognised by this Court in Humberstone v Northern Timber Mills and again in Wright v Attorney-General for the State of Tasmania. Those cases were cited as authorities for that proposition in Neale v Atlas Products (Vic) Pty Ltd; they support what has become the "conventional view" that "owners of expensive equipment, such as [a truck], are independent contractors".

[89] The **second** important feature of the relationship is that it was Mr and Mrs Jamsek in partnership who contracted for the doing of the work involving the use of the truck, and who were therefore jointly and severally liable to the company for the performance of the 1993 contract and jointly and severally entitled to be paid by the company when performance in fact occurred. They together invoiced the company as partners and were together paid by the company as partners.'

Justice Gordon and Justice Steward

59. Gordon and Steward JJ applied the principles they agreed on in *CFMMEU*.[19]

60. Their Honours said of relevant evidence that:

'[109] Consistent with the principles set out in CFMMEU, it was both **relevant and admissible to adduce evidence** to establish, in the case of the Whitby Partnership and Mr Whitby, that the 2008 Contract was discharged, that a new contract was formed and what the terms of that contract were. **By contrast, however, how the parties exercised their rights, performed their duties or unilaterally conducted themselves, whether at the time of a change in ownership of the business, the time of the dissolution of the Whitby Partnership or any other time during the period of the claim, was not relevant**.' (**emphasis added**)

Issue not dealt with

61. The High Court remitted the question of whether the respondents fell within the definition of 'employee' under the *Superannuation Guarantee (Administration) Act 1992* as the Full Court had not found it necessary to make findings with respect to the issue.

Takeaways

62. The Independent Contractor Cases indicate that a written contract takes much more prominence than had to the time of those cases been the situation. Where the relevant contract is wholly in writing it will be determinative subject to the usual

[19] *ZG Operations*, [135].

orthodox evidence as to its construction, and the catalogue of exceptions identified by Gordon J in *CFMMEU*. Subsequent conduct is not admissible as to its construction or meaning.

63. As Gordon J pointed out in *CFMMEU* the conduct of the parties may be admissible where the issues include:

    a. formation;
    b. contractual terms;
    c. discharge or variation;
    d. sham;
    e. other (including rectification, estoppel or any other legal, equitable or statutory rights or remedies that may impinge on an otherwise concluded, construed and interpreted contract).

64. The consequence of *CFMMEU* would seem that many independent contractors engaged by labour hire companies will be their employees.

65. Risk in employment/ service contracts can be managed by the drafting of contracts, and any changes in practices and circumstances. The failure to document may lead to issues of the type set out above.

66. The characterisation of the issue(s) is likely to be important with respect to the potential for success in litigation as it will affect what evidence can be adduced.

Marbryde Pty Ltd v Mainland Property Holdings No 8 Pty Ltd [2021] QSC 344 (*Marbryde*)

Introduction

67. *Marbryde* was a case in the Queensland Supreme Court. I have chosen to include it as a case as it involves the issues of contract formation and electronic transactions legislation, and electronic transaction issues are only likely to increase in the future.

68. Bowskill SJA summarised the background, facts and the cases being made as follows:

> '[1] The plaintiff made an offer to purchase property owned by the defendant, which was offered for sale by receivers appointed by a secured creditor of the defendant. It says the defendant accepted that offer and a binding contract came into existence, either on 24 August 2021 (when an email was sent by the real estate agent appointed by the receivers) or 26 August 2021 (when the deposit was paid). The defendant denies this. On 1 September 2021, the receivers executed a contract for sale of the property to a third party for a higher amount. When the prospect of this was flagged to the plaintiff, it caused a caveat to be lodged. By its claim, the plaintiff seeks a declaration that the plaintiff has a binding and enforceable contract with the defendant for the sale of the property and an order for specific performance of that contract. By its counterclaim, the defendant seeks a declaration that no such contract was entered into and an order for removal of the caveat. By its amended counterclaim, the defendant also seeks damages under s 130 of the *Land Title Act 1994*. As the contract with the third party is due to settle (following extension) on 31 January 2021, the plaintiff's claim, and the defendant's counterclaim for removal of the caveat, have proceeded to trial quickly.

The defendant's counterclaim for damages was not before me for determination and has been adjourned to a date to be fixed. …

[23] The **plaintiff's case** is that, by the email of 24 August 2021, the defendant accepted the plaintiff's offer to purchase the property and a binding, enforceable contract was formed on that day, with performance of the contract conditional upon the plaintiff paying the deposit. Alternatively, the plaintiff contends that by the email of 24 August 2021, the defendant accepted the plaintiff's offer, and that upon the deposit being paid the (only) precondition to formation of the contract was met and a binding and enforceable contract between the plaintiff and the defendant was formed on 26 August 2021. In so far as s 59 of the *Property Law Act 1974* requires "some memorandum or note of the contract, [which] is in writing, and signed by the party to be charged, or by some person by the party lawfully authorised", the plaintiff relies upon s 14 of the *Electronic Transactions (Queensland) Act 2001* to contend that the email of 24 August 2021 is sufficient to meet this requirement.

[24] The **defendant's case** is that no binding contract came into effect on 24 or 26 August 2021, as the words used in the 24 August 2021 email are objectively consistent with the defendant not intending to be immediately bound, and instead requiring formal execution of any contract before being bound. The defendant also contends that s 59 of the *Property Law Act* operates to prevent the plaintiff bringing action on the purported contract, and in this regard that s 14 of the *Electronic Transactions (Queensland) Act* does not apply.'

69. Justice Bowskill referred to the principle as to the intention to create contractual relations and the usual position in relation to contracts for the sale of land:

'[26] Whether the parties intended to create contractual relations requires an objective assessment of the state of affairs between the parties, which may take account of the subject matter of the agreement, the status of the parties to it, their relationship to one another, and other surrounding circumstances.

[27] It has been observed that in the context of a contract for the sale of land, the usual expectation of parties in negotiation is that they will not be taken to have made a concluded bargain unless and until a formal contract is executed. However, this is not an intractable rule and the decisive issue is always the intention of the parties, which must be objectively ascertained from the factual context.'

70. In the course of the Court's reasoning the court commented on a number of issues including that there would be a binding agreement until a contract was validly executed, that there was unqualified acceptance, there remained matters to be finally agreed, and the general lack of authority of a real estate agent to effect the sale.[20]

71. In terms of the electronic signature issues Bowskill SJA said:

'[34] The document relied upon by the plaintiff as meeting this requirement is the email of 24 August 2021, sent by the agent, Mr Croghan. For this conclusion, the plaintiff calls in aid s 14 of the *Electronic Transactions (Queensland) Act 2001*, which provides:

"14 Requirement for signature

(1) If, under a State law, a person's signature is required, the requirement is taken to have been met for an electronic communication if—
(a) a method is used to identify the person and to indicate the person's intention in relation to the information communicated; and

[20] *Marbryde*, [28]-[31].

(b) the method used was either –
(i) as reliable as appropriate for the purposes for which the electronic communication was generated or communicated, having regard to all the circumstances, including any relevant agreement; or
(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence; and
(c) the person to whom the signature is required to be given consents to the requirement being met by using the method mentioned in paragraph (a).
(2) The reference in subsection (1) to a law that requires a signature includes a reference to a law that provides consequences for the absence of a signature."

[35] The plaintiff pleads that it is to be inferred that the parties have consented to the method referred to in s 14(1)(a) – namely, that the email of 24 August 2021 should suffice as the signature of the defendant as seller – because:
(a) the parties engaged in negotiations by electronic communication including email and text message;
(b) the plaintiff's offer was sent by email; and
(c) acceptance of the plaintiff's offer was by email of 24 August 2021; or
(d) alternatively, the parties expressly agreed to signing by way of electronic signature, pursuant to clause 37 of the contract.

[36] Dealing with the last point first, the email of 24 August 2021 cannot be taken as an "electronic signature" for the purposes of clause 37 of the contract. As defined in clause 1 of the REIQ standard commercial terms, an "electronic signature" means an electronic method of signing that identifies the person and indicates their intention to sign the contract. **The plaintiff, as buyer, affixed an electronic signature, being an electronic image of the paper signature of its director, Mr Sinclair. The contract was never signed by the defendant, or its receiver, using any kind of signature, electronic or otherwise. The email from the real estate agent is not an "electronic method of signing" for the purposes of clause 37**.

[37] Moreover, the **parties cannot be taken to have consented** to the email from the real estate agent as a "method" for the purposes of s 14(1)(a), **in the face of the express acknowledgements in the expression of interest form**, the express wording of the email itself, and the fact that it was a communication from the real estate agent, not the defendant or its receivers.

[38] The mere fact that the plaintiff communicated its offer – in the form of a copy of a formal contract, bearing the electronic signature of Mr Sinclair as the sole director of the plaintiff – by way of an attachment to an email, **does not provide a basis to infer**, from the factual circumstances of this case, that the defendant consented to the contract being formed by exchange of electronic communications. In this regard, the present case may be distinguished from Stellard Pty Ltd & Anor v North Queensland Fuel Pty Ltd [2015] QSC 119, in which the negotiations took place by email (not by attachment of a formal contract, signed by the offering party); the offer was set out in an email; the acceptance was communicated in an email by a person expressly authorised to do so; it was held that the broader context of the two emails and the other expressions used in them strongly suggested that the parties were content to be bound immediately (at [39]); and, further, was held that in circumstances where parties have engaged in negotiation by email and, in particular, where an offer is made by email, **then it is open to the court to infer that consent has been given by conduct of the other party** (at [68]).

[39] In this case, it is **not open to draw such an inference**. On the contrary, the fact of the offer being in a formal contract, executed by the plaintiff; against the background of the expression of interest document; taken together with the express words of the 24 August 2021 email, **strongly supports the conclusion that the defendant did not agree to such a method**, and maintained its insistence that no binding contract would come into existence until the actual contract was executed by both parties.

[40] **Merely because the offer**, in the form of a copy of the contract, signed by the offeror, **is sent to the other party attached to an email is not sufficient to support an inference that the other party has agreed to its acceptance, and indeed signature, being presumed from an email in response**. **The**

reality is that nowadays most communications will be by email. The point made in Stellard is not that any use of email to communicate gives rise to an inference of consent to communication of binding intent by electronic means. Rather, in that case, **it was because the substance of the negotiations had been undertaken by an exchange of emails that the Court considered it could be inferred the parties consented to their intentions being communicated, in a binding way, using that method**. But if, as in this case, the evidence points to the fact that **one of the parties insisted**, from the outset of the negotiations, that **there would be no binding agreement until the contract was actually executed by both parties, it is not open to infer, simply from the use of email as a means of communication, consent to some other method of conveying their intention**.

[41] In all the circumstances, the plaintiff has not established a basis for the declaration it seeks nor for an order for specific performance. The plaintiff's claim will therefore be dismissed. **It is appropriate to declare that no binding contract for the sale of the property was entered into between the plaintiff and the defendant on 24 or 26 August 2021 and to order that the caveat lodged by the plaintiff be removed**.' (**emphasis added**)

Takeaways

72. As the Court observed, most communication today will be by email but that where there is an insistence on a formal contract it will not be open to conclude simply by the use of email that someone consents to some other method to convey their intention. It raises the question about some people who use an electronic signature (including an electronic image of a paper signature) and whether this may cause additional problems. This case also highlights the need to make your client's intentions clear from the beginning and to remain consistent.

Trends

73. In terms of trends, an important factor not only in the determination of *Dyco* but other cases has been the allocation of risk. That is something that is determined by the parties.

74. In this regard, it is useful to refer to the High Court's decision in *Mann v Paterson Constructions Pty Ltd* (***Mann***) which determined that there should be a limit on the restitution where a contract is terminated.[21] In *Mann* various members of the court said:

'[14] Restitutionary claims must respect contractual regimes and the allocations of risk made under those regimes. …[22]

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.'[23]

75. This can be seen as part of the embodiment of basic construction principles referred in above in the takeaways for *Dyco*. I think that this is because it is an important objective touchstone of the objectives and where the parties determine consider the risk should be.

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[21] (2019) 267 CLR 560; [2019] HCA 32.
[22] (2019) 267 CLR 560, [14]; [2019] HCA 32.
[23] (2019) 267 CLR 560, [214] (Nettle Gordon Edelman JJ); [2019] HCA 32

76. The recent cases in relation to repudiation clarify a number of matters involving a claim of repudiation based on an incorrect interpretation of a contract:

    a. It is necessary to be particular in correspondence;
    b. Where both parties make the same mistake on a related issue that may weaken a claim of repudiation;
    c. Seeking to approach to approach the Court with respect to a particular construction issue, and seeking agreement to do so, while potentially expensive, can help a party in making or defending an allegation of repudiation.

77. The trend is clearly for a continued increase in the use of electronic communication and transactions. In relation to how your client wants the contract to be formed the advice is: be clear; and be consistent.

Robert A. Quirk
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Higgins Chambers and Bay Street Chambers
March 2022