IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 136 of 2016

BETWEEN:

DANIEL MATTHEW SIMIC
First Appellant
HAZEL MARY DELANEY
Second Appellant
RICHARD PAUL SAPSFORD
Third Appellant
SIMIC MANAGEMENT INTERNATIONAL PTY LIMITED
Fourth Appellant
TRACK & MACHINE OPERATIONS PTY LTD
Fifth Appellant

AND

NEW SOUTH WALES LAND AND HOUSING CORPORATION
First Respondent
AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD
Second Respondent
NEBAX CONSTRUCTIONS AUSTRALIA PTY LIMITED (IN LIQUIDATION)
Third Respondent

First Respondent's / Cross-appellant's Submissions

Part I

1. The first respondent (the "Corporation") certifies that these submissions are in a form suitable for publication on the internet.

Part II

2. The Corporation agrees the issues set out in the appellants' submissions arise on the appeal.

3. If the appeal succeeds, and leave is granted to proceed on the Corporation's cross-appeal, the following issues arise:

Sparke Helmore Lawyers
Level 29, MLC Centre
19 Martin Place
Sydney NSW 2000

Telephone: 02 9373 3555
Fax: 02 9373 3599

Ref: NSW400-8

a) whether the Corporation has standing to seek rectification of the Undertakings;

b) whether the relevant intention was that of Ms Hanna, or of Mr Simic;

c) if Ms Hanna, what her intention was.

Part III

4. The Corporation considers that no notice is required to be given in compliance with s 78B of the *Judiciary Act 1903.*

Part IV

5. None of the material facts set out in the appellants' narrative of fact and chronology are contested. To those facts we would add the following.

6. Ms Hanna knew Nebax Constructions Australia Pty Ltd was a construction company that frequently entered into contracts that required Nebax to provide guarantees. Put another way, the provision of such guarantees was a feature of the market in which Nebax operated.[1]

7. Nebax had a facility with the Australia and New Zealand Banking Group Ltd that had, as one of its express purposes, the providing of guarantees by the ANZ to parties with whom Nebax had a contractual relationship.[2]

8. Nebax had such a contract, which Mr Simic intended to identify by the description given by Mr Simic to Ms Hanna and which Ms Hanna recorded as the 'Description of contract / agreement' in the Undertakings.[3]

9. Ms Hanna understood that the Undertakings were being entered into in relation to a construction contract to which Nebax was a party, and the words "Job Number P0409021, Bombaderry – Design & Construct 3 – 7 Karowa Street Contract Number BG2J8" were intended as a reference to that contract.[4]

10. Ms Hanna knew that the Undertakings were required pursuant to that contract.[5]

11. The name of the Favouree was a matter of indifference to Ms Hanna,[6] and she would still have issued the Undertakings if she had been given the Corporation's correct name.[7]

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[1] *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 ("PJ") at [73].
[2] Ibid.
[3] Ibid.
[4] PJ at [24].
[5] PJ at [73].
[6] PJ at [91].
[7] PJ at [24].

12. It was clear that Mr Simic intended that the Corporation would be the "Favouree" under the instruments that he requested ANZ to issue.[8]

13. No party (at trial) suggested the "contract" referred to in the Undertakings was anything but the Construction Contract.[9]

14. There never was, or has been, a 'New South Wales Land & Housing Department'.[10]

Part V

15. Not applicable.

Part VI

16. In short, the appellants contend that the Court of Appeal erred in construing the Undertakings prior to applying the principle of strict compliance. They also contend that the principles of strict compliance and autonomy exclude resort to the Construction Contract as an aid to construction of the Undertakings. More broadly, they contend that, when construing performance bonds and letters of credit, a court may not have regard to the commercial objects to be secured by the Undertakings, their genesis, background and context, and materials reasonably available to the parties when the contract was made.

17. The appellants' contentions are, with respect, incorrect.

18. Various intermediate and final courts of appeal in England and Wales, Scotland, Singapore and the United States of America have applied the ordinary principles of contractual construction to letters of credit and performance bonds, including resort to extrinsic evidence, and without restriction or influence by the principles of strict compliance and autonomy.[11] In none of the cases were the terms of the underlying contract incorporated into the letter of credit or performance bond.[12] We have been unable to find any relevant cases in Hong Kong.[13]

19. In substance, this was the reasoning of the Court of Appeal and the primary judge, albeit perhaps with some differing emphasis on certain principles of construction. For the avoidance of any doubt and in the event a differing view may be taken as to the Court of Appeal's reasoning, we will seek leave to file the attached Notice of Contention.

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[8] *Simic v New South Wales Land and Housing Corporation* [2015] NSWCA 413 ("CA") at [118].
[9] PJ at [66].
[10] PJ at [22], CA at [36].
[11] Albeit there may have been local variations as to what extrinsic evidence was admitted in the particular jurisdiction.
[12] The appellants submit that this did occur in *Rainy Sky SA v Kookmin Bank* [2011] 1 WLR 2900, [2011] UKSC 50, however for reasons set out later we submit this is not, at least relevantly, the case.
[13] The Hong Kong case of *Hing Hip Hing Fat Co Ltd v Daiwa Bank Ltd* [1991] 2 HKLR 35 referred to by Emmett AJA at [83] was a pure compliance case.

20. At the risk of over-simplification, strict compliance is confined to performance, and autonomy is restricted to rights and obligations flowing from the underlying (or other) contracts.

21. Various textbook writers have expressed broadly similar views. In A Maleck and D Quest's *Jack: Documentary Credits* it is said that documentary letters of credit should be construed in accordance with the ordinary rules of contractual construction.[14] Those rules, according to the authors, include resort to extrinsic evidence, citing *Reardon Smith Line Ltd v Hansen Tangen* [1976] 1 WLR 989 and *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 WLR 896.

22. In Sarna L, *Letters of Credit,* it is said:[15]

> "The notion of autonomy does not mean that the court must regard the letter of credit as divorced in all aspects from the underlying transaction. The letter of credit which is ambiguous in its drafting must be interpreted by the courts not in a vacuum but in the context of the accessory documents, including the credit application and the underlying contract."

23. As the authorities frequently refer to all or most of the issues in contention in this appeal relating to construction, strict compliance, autonomy and extrinsic evidence, and how they interrelate we think it more useful to consider each authority as a whole rather than deal with construction, strict compliance etc individually.

24. We shall address the authorities in England and Wales, Scotland, Singapore and the United States of America in that order. We broadly describe them as either 'pure compliance' cases (no issue as to the meaning of the performance bond or letter of credit) or 'construction / compliance cases' (cases which involved both the proper construction of a performance bond or letter of credit and strict compliance regarding the demand).

25. In our respectful submission the pure compliance cases are not relevant to the issues in this appeal as they do not touch upon, or concern, the issue of construction.

26. In *I E Contractors Ltd v Lloyds Bank PLC* [1989] 2Ll L Rep 496 Leggatt J, at p 208 (col 2), said that in a construction / compliance case a court takes a two-fold (or two-step) approach. First, construe the performance bond to determine what the beneficiary must do for the purpose of making a valid demand. Second, construe the demand to see whether what has been done is valid.

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[14] A Malek QC and D Quest, *Jack: Documentary Credits*, 4th ed., Tottel Publishing, 2009 at [1.17].
[15] L Sarna, *Letters of Credit, The Law and Current Practice*, 2nd ed, Carswell, 1986, at p 126.

27. Those two steps are separate, albeit factually related. It is apparent that in each of the construction / compliance cases the same approach, in substance, was taken.

England and Wales

28. *Equitable Trust Co of New York v Dawson Partners Ltd* (1927) 27 Ll L Rep 49 was a construction / compliance case. It is frequently cited for Lord Sumner's statement quoted at [37] of the appellants' submissions, but that quote concerns compliance and, importantly, follows the determination of two antecedent construction points upon which resort was had to extrinsic evidence.

29. The proper construction of two phrases in the instructions (and letter of credit) were contested in three respects: whether "experts" included the singular; whether "signed by the Chamber of Commerce" meant "signed by the "Handelsvereeniging" or the "Kamer von Koophandel"; and whether "signed by the Chamber of Commerce" meant it must be the Chamber of Commerce's certificate of quality. There is no need to consider that last mentioned matter.

30. On the evidence at trial (extrinsic evidence used for the purpose of construction), Bateson J was satisfied that there was no body called "Chamber of Commerce" in Batavia.[16] There were two bodies: "Kamer von Koophandel" (literally translated as "Chamber of Commerce"[17]) and "Handelsvereeniging" (literally translated as the "Association of Commerce" or "Commercial Association"[18]) which did different things. Bateson J considered the "proper business meaning of the phrase when considered in a place like Batavia is the right meaning to give to it"[19] and construed "Chamber of Commerce" to mean the "Handelsvereeniging".[20]

31. His Honour also found in favour of the plaintiff on the proper construction of "experts" taking into account, inter alia, the coding / decoding evidence (extrinsic evidence).

32. In the Court of Appeal, Bankes LJ said that the question in dispute was whether the conditions imposed in the letter of credit were or were not complied with (at 91, col 1). His Lordship agreed with Bateson J that "signed by the Chamber of Commerce" meant "signed by the Handelsvereeniging" (at 92, col 2). His Lordship then turned to the "pure question of construction" (ibid) in relation to "experts" and found in favour of Dawsons.

33. Scrutton LJ (in dissent) framed the issue as one of compliance (at 93, col 2) in the same two respects. On the Chamber of Commerce point his Lordship referred to the evidence led at trial (extrinsic evidence) in relation to Kamer von Koophandel and Handelsvereeniging (at 93, col 2),

[16] (1926) 24 Ll L Rep 261 at 262 (col 1).
[17] (1926) 25 Ll L Rep 90 per Scrutton LJ at 93 (col 2).
[18] Ibid.
[19] Op cit at 265 (col 2).
[20] Ibid.

and posed the question as to what Dawsons meant by a "Chamber of Commerce" (at 94, col 1). His Lordship found in favour of Equitable Trust, being "specially influenced by the fact" that the bank which discounted the bills considered that a signature from a "Chamber of Commerce" was satisfied by a signature from the Handelsvereeniging.

34. Atkin LJ held that the "grammatical or natural construction" of "experts" was in the plural (at 96, col 1). His Lordship referred to evidence of the parties' subjective understanding of "experts" (at 96, col 2) and found in favour of Dawsons. His Lordship felt it unnecessary to decide the "Chamber of Commerce" point.

35. In the House of Lords,[21] Cave LC, having heard the evidence read on the "Chamber of Commerce" point,[22] agreed with Bateson J, Bankes and Scrutton LJJ. On the "experts" point the Lord Chancellor held that the "argument on construction" failed (at 52, col 1) taking into account, inter alia, the correspondence tendered at trial and which disclosed the parties' subjective understanding (at 51, col 2), and finding the coding / decoding evidence was of no significance (at 52, col 1).

36. Viscount Sumner held that in the absence of any evidence to prove a special meaning (a type of extrinsic evidence) the plain English meaning of "experts" meant the plural (at 53, col 1). His Lordship then considered the argument as to ambiguity, of a latent kind, considered the coding / decoding evidence, and rejected the contention there was any ambiguity (at 53). His Lordship did not feel it necessary to decide the "Chamber of Commerce" point.

37. Lord Atkinson held that the correspondence tendered at trial made it perfectly clear that all parties intended "experts" to mean the plural (at 55, col 1 – 56, col 2) and thus Dawsons could rightly rely upon non-compliance (at 55, col 2).

38. Lord Shaw agreed with the Court of Appeal on the "experts" point (at 57, col 1), and said nothing about the "Chamber of Commerce" point.

39. Lord Carson, in dissent, agreed with the conclusions of Bateson J and Scrutton LJ (at 58, col 1). His Lordship, after referring to some evidence, said that "bearing these facts in mind" it was necessary to consider the terms of Dawson's instructions (at 58, col 2). The coding / decoding evidence gave "further colour"" to the view that Dawsons did not have "experts" plural in their minds. His Lordship held that Dawson's instructions were ambiguous, and the certificate presented complied with a reasonable interpretation of those instructions.

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[21] *Equitable Trust Company of New York v Dawson Partners Ltd* (1927) 27 Ll L Rep 49.
[22] Op cit at 51 (col 2).

40. *J H Rayner & Co v Hambro's Bank Ltd* [1943] 1 KB 37 was a pure compliance case, as was *Westpac Banking Corporation v South Carolina National Bank* [1986] 1 Ll L Rep 311.

41. *Maridive & Oil Services (SAE) v CAN Insurance Company (Europe) Limited* [2002] EWCA Civ 369 was a construction / compliance case. It supports the Corporation's submissions in three respects. First, the proper construction of the obligation was considered to then determine whether the (past) performance was compliant or not. Second, the references to evidence in [4] and [10] of Lord Mance's judgment rather suggest that the outcome may well have been different if evidence of the type referred to by French CJ, Hayne, Crennan and Kiefel JJ in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35] had been tendered. Third, the same paragraphs suggest extrinsic evidence relevant to the proper construction of the bond would have been admissible.

42. *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900 was a construction / compliance case. In that case each claimant (Buyer) had entered into a shipbuilding contract with a Korean shipbuilder (Builder). The contract provided for a refund of payment instalments by the Builder in certain circumstances such as rejection of a ship, termination, cancellation or rescission (Articles X.5 and X.6). Article XII.3 of the contract additionally provided that in certain circumstances (which we will call insolvency events) the Buyer could require a full refund of payment instalments from the Builder. An insolvency event occurred. The question of construction was whether or not the words "all such sums due to you under the Contract" in paragraph (3) of the bonds included payment instalments refundable by operation of Article XII.3 (insolvency).

43. Lord Clarke, with whom Lords Phillips, Mance, Kerr and Wilson agreed, found in favour of the Buyers. At [10] his Lordship said:

> "It is common ground that the terms of the Contracts are relevant to the true construction of the Bonds. *They are referred to in the Bonds and provide the immediate context in which the Bonds were entered into.* They are thus plainly an important aid in the meaning of the Bonds." (Our emphasis)

44. And at [14]:

> "For the most part, the correct approach to construction of the Bonds, *as in the case of any contract*, was not in dispute." (Our emphasis)

45. The appellants submit at [50] of their submissions that *Rainy Sky* is distinguishable because the "terminology of the underlying contract had been expressly incorporated" into the Bonds (and thus is an exception to the principle of autonomy). It is true that clause [1] of the Bonds stated:

"... Other terms and expressions used in this Bond shall have the same meaning as in the Contract, a copy of which has been provided to us."

46. However, a reading of the judgment reveals that their Lordships' decision was not based upon the meaning of "terms" and "expressions" found both in the Bonds and the Contracts. Rather, having found textual ambiguity their Lordships considered it appropriate to have regard to considerations of commercial common sense in resolving the question of what a reasonable person would have understood the parties to have meant.[23]

Scotland

47. *South Lanarkshire Council v Coface SA* [2016] CSIH 15 was a construction / compliance case. It concerned a reclamation bond. At issue was whether there had been a valid call on the bond (strict compliance), but this arose because of a dispute as to the proper construction to be given to clauses 2 and 3 of the bond.

48. Lords Menzies, Smith and Drummond Young said at [9] that the construction of such bonds were governed by the normal principles that apply to the construction of contracts, such principles being laid down in cases such as *Rainy Sky.* The terms of such bonds had to be construed in context and in accordance with the purposes that the contract was intended to achieve. The context included the circumstances known to the parties at the time of contracting or that ought to have been known to reasonable persons in the position of the parties. In the case of performance bonds the commercial purpose of such bonds and the contractual and business structure in which they operated were, in their Lordships opinion, of great importance. At [17] their Lordships held:

> "That construction follows in our opinion from the application of the normal principles that apply to the construction of contracts; it secures the fundamental purpose of a performance bond, namely to provide a prompt and readily realizable (sic) security for obligations in the underlying transaction, and it does so in the particular context of a performance bond, namely to make provision for a breach of the obligations in the underlying contract."

Singapore

49. *United Bank Ltd v Banque Nationale de Paris* [1991] SGHC 78; [1991] 2 SLR(R) 60 was a pure compliance case.

[23] At [40].

50. In that case Tin J (as his Honour then was) at [24] – [42], considered a number of pure compliance cases. However, at [38], his Honour considered *Bank of Montreal v Federal National Bank & Trust Co of Shawnee* 622 F Supp 6 (D Okla, 1984), a construction / compliance case.

51. In *Bank of Montreal* the establishment clause of the letter of credit listed the companies to whom advances were expected. The subsequent certification clause listed the companies about whom documentation was required to draw on the letter of credit. The lists should have been identical, but "Blow Out *Products* Ltd" appeared in the former and "Blow Out *Prevention* Ltd", a non-existent company on the evidence, appeared in the latter in lieu of "Blow Out Products Ltd". The District Court found that this was "clearly a draftsman's error", construed the words "Blow Out Prevention Ltd" to mean "Blow Out Products Ltd", and accordingly found that the draft presented for payment complied with the letter of credit.

52. At [40], Tin J (with some hesitation) followed the approach in *Rayner v Hambro's Bank* and distinguished *Bank of Montreal* because it involved an ambiguity in the letter of credit, a feature absent from the case before his Honour.[24]

53. A later Singaporean case is more relevant - *Master Marine AS v Labroy Offshore Ltd* [2012] SGCA 27; [2012] 3 SLR 125 (Tin, Leong and Rajah JJA). This was a construction / compliance case. It concerned 12 relevantly identical refund (performance) bonds, issued pursuant to a shipbuilding contract, each bond containing a reference to the underlying contract in the subject title. The beneficiary made a demand for payment upon the banks, the customer and banks sought and obtained an injunction restraining payment upon that demand, asserting that the conditions for making the demand had not been met on the proper construction of the performance bonds. The Court said that the primary issue was what exactly were the conditions precedent to make a valid demand, and that could only be determined vide a proper construction of the relevant clause of the bonds (at [21]).

54. After referring to various general principles, including that of strict compliance (at [31]), the Court turned to the principles to be applied in construing the bond including the use of extrinsic evidence (commencing at [34]). The Court observed at [41] that:

> "The reality, however, is that the ordinary principles of interpretation that apply to all mercantile contracts apply also to performance bonds."

55. And earlier at [34]:

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[24] At [41].

"As for the form of extrinsic evidence to admit in both situations, the most immediately relevant material (in the sense that it affects the way in which the language of the document would be understood by a reasonable person: see *Zurich* at [125]) would ordinarily be the underlying agreement that necessitates the procurement of the performance bond."

United States of America[25]

56. We have already referred to *Bank of Montreal* above.

57. *Dessaleng Beyene and Jean M Hanson v Irving Trust Co* 762 F 2d 4 (2d Cir, 1985) was a pure compliance case.

58. In *Beyene* the Second Circuit Court of Appeal referred to its recent decisions in *Voest-Alpine International Corp. v. Chase Manhattan Bank*, N.A., 707 F.2d 680, 682-83 (2d Cir. 1983) and *Marino Industries Corp. v. Chase Manhattan Bank, N.A.*, 686 F.2d 112, 114-15 (2d Cir. 1982). *Voest-Alpine* was a pure compliance case and can therefore be put to one side.

59. *Marino Industries* was essentially a pure compliance case with a minor construction issue involving an ambiguous term, the Court holding that the ambiguity was to be resolved contra proferentem against the bank. Reference was made to *Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 465 (2d Cir. 1970).

60. *Venizelos, S.A. v. Chase Manhattan Bank*, 425 F.2d 461, 465 (2d Cir. 1970)[26] was a construction / compliance case. Clause 47 of the charter party (which was for five voyages carrying scrap metal) provided that a revolving letter of credit was to be established to cover the freight for two voyages. The contract also provided that upon payment of one freight the charterer was to replenish the funds paid before it could reload the vessel for the next voyage. An amended letter of credit was established which provided for payment in respect of 19,300 tons, and contained the term that that payment was not permitted for partial shipments. The ship, the "Anastassis", typically carried about 9,500 tons of deadweight cargo.

61. When two drafts were presented by the shipowner's agent (Venizelos), Chase, the confirming bank, refused payment on the basis that the ship had conveyed a partial shipment of 10,015

[25] Neither the *Restatement (Second) of Contracts* nor *Williston on Contracts*, 4th ed (online), (nor, it appears, does *Corbin on Contracts, 3rd ed*) contain anything on construction / compliance that we have been able to find. There are passages in *Williston* at §2:23 describing letters of credit generally, and the strict compliance and independence (autonomy) principles. There is lesser, general material in *Corbin* at §10.21.

[26] Cited in *Hawkland's Uniform Commercial Code Series*, Article 5, Letters of Credit, at §5-104:4 for the propositions that when a letter of credit is susceptible to more than one interpretation, the courts prefer an interpretation which will sustain the credit to an interpretation which will defeat it, and that the courts prefer an interpretation rendering the credit possible of performance to an interpretation which makes its performance impossible or meaningless.

tons rather than the 19,300 tons provided for in the letter of credit, and that under the amended letter's terms payment for partial shipments was not permitted. The primary judge agreed.

62. The Second Circuit Court of Appeal, in overturning the decision below, held that the judgment below was premised upon a particular (and incorrect) construction of the amendment to the letter of credit. The Court of Appeal so held for two reasons. First, because of the terms of cl 47 of the charter party (the underlying contract) it was clear that the letter of credit "meant and provided for" freight for two voyages.[27] Secondly, the terms of the amended letter of credit "considered independently" required the decision below to be overturned.[28] The Court said (citations omitted):[29]

> "A construction that will sustain an instrument will be preferred to one that will defeat it; *Ga Nun v. Palmer*; accord: *Silverman v. Alpart*; if an agreement is fairly capable of a construction that will make it valid and enforceable, that construction will be given it: *M. O'Neil Supply Co., Inc. v. Petroleum Heat & Power Co.* The same general principles which apply to other contracts in writing govern letters of credit. *Fair Pavilions, Inc. v. First Nat'l City Bank*, rev'd on other grounds. Where a letter of credit is fairly susceptible of two constructions, one of which makes it fair, customary and one which prudent men would naturally enter into, while the other makes it inequitable, the former interpretation must be preferred to the latter, and a construction rendering the contract possible of performance will be preferred to one which renders its performance impossible or meaningless. ...
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> If the requirement of total shipment were interpreted to mean 19,300 tons as Chase claims, the letter of credit would be meaningless since Venizelos could not transport that amount in one voyage on its liberty ship "Anastassis"; however, if a total shipment were said to be 9690 tons as stated in the original letter of credit, the contract would be reasonable and possible to perform ... If Chase had any lingering doubts as to what was a "partial shipment" with reference to the vessel specified in the amendment to the letter of credit, prudence would have dictated that it inquire further. Had Chase done so, it would have been clear that the correct construction of the letter was to prohibit, as partial shipments, shipments of less than 9690 metric tons; this is the only reasonable construction to be given to the terms of the amended letter of credit under the circumstances presented." (Emphasis ours)

63. The reference to a "meaningless" interpretation supports the Court of Appeal's reasoning at CA [111], itself reflective of Kirby J's oft-quoted statement from *Geebung Investments Pty Ltd v*

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[27] At 465 (col 2) [5-10].
[28] Ibid.
[29] At 465 (col 2), [5 – 10] – 466 (col 2) [11 – 12].

Varga Group Investments No 8 Pty Ltd (1995) 7 BPR 14,551; (1995) Aust Contract R 90-059 that courts ought be the upholders of bargains and not their destroyers.

64. The reference to a prudent inquiry supports the Court of Appeal's observation at CA [110] that a simple enquiry by the Bank would have clarified the situation. It is common practice for the issuers of letters of credit and performance bonds to make enquiries of the applicant concerning non-compliant calls.

65. When construing the letter of credit against the background of cl 47 of the underlying contract (the charter party) the Court cited *Fair Pavilions v. First Nat. City Bank*, 19 N.Y.2d 512 (NY 1967),[30] a construction / compliance case.

66. In that case, the New York Court of Appeals (Chief Judge Fuld, Judges Burke, Scileppi, Bergan and Keating concurring) considered a letter of credit which had been issued for the benefit of Fair Pavilions (the builder) in relation to instalment payments under the building contract with Exhibitions de France Inc. Clause 6 of the letter of credit provided that it could be terminated if at least 10 days prior to any availability date, the bank received an affidavit from an officer of Willard (Willard International Financial Co Ltd, which was the applicant for the letter of credit on behalf of Exhibitions) to the effect that one or more of the events described in clause XV (Owner's Right to Terminate the Contract) of the contract between Exhibitions and the plaintiff had occurred. The bank received an affidavit by an officer of Willard stating, in conclusory form, "One or more of the events described in clause XV have occurred." The particular event claimed to have occurred was not identified. In finding that the proper interpretation of clause 6 of the letter of credit was that the affidavit had to identify the alleged defect, the Court of Appeals had regard to, inter alia, the terms of clause XV of the building contract.

67. A number of other United States cases have expressed the proposition that in construing the terms of a letter of credit the same general principles apply which govern other written contracts.[31] The general contractual principles set out in *Venizelos* and quoted above have been followed and applied in a number of cases, including the Seventh Circuit Court of Appeal in *Bank of North Carolina NA v The Rock Island Bank* 570 F 2d 202.

68. *Hanil Bank v Pt Bank Negara Indonesia* 41 UCC Rep Serv 2d 618 (SDNY 2000) was a pure compliance case and is thus not relevant.

69. *Tradax Petroleum American Inc v Coral Petroleum Inc* 878 F 2d 830 (5th Cir 1989) was a construction / compliance case, together with reformation (rectification). The case is

[30] Rev'd on other grounds, 19 N.Y.2d 512, 281 N.Y.S.2d 23, 227 N.E.2d 839 (1967).
[31] *Chase Manhattan Bank v. Equibank*, 394 F. Supp. 352 (W.D. Pa. 1975) [cited with approval in *West Virginia Housing Development Fund v. Sroka*, 415 F. Supp. 1107 (W.D. Pa. 1976)].

distinguishable because its ratio relied upon Articles 17 and 18 of the Uniform Customs and Practice for Documentary Credits 400 provided that banks assumed no liability or responsibility for the description of goods or for the interpretation of technical terms, and the offending term in the letter of credit was a technical term describing the relevant goods, being oil. On reformation, no mutual mistake was proved.

Australia

70. The issues in *Wood Hall Ltd v The Pipeline Authority* [1979] 141 CLR 443 are, with respect, accurately summarised and explained by Emmett AJA at CA [84] – [87]. In our respectful submission *Wood Hall* was a case that concerned the ordinary application of principles of contractual construction.

71. *Griffin Energy Group Pty Ltd v ICICI Bank Ltd* [2015] NSWCA 29 was much debated between the parties below, perhaps because of the succinctness of [46] and [47] in that case (quoted by Emmett AJA at CA [89]). The debate about what Griffin Energy stood for probably revolves around what is meant by "... regard is not to be had to ..." in the second sentence of [46]. The text referred to at the end of that paragraph, S McCracken and A Everett, *Everett and McCraken's Banking and Financial Institutions Law*, 7th ed, Lawbook Co, 2009[32] supports the contention their Honours were referring to purported rights and obligations arising from the underlying contract, and not to the use of the underlying contract as an aid in construing the letter of credit.

The Court of Appeal

72. In this case the Court of Appeal was correct in determining the proper construction of the Undertakings before turning to (strict) compliance. The two issues are separate.

73. The Court was also correct in having regard to the Construction Contract in order to appreciate the commercial purpose or objects of the Undertakings, and understand the genesis of the Undertakings, their background and context. Further, the Construction Contract was reasonably available to the ANZ.[33]

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[32] The relevant passages in the 8th edition of this work, [11-060], op cit, appear to be identical to the passages at [14.060] of the 7th edition.

[33] *Reardon Smith Line Ltd v Hansen-Tangen* [1976] 1 WLR 989 at 995-6; *Codelfa Construction Pty Ltd v State Authority of New South Wales* (1982) 149 CLR 337 at 350-1; *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; 251 CLR 640 per French CJ, Hayne, Crennan and Kiefel JJ at [35]; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; 325 ALR 188; 89 ALJR 990 per French CJ, Nettle and Gordon JJ at [46] – [52], Kiefel and Keane JJ at [108] – [110], Bell and Gageler JJ at [120]; *Investors Compensation Scheme v West Bromwich Building Society* [1997] UKHL 28; [1998] 1 WLR 896 per Lord Hoffman, with whom Lords Goff, Hope and Clyde agreed, at 912 – 913.

74. Emmett AJA, with great respect, was not correct at CA [101] in suggesting that the autonomy principle restricts the availability of material. That proposition is not consistent with the authorities we have cited. His Honour was perhaps influenced in so thinking because of the perceived artificial and undesirable distinction referred to at CA [102]. In our respectful submission that distinction is neither artificial nor undesirable. Be that as it may, the surrounding circumstances found by the primary judge, or the Construction Contract itself, or both, support the ultimate finding.

75. As Lord Clarke said in *Rainy Sky* at [21], the "exercise of construction is essentially one unitary exercise" in which the court must consider the language used and ascertain what a reasonable person, being a person who has all the background knowledge which would reasonably be available to the parties at the time, would have understood the parties to have meant.

76. In the present case, the question is whether a reasonable person having the background knowledge identified by the primary judge at PJ [72] and [73], and having the Construction Contract reasonably available to them, would have intended a commercial nonsense (the appellants' position) or a meaning which gave effect to the commercial purpose objectively intended.

77. As French CJ, Hayne, Crennan and Kiefel JJ held in *Electricity Generation Corporation*:[34]

> "A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working a commercial inconvenience."

78. Dixon CJ and Fullager J in *Fitzgerald v Masters* [1956] HCA 53; (1956) 95 CLR 420 regarded it as "almost absurd" that, having agreed on everything essential the parties in that case intended that the contract would be a nullity.

79. Of course, regard must be had to the words used, but the name of a party is a different thing to a contractual term.

80. Hence we have what the primary judge called 'misnomer and absurdity' cases[35] – i.e. where the error was made in recording the name of a party - *Whittam v W J Daniel & Co Ltd* [1961] 1 QB 271, *F Goldsmith (Sicklesmere) Ltd v Baxter* [1970] 1 Ch 85, *Nittan (UK) Ltd v Solent Steel Fabrication Ltd* (1981) 1 Ll L Rep 633, *Maddestra v Penfolds Wines Pty Ltd* (1993) 44 FCR 303 and *National Australia Bank Ltd v Clowes* [2013] NSWCA 179. To that list we would add

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[34] Citing in support *Zhu v Treasurer of New South Wales* [204] HCA 56; (2004) 218 CLR 530 per Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ at [82].

[35] His Honour first construed the guarantee according to the ordinary rules of contractual construction: PJ [65] – [74]. Separately, but in addition, the primary judge applied the "more specific principles" in relation to misnomer (PJ [75]) and absurdity (PJ [77]).

Fitzgerald v Masters [1956] HCA 53; (1956) 95 CLR 420 and *Miwa Pty Ltd v Siantan Properties Pty Ltd* [2011] NSWCA 297, each referred to by Leeming JA in *Clowes*.

81. These authorities do not diverge from the ordinary principles of construction, rather they are examples of the particular application of those principles to cases of misnomer. As Lord Clarke said in *Rainy Sky* at [22]:

> "I am of course aware that, in considering statements of general principle in a particular case, the court must have regard to the fact that the precise formulation of the proposition may be affected by the facts of the case."

82. Human beings sometimes use the wrong words. As Lord Hoffman said in *Investors Compensation Scheme* at 912 – 913.

> "(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax. (see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.*
>
> (5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *The Antaios Compania Neviera S.A. v. Salen Rederierna A.B:*
>
> > '. . . if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.' " (Citations omitted)

83. In *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101 Lord Hoffman, with whom Lords Hope and Rodger and Baroness Hale, turned to the subject of what Brightman J called "correction of mistakes by construction" and its two conditions (a clear mistake on the face of the instrument and that the correction must be clear) at [22] – [24]. At [24] his Lordship said:

"The second qualification concerns the words 'on the face of the instrument'. I agree with Carnwath LJ (at pp 1350-1351) that in deciding whether there is a clear mistake, the court is not confined to reading the document without regard to its background or context. As the exercise is part of the single task of interpretation, the background and context must always be taken into consideration."

84. *Investors Compensation* is applied in Hong Kong. The Hong Kong Court of Final Appeal, in applying *Investors Compensation* in *Fully Profit (Asia) Ltd The Secretary for Justice* [2013] HKCFA 40; (2013) 16 HKCFAR 351; [2013] 6 HKC 374, a decision in which Lord Hoffman sat as a Non-Permanent Judge, Chief Justice Ma, with whom Mr Justice Chan PJ, Mr Justice Ribeiro PJ, Mr Justice Bokhary NPJ and Lord Hoffmann NPJ agreed, stated at [15]:

"The statements of principle in *Investors Compensation Scheme* and in *Jumbo King* refer time and again to the relevant background against which the relevant contract and contractual terms must be viewed. It is in my view not particularly helpful in most cases to refer to the "ordinary and natural meaning" of words because, as very often experience tells us, there can be much debate over exactly what is the ordinary or natural meaning of words. The surer guide to interpretation is context. Here, I would just add that in the area of statutory and constitutional interpretation, it is context that is key; context is the starting point (together with purpose) rather than looking at what may be the natural and ordinary meaning of words." (Citations omitted)

85. So in this case. Clearly some wrong words were used. The correction is clear.

Part VII

86. Alternatively, special leave to proceed with the cross-appeal ought be granted, the cross-appeal allowed and rectification of the performance bond ordered. Rectification would have been ordered had the primary judge found it necessary to decide.[36]

87. The Court of Appeal did not decide the rectification issue but mentioned three matters of possible concern. They were the standing of the Corporation to seek rectification, the relevance or otherwise of the second respondent's (the "ANZ's") officer's intention, and if relevant, what her intention was.[37]

88. Standing was not at issue at the trial and in the Court of Appeal and ought not now be entertained for the first time. Alternatively, we submit the Corporation does have standing because it is a party to the contracts (being the Undertakings). Despite difficulties reconciling

[36] PJ [88] – [95].
[37] CA [117] – [118].

performance bonds and letters of credit with some traditional contractual principles, particularly regarding consideration, commercial entities and the courts have long accepted that performance bonds and letters of credit are enforceable contracts between the beneficiary and the issuing bank.[38]

89. The Court of Appeal's other misgivings related to the issue of common intention so far as it concerns the intention of the Bank.

90. At trial the Corporation satisfied the primary judge, to the necessary standard of clear and convincing proof, that the recording of the agreement (the Undertakings) was not the agreement reached between the parties. Rectification is available notwithstanding the absence of an antecedent agreement between the parties, and there is no requirement for communication of the common intention.[39]

91. At trial and on appeal there was no doubt that the Corporation intended its name to be entered on the Undertakings.

92. At trial and on appeal there was no doubt that Mr Simic subjectively intended that the counter-party to the proposed Construction Contract be entered on the Undertakings so that the prerequisites of Special Condition 39 of the proposed Construction Contract would be satisfied and Nebax gain the benefits accruing under that Construction Contract

93. Intention, in rectification suits, ordinarily refers to that which is subjectively seen as to be brought about and the consequences of it, that which is subjectively foreseen and intended to be effected by the document.[40]

94. At trial and on appeal there was no doubt that Ms Hanna, apart from the purely mechanical act of typing in the particular words, numbers and letters given to her by Mr Simic, subjectively intended that the name of the Favouree was to be that of Nebax's counter-party to the Construction Contract. Put another way, Ms Hanna's intention was not to insert the name of a non-existent department, but to insert the name of the Principal in the Construction Contract.

95. The most compelling evidence, and the preferable evidence on the authorities, was Ms Hanna's outward manifestation of her intention, rather than her subjective state of mind. That is, it was her words and conduct rather than her subjective state of mind that ought be preferred.

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[38] *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 183.
[39] *Bishopgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd* (1981) 1 NSWLR 429 at 431; *Bush v National Australia Bank* Ltd (1992) 35 NSWLR 390 at 405 – 406; *Mander Pty Ltd v Clements* (2005) 30 WAR 46 per McKechnie J at [54].
[40] *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd* (1995) 41 NSWLR 329 per Mahoney A-P at 332.B – C; referred to with approval in *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at [180] per Tobias JA, with whom Mason P and Campbell JA agreed.

96. In *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 Tobias JA (with whom Mason P and Campbell JA agreed) stated that the common intention, which must be established by clear and convincing proof to justify rectification, must be "the actual or true common intention of the parties" (at [182]).

97. At [185] his Honour said that in a case where the correspondence and/or conduct positively establishes the necessary common intention, then assertions by the party opposing rectification of his or her subjective state of mind which is inconsistent with that party's outward manifestation of his or her intention, being unexpressed and uncommunicated, are unlikely to trump his or her expressed intention

98. A similar point was made by Mustill J in *Establissements Georges et Paul Levy v Adderley Navigation Co Panama SA ("The Olympic Pride")* [1980] 2 Lloyd's Rep 67 at 72 wherein his Honour said:

> "The prior transaction may consist either of a concluded agreement or of a continuing common intention. In the latter event, the intention must have been objectively manifested. It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter."

99. In *Chartbrook* Lord Hoffmann stated at [60]:

> "Now that it has been established that rectification is also available when there was no binding antecedent agreement but the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, it would be anomalous if the "common continuing intention" were to be an objective fact if it amounted to an enforceable contract but a subjective belief if it did not. On the contrary, the authorities suggest that in both cases the question is what an objective observer would have thought the intentions of the parties to be."

100. To similar effect was the judgment of Derrington J, with whom Kelly ACJ and Moynihan J agreed, in *Elders Lensworth Finance Ltd v Australian Central Pacific Ltd* (1986) 2 QdR 364, in a passage quoted by the primary judge.[41] A part of that quote is worth repeating here, namely:

> "If for example there is an intention that a certain result be achieved by the transaction, e.g., that the guarantee provided should support the lease agreement which is in fact entered into, that is not defeated if, in the process of putting that intention into effect, the party were inadvertently to form a particular intention in respect of machinery which does not produce that result. A proposal that in such a case it is permissible to look only at the

[41] PJ [89].

intent on the subject of the machinery, even if that be of little or no importance, is nowhere suggested by the authorities and is not consistent with general principle. The solution lies in determining the effective intention if that be possible.

101. The primary judge adopted this approach, relying (PJ [92]) on the factual findings at PJ [72] – [73]. At PJ [92] the primary judge made a factual finding that the effective intention (to use Derrington J's expression) was for the Undertakings to support (facilitate) the Construction Contract. That is, the commercial purpose of the Undertakings was that a certain result be achieved, that result being that the Bank's customer (Nebax) would have an instrument which was a pre-requisite to the formation of the Construction Contract between the Corporation and Nebax, a transaction Nebax (and Mr Simic) desired.

102. The facts in *Elders* are, in their relevant respects, analogous to the facts here.

103. Ms Hanna had had many dealings with Mr Simic. She knew he operated a construction business and regularly obtained contracts from various entities and government departments. It was not unusual for Mr Simic to contact her and request urgent provision of a bank guarantee in relation to a construction contract which Nebax had obtained.[42]

104. On 12 April 2010 Nebax entered into a facility with the Bank, the purpose of the facility being expressed as "Bank Guarantee requirement various contracts."[43]

105. On 16 April 2010 Mr Simic conversed with Ms Hanna and said:[44]

> "Adele, I require two bank guarantees for Nebax. *Nebax has just obtained a contract* from Housing NSW, *they need to be made out to* New South Wales Land & Housing department trading as Housing NSW and each for $73,482.53." (Our emphasis)

106. Ms Hanna then produced the two Undertakings for those amounts. The primary judge found that Ms Hanna understood the Undertakings were being entered into in relation to a construction contract to which Nebax was a party. She would have issued the same Undertakings (but for the name of the Favouree) if she had been given the Corporation's name.[45]

107. Next to the word "Favouree" is "To: New South Wales Land & Housing Department ... (The Principal)". The Undertakings record that the Bank:

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[42] PJ [16].
[43] PJ [17].
[44] PJ [18].
[45] PJ [24].

"asks the Principal to accept this (Undertaking) *in connection with a contract between the Principal and (Nebax)* ..." (Our emphasis)

108. Thereafter the Undertakings refer to the word "Principal" 15 times, and never the word "Favouree".

109. No party suggested to the primary judge that the contract referred to was anything but the Construction Contract.[46]

110. Ms Hanna gave the two original Undertakings to Mr Simic. Mr Simic delivered them to the Corporation.

111. That conduct, as the primary judge found, was sufficient to establish that Ms Hanna's and the Corporation's common intention was that the name of the Corporation be entered into the Undertakings as Favouree.

112. Our submission may be put as Heydon J stated in *Raftland Pty Ltd v Commissioner of Taxation of the Commonwealth of Australia* [2008] 238 CLR 516 at [176] (albeit in non-analogous circumstances) and by making one substitution:

> "Rectification is a remedy granted where the parties are in complete agreement as to the terms of their dealings, but by an error wrote them down wrongly. Here they were in complete agreement, and one of the terms of that agreement was that ... they be written down as they were written down in the" Construction Contract.

Part VIII

113. The Corporation estimates its oral argument will take approximately 1.5 hrs.

Dated: 29 June 2016

Greg Curtin SC

David Talintyre

Counsel for the First Respondent

Tel: (02) 9151 2202

Fax: (02) 9101 9423

Email: gcurtinsc@level22.com.au

(02) 9151 2204

-

dtalintyre@level22.com.au

[46] PJ [66].

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S 136 of 2016

ON APPEAL FROM THE NEW SOUTH WALES COURT OF APPEAL

BETWEEN:

DANIEL MATTHEW SIMIC
First Appellant

HAZEL MARY DELANEY
Second Appellant

RICHARD PAUL SAPSFORD
Third Appellant

SIMIC MANAGEMENT INTERNATIONAL PTY LIMITED
Fourth Appellant

TRACK & MACHINE OPERATIONS PTY LTD
Fifth Appellant

AND

NEW SOUTH WALES LAND AND HOUSING CORPORATION
First Respondent

AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD
Second Respondent

NEBAX CONSTRUCTIONS AUSTRALIA PTY LIMITED (IN LIQUIDATION)
Third Respondent

NOTICE OF CONTENTION

The first respondent wishes to contend that the decision of the Court below should be affirmed but on the ground that the Court below erroneously decided or failed to decide some matter of fact or law.

Sparke Helmore Lawyers
Level 29, MLC Centre
19 Martin Place
Sydney NSW 2000

Telephone: 02 9373 3555
Fax: 02 9373 3599

Ref: NSW400-8

Grounds

1. The Court of Appeal ought to have reached the same decision but on the basis of the general principles of contractual construction, and those particular principles relating to misnomer and absurdity.

Dated 30 June 2016

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Solicitor for the First Respondent
Timothy Robert Castle by his employed solicitor Jo Lu Yap

AND TO: The Appellant
O'Neill McDonald Lawyers
Level 12, 84 Pitt Street
Sydney NSW 2000

AND TO: The Second Respondent
Kemp Strang Solicitors
Level 17, 175 Pitt Street
Sydney NSW 2000

THE FIRST RESPONDENT'S SOLICITOR IS:
Sparke Helmore Lawyers
Level 29, MLC Centre
19 Martin Place
Sydney NSW 2000