Recent Developments in Commercial Litigation[1]

The Hon Justice Roslyn Atkinson AO

Introduction

Thank you to the Queensland Law Society for the invitation to speak today on this important topic of recent developments in commercial litigation. I would like first of all to acknowledge the traditional custodians of the land on which we meet this morning, a place where Indigenous people met for generations to discuss pressing issues in their society which no doubt included the economic wellbeing of that society.

However, we are here to discuss much more recent developments in commercial litigation. Over the course of the past year several decisions have stood out. For instance, pertaining to sovereign risk, there is *Duncan v New South Wales*[2] (in the High Court); pertaining to land acquisition, there is *Chief Executive, Department of Transport and Main Roads v Cidneo Pty Ltd*[3] (in the Court of Appeal) and *Moreton Bay Regional Council v Mekpine Pty Ltd*[4] (in the High Court); and dealing with shareholder activism, there is *Caason Investments v Cao*[5] (in the Federal Court). However, since contractual interpretation was the most recurrent issue for commercial litigants it is to that issue that I will confine the majority of my comments today. I will review five recent appellate cases with that focus in the hope that you will find in my remarks something of particular relevance to your practice.

In the final section of this paper I wish also to offer some brief remarks on emerging commercial litigation practice not annexed directly to any particular court ruling. In particular, I will canvass the connection between judicial independence and economic development.

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1 Presentation to the Queensland Law Society Symposium 2016, Brisbane Convention and Exhibition Centre.

2 *Duncan v NSW; NuCoal Resources Limited v NSW; Cascade Coal Pty Limited v NSW* (2015) 89 ALJR 462; [2015] HCA 13. See also *Tabcorp Holdings Ltd v Victoria* [2016] HCA 4; *Victoria v Tatts Group Ltd* [2016] HCA 5.

3 *Chief Executive, Department of Transport and Main Roads v Cidneo Pty Ltd* [2015] QCA 096.

4 *Moreton Bay Regional Council v Mekpine Pty Ltd* [2016] HCA 7.

5 *Caason Investments v Cao* [2015] FCAFC 94. See also *Australasian Centre of Corporate Responsibility v CBA* (2015) ASCR 489.

Contractual Interpretation

The aspect of contractual interpretation I wish to explore is the application of the objective theory of contract to understanding basic contractual interpretation principles. Justice Edelman, speaking *extra curially*, has recently applied this theory to three issues: implied terms in contracts, rectification, and post-contractual conduct.[6] His Honour was of the view that the objective theory of contract might assist in developing the doctrine in those areas. It has been my observation from surveying the recent appellate cases, which were decided largely on the basis of *core* principles of contractual interpretation, that there is considerable merit in revisiting the objective theory of contract in relation to more fundamental propositions. The reason for this, as has been recently noted by Justice McDougall of the Supreme Court of New South Wales, also speaking *extra curially*, is that 'the vast majority of cases involving the construction of contracts are determined by orthodox principles of interpretation'.[7]

The objective theory of contract was captured neatly by Oliver Wendell Holmes in his famous address to those attending the dedication of a new Hall at Boston University School of Law, on January 8, 1897. He said: [8]

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

The theory is one that I am sure you all know; it forms substantially the basis for contract law in this country. However, it is surprising how often its practical consequences are overlooked or given insufficient attention by practitioners. The theory helps crystallise and explain the many core principles of contractual interpretation relied on every day by parties and courts in resolving commercial disputes. In keeping with my brief to provide an overview of recent significant decisions in commercial litigation, I will demonstrate this by reference to five cases handed down in the past year: two by the High Court, two by the

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6 James Edelman, "Three issues in construction of contract", Presentation to the Conference of Supreme and Federal Court Judges, 27 January 2016.

7 Robert McDougall, "Construction of contracts: The High Court's approach" (2015) 4 *Journal of Civil Litigation and Practice* 141, at 149.

8 Holmes, "The Path of the Law", (1897) 10 *Harvard Law Review*, 457 at 463–4 (emphasis in original), quoted with approval in *Byrnes v Kendle* (2011) 243 CLR 253, at 285 [100] per Heydon and Crennan JJ.

Queensland Court of Appeal and one by the Court of Appeal of New South Wales. Although in many respects 'standard' cases, they resolved disputes on which the rights to several hundreds of millions of dollars turned, showing the importance of fundamental legal principles.

Mount Bruce Mining

I shall begin by examining the High Court decision of *Mount Bruce Mining v Wright Prospecting* [2015] HCA 37 handed down at the end of last year. In that case, two issues of contractual interpretation occurred in a dispute over the respondents' entitlement to royalty payments in respect of mining operations conducted in the Pilbara region of Western Australia. An agreement entered into in 1970 had the effect of requiring royalty payments on iron ore won to be made by Mount Bruce Mining to Wright Prospecting (and another) if two conditions were satisfied:

1. The ore was won from what was referred to as the 'MBM area'; and

2. The ore was won by MBM or by a defined entity, including, relevantly, 'the successors and assigns of MBM and all persons or corporations deriving title through or under MBM to any areas of land in respect of which an obligation to pay a royalty had arisen or may arise.'

In the years between that agreement being reached and the dispute arising, the area subject to the dispute was the subject of various mining leases and reserves (giving rights of occupancy) held by Mount Bruce Mining. In 1982, Mount Bruce Mining surrendered its most recently acquired reserve to the Western Australian government and a mining lease over that area was granted to a third party later that year. A central consideration for the High Court, many years later, was whether Mount Bruce Mining was required to pay royalties on iron ore won by that third party. Mount Bruce Mining argued, first, that the relevant mining operations did not occur within the 'MBM area', as defined in the 1970 agreement. The second argument raised was that the entities now deriving ore from the disputed area (i.e., the third party joint venturers) did not derive title 'through or under' Mount Bruce Mining.

In the course of three joint judgments, the High Court was ultimately unanimous in finding:

1. The MBM area was a physical area of land and not, as Mount Bruce Mining had claimed, rights of occupancy attaching to it; and

2. The phrase 'through or under' was broad enough, in the context, to cover the close practical or causal connection that existed between the rights exercised by those presently mining ore in the MBM area and the rights Mount Bruce Mining obtained from its agreement under the royalties contract; it was not a phrase confined, as Mount Bruce Mining had argued, to formal succession, assignment or conveyance.

Plain meaning, of course, cannot be deduced without regard to the context in which the language is employed; symbols of language cannot be accurately interpreted in isolation. This context will include not only the words surrounding a given phrase – for instance, the remainder of a written contract – but may also include the context in which the contract was formed, consisting of the circumstances known to both parties preceding formation.[9] Indeed, returning to the objective theory of contract, these circumstances are those which the reasonable observer knows would have been part of the background to the parties reaching agreement. It makes sense, then, that such circumstances known by both parties may, in appropriate circumstances, be of proper use in interpreting a contract at a later point in time. The relative utility of knowing such circumstances as an aid to interpretation may, of course, vary from case to case. Sometimes, even often, the language of a contract, read as a whole, will be sufficiently clear that the introduction of so-called 'extrinsic evidence' will have little to no bearing on the construction adopted.

The joint judgment of French CJ, Nettle and Gordon JJ set out the applicable legal principles for construing a commercial contract as follows:

> [46] The rights and liabilities of parties under a provision of a contract are determined objectively, by reference to its text, context (the entire text of the contract as well as any contract, document or

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[9] See *Royal Botanical Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45, 52–3 (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Pacific Carriers v BNP Paribas* (2004) 218 CLR 451, at 461–2 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ); *International Air Transport Association v Ansett Australia Holdings* (2008) 234 CLR 151, at 160 (Glesson CJ). *Electricity Generation v Woodside Energy* (2014) 251 CLR 640, at 656–7 (French CJ, Hayne, Crennan and Kiefel JJ).

statutory provision referred to in the text of the contract) and purpose.

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

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

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

[50] Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.

[51] Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption 'that the parties …

> intended to produce a commercial result.' Put another way, a commercial contract should be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience.'" (citations omitted)

In the *Mount Bruce Mining* case, the fact that the MBM area was defined 'by reference to identified temporary reserves (by block numbers) which were indicated on the map appended to the 1970 Agreement' was of overwhelming significance in reaching the conclusion that the area was a physical location and not a reference to rights.[10] One might think, of course, that the word 'area' itself suggests a geographic location and, indeed, this is what the High Court held. Mount Bruce Mining had argued that the ordinary meaning of the word 'area' in the expression 'MBM area' could not aid interpretation because that phrase was a specially defined expression in the contract. The objective theory of contract shows this argument to be untenable. As was explained by Bell and Gageler JJ:

> The meaning of the term "MBM area"… is to be resolved… by reference to the overriding criterion of how reasonable business people can be taken to have understood the term. In the absence of the background circumstances indicating some reason to think otherwise, it is therefore appropriate to proceed on the assumption that the words chosen as the label for the defined term were not chosen arbitrarily but as "a distillation of… a concept intended to be more precisely stated in the definition."[11]

When it came to interpreting the phrase deriving title 'through or under', French CJ, Nettle and Gordon JJ[12] observed that it was inappropriate to resolve the constructional choice by reference, especially as a starting point, to case precedent rather than the text and context of the 1970 Agreement in dispute.[13] Again, reference to the objective theory of contract shows why this is the case. A reasonable business person will understand known past business practice when trying to reach an agreement with another. The particular circumstances of the parties to an agreement will be more useful as an aid to construction than a previous case that happened to construe the same phrase but where that phrase

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10 *Mount Bruce Mining* at [62] (French CJ, Nettle and Gordon JJ), [87] (Kiefel and Keane JJ).

11 *Mount Bruce Mining* at [121], quoting *Chartbrook v Persimmon Homes* [2009] AC 1101, at [17].

12 *Mount Bruce Mining* at [81].

13 See also *Mount Bruce Mining* at [96] (Kiefel and Keane JJ), quoting *Tanning Research Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 342.

was found in a contract formed in entirely different circumstances and for different purposes. This point also reiterates the commonly given but, one suspects, less heeded advice to avoid reliance on the tempting library of template contracts when drafting. Regard must always be had to the client's individual circumstances when striving to set out their rights and obligations with the utmost clarity.

The High Court's conclusion that the phrase 'through or under' could not be sensibly confined to entities deriving title by succession or assignment from Mount Bruce Mining was again arrived at by reference to what the objective observer would have appreciated was the 'evident purpose' of the agreement reached: namely, that royalties would be payable in respect of iron ore won by anyone from land in the MBM area so long as the exploitation of the land was carried on under a title, the derivation of which was facilitated by Mount Bruce Mining deploying any title obtained by it in the course of pursuing the opportunity afforded to it by the respondents.

The decision of the trial judge to enter judgement against MBM in the amount of $130,816,256.83 was restored.

Peabody v QBH & Grocon v Juniper

To reinforce the points just made, I will briefly refer to two recent Queensland appellate decisions on contractual construction. The first is *Peabody (Wilkie Creek) v Queensland Bulk Handling* [2015] QCA 202 ('*Peabody*'). That case involved interpreting a Coal Port Services Agreement entered into by Peabody (a coal mining company) and Queensland Bulk Handling (the operator of a coal export terminal). That agreement provided for a process by which the existing contractual relationship between these parties could be continued into the future. One part of that process involved Peabody providing to Queensland Bulk Handling a *binding indication of preparedness to commit* to continue to require static stockpile capacity and minimum annual throughput of certain levels. The issue became whether this binding indication of preparedness to commit was contractually binding (as argued by Queensland Bulk Handling) or merely a warranty or representation of Peabody's intention or state of mind prior to formal agreement being reached at a later stage (as submitted by Peabody).

As with each case I will discuss this morning, the issue was resolved by the conventional approach of identifying which of competing constructions of an ambiguous provision was most clearly conveyed by the text of the agreement, construed objectively in its context. The principle is easy to state but, in some cases, difficult to apply. Although ultimately unsuccessful, the Court of Appeal found it was reasonable for Peabody to argue that it would seem objectively unlikely that a party in its position would commit itself to the Option Term before all the terms of the agreement for that period were settled.[14] However, competing considerations outweighed this argument. For instance, the staged structure of the process set out by the clause objectively appeared designed 'for the exclusive benefit of Queensland Bulk Handling';[15] Peabody would already, at this stage of the process, be aware of the essential terms of any continuing contract;[16] and, importantly, as the trial judge had held, it would appear 'nonsensical' if the clause did not operate merely because the possibility of a binding agreement became clear at an earlier date than was anticipated.[17]

This case shows that the task of construing contracts is not a search for the best and fairest interpretation of the agreement possible; it is about finding the interpretation that 'conforms [most] closely to the contractual text and [best] reflects the evident aim of the clause.'[18] The objective theory of contract acknowledges, through its device of the objective observer, the possibility that contracts will reflect the commercial reality that parties will bargain from positions of varying strength and that the contracts formed will reflect this. Of course, this does not mean that the objective observer will uncritically accept what appears to be a commercially unfeasible agreement as, in almost all cases, it is objectively unlikely that parties will have intended to produce this outcome. This was a particularly important factor in the next case to which we turn.

Grocon Constructions (Qld) v Juniper Developer (No 2) [2015] QCA 291 ('*Grocon*'), was handed down in December last year. The leading judgment was written by McMeekin J with whom Holmes CJ and I agreed. In that case the critical issue was whether the definition of 'Practical Completion' in a construction contract, properly construed, meant that trivial failings like, for

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14 *Peabody* at [35].
15 *Peabody* at [40].
16 *Peabody* at [35].
17 *Peabody* at [17].
18 *Peabody* at [38]

instance, the non-installation of a single lightbulb, would mean the project had not been practically completed. If this were the case, the liquidated damages clause in the contract could potentially have been void for being penal rather than compensatory.

The definition of practical completion in the contract set out, in a series of sub-clauses ((a) though to (k)), apparent requirements for Practical Completion to have occurred, the last of which was preceded by the word 'and'. As one normally reads *statutory* provisions, this would indicate a series of necessary conditions for the definition to be met. However, as was noted in *Mount Bruce Mining* by Bell and Gageler JJ:[19]

> The issue [of contractual construction] is not to be resolved by invocation of the strictures of logic presumptively applicable to the interpretation of a defined expression with a complex statutory scheme. It is to be decided by reference to the overriding criterion of how reasonable businesspersons can be taken to have understood the term.

In *Grocon*, at first instance and again in the Court of Appeal, two considerations were important. First, as in *Mount Bruce Mining*, the ordinary English meaning of the words was significant. 'Practical' in the phrase 'Practical Completion' was held to be of assistance in construing the defined term. In normal parlance, those words connote completion 'for all practical purposes.'[20] Secondly, and of most significance, was the observation that, *objectively*, 'the parties could hardly have supposed that a "Certificate of Practical Completion" would be denied in a multi-million dollar building contract because [for instance] of a missing lightbulb.'[21] Further support for this construction was also found in the definition clause itself.[22] Suffice it to say, there was sufficient ambiguity in that clause that the court, adopting the vantage of a reasonable businessperson, would not, in interpreting the contract to make commercial sense, be imposing its will on what the agreement *ought to be* as opposed to what is was. The apposite tenet of contractual interpretation was sagely summarised by Lord Reid in *L Schuler AG v Wickman Machine Tool Sales Ltd*:[23]

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19 *Mount Bruce Mining*, at 1008 [121].
20 *Grocon*, at [59].
21 *Grocon*, at [59], [68].
22 See particularly, *Grocon* at [60]–[67].
23 [1974] AC 235 at 251.

> The fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that the parties can have intended it, and if they do intend it the more necessary it is that they shall make that intention abundantly clear.

Korda v Australian Executor Trustees

That final point leads me to discuss the fourth recent case of contractual construction, this time pertaining also to trusts law. It also presents an opportunity to begin reflecting on the importance of appreciating the intersectionality of law. The best practitioners have an eye for how the law fits together (and where it perhaps does not fit so well), and are aware of developments in disparate fields. This allows for the most comprehensive understanding of one's own speciality.

The case of *Korda v Australian Executor Trustees* [2015] HCA 4 ('*Korda*') was handed down by the High Court in March 2015. The dispute subject to the appeal arose after two companies that had conducted a forestry investment scheme went into receivership. The first and second appellants were appointed as receivers and managers of those companies and the respondent was the corporate trustee for investors (referred to as 'Covenant holders') in the forestry investment scheme. The issue was whether the contractual agreements setting up the scheme had the effect of creating a trust for the benefit of investors in the land and trees being milled as part of the investment scheme. Were this to be the case, the appellant receivers would be obliged to pay the sale proceeds of the trees and land to the investors and not retain it for themselves (or pay it to others).

As is well known, for an express trust to arise there must be certainty of intention, certainty of subject matter, and certainty of object.[24] A contract is one of the most common bases for the establishment of these three certainties.[25] Accordingly, the objective theory of contract was critical in determining whether an express trust had been formed. As was succinctly stated by French CJ, 'an express trust cannot be created unless the person or persons creating it

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[24] See *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493.

[25] *Gosper v Sawyer* (1985) 160 CLR 548 at 568-569.

can be taken to have intended to do so.'[26] In each case, courts will look to 'the nature of the transaction and the circumstances, including commercial necessity, in order to infer or impute intention.'[27] However, on the other hand, 'a trust is not to be inferred simply because a court thinks it is an appropriate means of protecting or creating an interest.'[28] The objective theory of contract provides the basis for this: contracts (and express trusts) are formed because of the manifestation of parties' intentions in the world, not what they or anyone else thinks they ought to have agreed with the benefit of hindsight.[29] Similarly, 'that which is commercially desirable for one party is not, on that account, [an evident] commercial purpose of both.'[30]

The court was unanimous in finding that none of the relevant documents established that the investors were to acquire a proprietary interest in any land or trees that were being used to generate money for the investment scheme. Instead, the Covenant holders merely had certain contractual entitlements to profits generated by the scheme. There were several aspects of the agreement that pointed explicitly against an intention to create a trust. Most significantly, there was no indication that the land owner or miller were to hold proceeds of the scheme separately from other money of their own. This was to abnegate one of the hallmark duties of trusteeship from the agreement reached. The third party observer, then, would find it difficult to see any intent to create a trust structure by the parties, even if it might be of benefit to one or other of the parties to do so.

French CJ expressed his conclusion in this way: [31]

> No doubt the creation of a trust would have been favoured by the Covenant holders if they had been asked about it. So too would the creation of a trust in favour of many investors in commercial undertakings. The advantages of a trust, which might have enhanced the desirability of the investment from the point of view of the Covenant holders, do not support an inference that the creation of the trust would

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26 *Korda* at [3] (emphasis added).
27 *Korda* at [10] quoting *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 121.
28 *Korda* at [10]–[11].
29 See *Korda* at [29].
30 *Korda* at [53].
31 *Korda* at [53].

> have reflected the joint intention of promisors and promisees. AET's argument in that respect almost amounted to an invitation to the Court to imply a trust in order to reinforce marketing promises found in the Prospectus. That approach would conflate the ascertainment of an express trust with the imposition of a constructive trust. The invitation should not be accepted.

The point I make is that the objective theory of contract is applicable to all sorts of agreement that have a contract as their basis. In other words, the objective theory of contract governs the establishment of express trusts as well as any other type of business or commercial arrangement. However, it might be argued that certain rules arise in respect of trust law formation that do not similarly appear in more standard contractual interpretation cases. For instance, in *Korda*, Keane J places emphasis on a 'need for clarity as to the intention to create a trust'[32] and the point that 'the language of the relevant documents is not to be strained.'[33] There are references by Gageler J to the ascertainment of 'characteristics of a fiduciary relationship'[34] being formed and the failure to use common language of trusts, such as 'trust', 'trustee', and 'beneficiary'.[35] Are these considerations an isolated aspect of trust law? In my view, the objective theory of contract shows these to be practical applications of the objective lens to a particular type of case.

Trusts, by their nature, create some of the strictest and most far-reaching duties enforced by the law. That being the case, a reasonable business person is unlikely to commit themselves to enter a trust relationship by the use of loose language. Instead, they would have considered the consequences carefully and taken pains to set out the relevant obligations of each party. There is a known formality around the language of trusts in the business community. Accordingly, the use of that language would be a clear sign to the objective observer of such an accord being formed, and the absence of this a sign (albeit not determinative) that this was not occurring. Similarly, one might expect a higher 'clarity threshold' to be required for an apparently 'uncommercial' business contract to be entered into. Otherwise, the objective observer will be

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32 *Korda* at [205].
33 *Korda* at [208].
34 *Korda* at [106].
35 *Korda* at [109].

justified in construing an ambiguous clause in favour of a commercially sensible result, expecting that to have been the intention of the parties.[36]

Australian Vintage v Belvino Investments No 2

The final case I will discuss rounds off our examination of the objective theory of contractual interpretation by exploring two issues. First, the question of construing a clause in a contract that obliged an expert to apply a mathematical formula. Secondly, the issue of whether that expert's interpretation and then application of that formula was reviewable by the courts. The case in question is the New South Wales Court of Appeal decision in *Australian Vintage Ltd v Belvino Investments No 2 Pty Ltd* [2015] NSWCA 275 ('*Australian Vintage*').

In that case the appellant was the lessee and the first respondent the lessor of premises in Victoria. The sole permitted use of the premises by the lessee was the development and operation of a vineyard. Clause 4.26 of the lease contract made provision for circumstances where the productivity of the vineyard was affected by a natural disaster. The clause operated if, at any time after the 5th anniversary of the commencement of the lease, the lessee formed the opinion that the amount of grapes produced or capable of being produced from all vines on the premises in respect of any one vintage had been reduced by more than a threshold amount and that this reduction was due to a natural disaster. The clause went on to require the parties to meet to discuss and agree on this opinion and the remedial work required to restore production capacity to the threshold. In the absence of an agreement, the matter could be referred to an expert who would give a report on the state of the property, including the health and condition of the vines and the state of repair of trellises. Critically, under cl 4.26(f), the expert was required to deal with three specific matters, the first of which became subject to litigation. That was the determination by the expert about whether production or production capacity had been reduced by more than 50% of average production capacity. In other words, the expert was required to verify the lessee's opinion, notified pursuant to clause 4.26(b) that:

> The amount of grapes produced (*Production*) or capable of being produced (*Production Capacity*) for all vines on the Premises in respect of any one vintage is reduced by more than 50% of Average Production Capacity for that vintage year due to a Natural Disaster

[36] Recall, in this respect, the case of *Grocon* discussed earlier.

The expert's determination of this issue was said by clause 4.26(g) to be 'final and binding on the parties'.

In October 2013, a severe frost occurred in the area in which the vineyard was situated, causing a substantial diminution in the production of grapes for the 2014 vintage year. The lessee invoked clause 4.26 of the contract and, absent the lessor's agreement about the abovementioned opinion, the matter was referred for an expert's opinion. The expert determined that although a natural disaster had occurred, reduction of production or production capacity as a result of it was less than 50% of average production capacity. Proceedings brought by the lessee seeking to have this determination set aside were dismissed by the trial judge on the basis that, first, the expert's determination was not reviewable and, secondly, that in any event the expert's ultimate determination was correct. The lessee appealed those decisions to the Court of Appeal. As will be seen, the resolution of both points of appeal in fact came down to the same issue: whether, properly construed, the expert had made a determination in accordance with the terms of the contract.

The Court of Appeal dealt first with the proper construction of clauses 4.26(b) and (f) that set out the issue for the lessee's and then the expert's opinion. The Court of Appeal noted that the different interpretations by the expert, trial judge, and lessee of these clauses arose from deciding which formula should be used as opposed to the particular figures which went into that equation.

The resolution of the proper construction was determined, unsurprisingly, by reference to the words used by the parties, in the context of the lease as a whole, having regard to the purpose and object of the clause, as it appeared from the lease.[37] This was a pure case in which to make a construction determination as it was accepted by both parties that there were no surrounding circumstances which would assist in the interpretation process. Indeed, the summary of the contract and clauses I have provided above is almost alone sufficient for resolution of the issue.

The Court of Appeal held that the approaches taken by both the expert and primary judge to determining the correct formula for calculating whether the

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[37] *Australian Vintage* at [46].

threshold reduction had been met failed to address the central consideration that appears on the face of the relevant clauses, namely whether as a result of a natural disaster there had been a *reduction* of grape production or production capacity *in a given vintage year*.[38] Only once that reduction had been determined could it be compared to the threshold of 50% average production capacity and, if lower, trigger various options for remedial works and/or termination of the lease.

The court then turned to consider the issue of whether, despite their different view as to the proper formula to apply, the expert's determination should be left undisturbed. It was in resolving this question that the application of the objective theory of contract in the judgment of Bathurst CJ, with whom Beazley P and McColl JA agreed, became most evident. The Chief Justice made the following observations at [83] and [84]:

> Although it is correct that the dispute between the parties could include matters of contractual construction, the contract provided that the expert's determination was to relate to the three matters in cl 4.26(f). These matters seem to me to involve, first, a calculation of production, production capacity and average production capacity and the calculation of any reduction. Although the expert had to apply the formula, it does not seem to me that the contract revealed an intention that the parties would be bound if he or she misapplied it.
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> The three matters for determination, namely, calculation of production or production capacity, whether the reduction was due to a natural disaster and the remedial work required to restore production capacity, were all matters of judgment and were peculiarly within the qualification of the expert, particularly having regard to his or her functions under cl 4.25. By contrast, the construction of the formula was an objective matter outside of the expertise of such a person. It seems to me that, in these circumstances, it would be unlikely that the parties intended to bind themselves to the expert's determination on that issue. It does not seem to me that questions of costs, finality and expedition compel a contrary conclusion.

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[38] *Australian Vintage* at [49]–[52].

Importantly, Bathurst CJ noted that this was not to say that pure questions of law could not be left to the determination of an expert.[39] However, objectively, the parties had not intended to do so in this case. Indeed, it was noted that as a general principle 'parties are more likely to have left to an expert matters involving discretion or opinion [such as, in this case, working out the extent to which production capacity of grapes had been reduced], rather than matters of objective fact [such as the 'true meaning' of a contract].'[40] One might also observe that the reasonable commercial observer would be entitled to consider that terms of the contract would need to be very clear indeed to assign to a viticulturist the determining authority to decide an issue of contractual interpretation.

Chief Justice Bathurst concluded by endorsing the proposition stated by Nettle JA (as his Honour then was) in *AGL Victoria v SPI Networks (Gas)* that an indication in a contract that an expert's decision is 'final and binding' makes very little difference to the question of whether that expert's decision can be reviewed.[41] Bathurst CJ stated succinctly that:

> 'To the extent that the decision was made in accordance with the terms of the contract, it will be final and binding. To the extent that it was not, it will be subject to review.'[42]

Since it will be a rare case that the contract will afford a non-legal expert the authority to determine a pure question of law, such as contractual construction, it will accordingly be rare that an expert's decision about how to go about making an assessment required by the contract will be immune from review.

Commercial Practice

That is perhaps enough said about recent commercial litigation *decisions*. So, although not to detract from the importance of the above, I will conclude by sharing my thoughts on commercial practice more broadly to show that there are more fundamental considerations about the efficiency and legitimacy of a

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39 See *Australian Vintage* at [76] citing *Downer Engineering Power v P & H Minepro Australasia* [2007] NSWCA 318 at [79].

40 *Australian Vintage* at [76] citing *AGL Victoria v SPI Networks (Gas)* [2006] VSCA 173 at [53]; *WMC Resources v Leighton Contractors* [1999] WASCA 10; 20 WAR 489 at 494–7.

41 *Australian Vintage* at [85].

42 *Australian Vintage* at [85].

legal system which must be addressed before even fundamental propositions of contractual interpretation become important.

Litigation is never a desirable outcome of commercial practice. Legal practitioners who draft contracts and advise clients never want to see their clients or those contracts end up in court. But inevitably some will end up in court and some of you will see contracts you have drafted or advised clients about being litigated. What is then important is to remember that the existence of free, independent, competent and incorruptible courts and judges are not only essential to our democracy but also to the country's economic well-being. This is accepted in Australia and in many other countries without question.

But it is an ongoing struggle in many other countries, where commercial courts may be formed to try to bring economic progress to a country through observation of the rule of law. But often, as I have seen for myself when visiting many countries, as part of the International Association of Judges, the commercial court will be physically separated from the other courts and the type of judicial independence necessary to inspire confidence in the people of that country as well as the major economic and trading parties operating in that country of a just, unbiased and fair outcome in the courts remains an aspiration rather than a reality.