2 CONTRACT DOCUMENTS

DOCUMENTATION

Building contracts

2.1 Every building contract is constituted by agreement and it is conventional to speak of agreement in terms of *consensus ad idem*: see **1.1**. But *consensus* must exist, although the paths to finding its existence may differ: it has been said that it is not a function of the court to interpret documents and dealings between parties as leading to a finding of *consensus ad idem* when there was obviously no *consensus*.[1] In considering whether there is *consensus*, in practice the law generally ignores the subjective expectations and the unexpressed mental reservations of the parties.[2] The emphasis should be on what the relevant communications would have conveyed to reasonable persons in the parties' positions rather than on a pedantic analysis of language and preference given to form over substance.[3] A building contract, like any commercial contract, should be given a 'businesslike' interpretation.[4]

But building contracts are not noted for their brevity. Seldom will the contract consist of a single page. In fact, often the contract will consist of 'a monumental and forbidding aggregation of documents' — to adopt what the New South Wales Court of Appeal said in *F E Cleary & Sons Pty Ltd v Buckland Building Group Pty Ltd*.[5] Frequently it may be necessary for the court to examine the history of the negotiations and dealings between the parties only some of which may be in documentary form.[6] And by law it is quite clear that an agreement may exist out of a 'chain of correspondence'.[7]

1. *Comco Constructions Pty Ltd v Leisure Holdings Australia Pty Ltd* (1986) 3 BCL 259 at 265.
2. *G Percy Trentham Ltd v Archital Luxfer Ltd* [1993] 1 Lloyd's Rep 25 at 27. See also *Acorn Consolidated Pty Ltd v Hawkslade Investments Pty Ltd* (2000) 16 BCL 353 at 363.
3. *Weemah Park Pty Ltd v Glenlaton Investments Pty Ltd* [2011] QCA 150 at [49] per Muir JA (agreeing with trial judge).
4. *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at 160 per Gleeson CJ.
5. CA(NSW), 12 February 1976, unreported.
6. See *Hescorp Italia SpA v Morrison Construction Ltd* (2000) 16 Const LJ 413 at 415.
7. *ANZ Bank v Ciavarella* [2002] NSWSC 1186 (mediation agreement).

On the other hand, it is possible for the parties to specify an 'entire agreement clause', such that the written document constitutes the *only* agreement between them, and this has or may have the effect of denuding what would otherwise constitute a collateral warranty of legal effect.[8] Such a clause, however, cannot prevent the implication of a term by law.[9]

Kinds of contract documents

2.2 The contract documents may comprise the following:

1. The agreement in the narrow sense, or articles or heads of agreement, as this document may be called. This document may be perhaps only a page or so in length setting out what may be no more than six clauses. It contains a promise by the contractor to execute the works and a promise by the employer to pay for them. Usually it will name the builder, architect or engineer. It identifies the drawings and specifications in accordance with which the work is to be done, and may in addition list the documents which form part of the contract. A document setting out so called 'heads of agreement' may itself constitute a binding agreement, without more.[10] Or they may constitute a binding agreement even though there are areas in them, if not sufficiently pervasive, that amount to 'agreements to agree'.[11]
2. Conditions. Ordinarily these are the general conditions of contract, usually in the form of a printed set. At times there is also a set of special conditions. 'General conditions of contract' usually means a specific set of conditions so described.
3. Drawings prepared by the architect or engineer.
4. Specification. This describes in detail the work to be done, such description being not essentially graphic or representational (as with drawings) but verbal. If something does not conform to the specification, it is said to be 'out of specification' or 'out of spec'.
5. Bills of quantities. These show in great particularity the quantity of work to be done. They may, but usually do not, form part of the contract. Sometimes there is a combined specification and bill of quantities, called a specified bill of quantities. See generally **15.1–15.14**.
6. Schedule of rates.
7. Miscellaneous documents. Often the articles or heads of agreement expressly state that the contract documents include such documents as the builder's tender. At times a formidable list of documents is

8. *Inntrepreneur Pub Co v East Crown Ltd* [2000] 2 Lloyd's Rep 611. See **2.6**.
9. See *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49 at [114], [1519] (nor can it prevent a written agreement being varied by subsequent oral one).
10. *Anaconda Nickel Ltd v Tarmoola Australia Pty Ltd* (2000) 22 WAR 101. See also *AW Ellis Engineering Pty Ltd v Malago Pty Ltd* [2012] NSWSC 55 at [114].
11. *LMI Australia Pty Ltd v Baulderstone Hornibrook Pty Ltd* (2001) 18 BCL 57 at 61–4.

assembled, comprising not only the general conditions, specifications and drawings but also several notices to tenderers, the tender itself, the letter accompanying the tender and various other letters. Even telegrams, telex messages and notes of conferences or minutes of meetings may be included. This practice of stating expressly what documents constitute the contract is often very useful and may avoid disputation about whether some particular document is or is not included. A contract may be held to exist out of correspondence (such as by email or texts), even though it is difficult, if not impossible, to analyse a transaction in terms of offer and acceptance.[12] But providing the correspondence objectively manifests a present intent of the parties to be bound, it can be done.[13]

Documents forming part of the contract should be so endorsed and the endorsement signed by or on behalf of the parties. Where there might be dispute about whether a particular page of a document forms part of the contract, each page should be initialled. This precaution should obviously be taken in regard to additions and attachments and documents, such as specifications, that are not in a standard form.

Even when it is clear what documents constitute the contract it can be difficult at times to reconcile two or more provisions contained in the contract dealing with the same matter. On some occasions, it will be found even that some matter, for example, progress payments, is dealt with in the general conditions, the special conditions and the early provisions both of the specification and of the bill of quantities. A specific provision in a contract, inconsistent with a general provision in the one composite document, was held to prevail in *Ankay Pty Ltd v Erley Pty Ltd*.[14]

At times the writer of a specification lays down what is in effect a set of general conditions without paying regard to the question whether those provisions and the general conditions proper overlap or conflict. Similarly, the authors of some bills of quantities have an unfortunate habit of inaccurately paraphrasing the general conditions of contract and of interspersing these inaccurate paraphrases with what appear to be additional provisions. In a case where the bills of quantities are made part of the contract it may be very difficult to say what the effect of this is. In practice a provision which is really in the nature of a general or special condition but which is buried in a specification is often overlooked. However undesirable it may be to put into a specification matter which properly belongs in the general or special conditions, nonetheless, if the specification is a contract document, the parties will be bound by its provisions, even though they may deal with such matters as liquidated damages.

12. *Marist Brothers Community Inc v Shire of Harvey* (1995) 14 WAR 69.
13. *Coles Supermarkets Australia Pty Ltd v FKP Ltd* [2008] FCA 1915 at [45].
14. SC(WA), White J, 9 November 1994, unreported.

Main standard forms

2.3 Standard forms of building agreement are in widespread use.[15] They have been known by various short titles. The main forms which have been in use historically include the old Ed 5b JCC, AS 4000 and NPWC3.

ABIC forms have replaced the JCC series of contracts in many instances.

There are various ABIC forms. ABIC stands for Australian Building Industry Contracts. These are jointly published by Master Builders Australia (MBA) and the Australian Institute of Architects (AIA) and are intended for use in building projects where an architect administers the contract.

ABIC MW-2008 Major Works Contract is the most comprehensive contract in the ABIC suite of contracts. It is the standard contract for non-housing work. There is then the ABIC MW-2008 Major Works Contract-Housing which is a state and territory specific contract for housing work. Thus there is ABIC MW-2008 H Vic which is the Major Works Contract for Housing in Victoria. In Queensland there is ABIC MW-2011 H Qld. In Queensland also there is ABIC MW-2011 C Qld which is a Major Works Commercial Contract.

ABIC SW-2008 is in general use (except in Queensland) as the standard contract (Simple Works) for non-housing work. There is then the ABIC SW-2008 Simple Works Contract-Housing which, again, is a state and territory specific contract for housing work. In Queensland it is known as ABIC SW-2011 H Qld. There is for Queensland also ABIC SW-2011 C Qld which is a Simple Works Commercial Contract.

Other ABIC forms include ABIC EW-1 2003 which is an Early Works Contract (suitable for early works such as demolition and/or groundworks including temporary works where an architect administers the contract) and ABIC BW-1 2002 which is a Basic Works Contract (suitable for small commercial projects or single trade activities administered by an architect). These may not be suitable for use in Queensland.

There are various other standard form contracts. One, for example, is PC-1 1998 (published by the Property Council of Australia), but this is seldom, if ever, encountered. Of course, on many occasions parties are still using the well-known JCC forms of contract.

In many very major works, particularly infrastructure building, there is no doubt a tendency to draft contracts specifically for the purpose. One reason is because they may involve so-called 'public/private partnerships', or PPP. These contracts are highly complex and lengthy and great care must be taken both in drafting and perusing them.

15. See generally J Sweet, 'Standard Construction Contracts: Some Advice to Construction Lawyers' (1991) 7 *Construction Law Journal* 8.

Other standard forms

2.4 Various public authorities and others have their own standard forms. It is likely that some or many of these may not have been revised for many years.

Other short titles encountered include: UHC1 (Uniform Housing Contract: Agreement and Conditions of Contract), DECON2-2005 (Design and Construct Contract — Lump Sum), DECON2 SC 2005 (Design and Construct Subcontract — Lump Sum, CM 2012 (Construction Management Contract) and IC 2007 (Independent Contractors Agreement).

There are also state and territory local contracts which may be encountered. For example, in Victoria there has been HIA V30 (Housing Industry Association) for new house construction. There has also been HIC 5 (Home Improvement Contract) where the contract price is for more than $5,000.

INTERPRETATION OF CONTRACT DOCUMENTS

General approach

2.5 The primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. This was said by Gibbs J to be 'trite law'.[16] In *Investors Compensation Scheme Ltd v West Bromwich Building Society*[17] Lord Hoffmann said that:

> Interpretation is the ascertainment of the meaning which [a] document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

The subjective intentions of the parties are irrelevant.[18] This has been called the 'objectivist' theory of contract.[19] But in *Hillas and Co Ltd v Arcos Ltd*[20] Lord Wright said that the court should construe commercial contracts 'fairly and broadly, without being too astute or subtle in finding defects'. This should not be understood as limited to documents drawn by business people for themselves and without legal assistance.[21] The Full Federal Court in *Sharp v Cossack Pearls Pty Ltd*[22] (referring to Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of NSW*[23]) said that the appellants in that case had correctly contended that the courts ought to have regard to the objectively

16. *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109.
17. [1998] 1 All ER 98 at 114. See also *Nordic Holdings Ltd v Mott Macdonald Ltd* (2001) 77 Cons LR 88 at 116–17.
18. *Acorn Consolidated Pty Ltd v Hawkslade Investments Pty Ltd* (1999) 16 BCL 353 at 358.
19. *Stoelwinder v Southern Health* [2001] FCA 115 at [30] per Finkelstein J.
20. (1932) 147 LT 503 at 514.
21. *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109.
22. [2012] FCAFC 110 at [82].
23. (1982) 149 CLR 337 at 350.

determined commercial purpose of a contract with knowledge of the genesis of the transaction, the background, the context and the market in which the parties were operating. See further **2.16**.

Although a supposed building agreement may be bad for uncertainty, arguments invoking alleged uncertainty exert minimal attraction.[24] There is a clear reluctance in the courts to conclude that a commercial agreement on which parties have acted is void for uncertainty.[25] The courts endeavour as far as possible to treat the dealings of people as effective.[26] See further **3.1–3.4**.

At the same time a contract may be held not to exist even though the parties have shaken hands[27] or a document has been signed.[28] In *Hide & Skin Trading Pty Ltd v Oceanic Meat Traders Ltd*[29] it was said by Kirby P that subject to the rule that a court should give the words of a written agreement the natural meaning that they bear, 'in giving meaning to the words of an agreement between commercial parties, courts will endeavour to avoid a construction which makes commercial nonsense or is shown to be commercially inconvenient'. He returned to this view in *Pan Foods Company Importers & Distributors Pty Ltd v Australia and New Zealand Banking Group Ltd*[30] when he said that 'such documents should be construed practically, so as to give effect to their presumed commercial purposes'. How far this approach is at odds with the trite law position stated by Gibbs J is a matter of some debate.[31] Certainly though in *Steggles Ltd v Yarrabee Chicken Co Pty Ltd*[32] the Full Federal Court said that 'in approaching the construction of [a commercial] contract, if a detailed, semantic and syntactical analysis of words … will lead to a conclusion that flouts business common sense, it must yield to business common sense'. This hardly seems like the trite law position of Gibbs J. Nevertheless, and as was quoted by Lord Bingham in *Homburg Houtimport BV v Agrosin Private Ltd*,[33] 'a business sense will be given to business documents'.

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.[34] As Kirby P said in *Geebung Investments Pty Ltd v Varga Group Investments No 8 Pty Ltd*[35] 'courts should be the upholders of bargains and not their destroyers'.

24. *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep 205 (PC).
25. *Sportsvision Australia Pty Ltd v Tallglen Pty Ltd* (1998) 44 NSWLR 103.
26. *Hillas and Co Ltd v Arcos Ltd* (1932) 147 LT 503 at 512.
27. *Graham Evans Pty Ltd v Stencraft Pty Ltd* [1999] FCA 1670.
28. *Le Mans Grand Prix Circuits Pty Ltd v Ilidis* [1998] 4 VR 661.
29. (1990) 20 NSWLR 310 at 313–14.
30. (2000) 170 ALR 579 at 584.
31. See *Hancock Prospecting Pty Ltd v BHP Minerals Pty Ltd* [2002] WASC 224 at [49].
32. [2012] FCAFC 91 at [59]. The court (Jacobson, Lander and Foster JJ) referred to *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at [43].
33. [2003] 2 WLR 711 at 718 (quoting from *Glynn v Margetsen & Co* [1893] AC 351 at 359 per Lord Halsbury LC).
34. *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 115 per Lord Hoffmann.
35. (1995) 7 BPR 14551 at 14570.

Internal aids to construction

2.6 The agreement itself may contain provisions designed to aid construction. There may be a definitions clause setting out at length the meanings of various expressions used: see, for example, s 51 (Definitions) of ABIC MW-2008 H Vic. Another clause may state which of perhaps several contract documents is to prevail in the event of conflict. Building agreements commonly specify the law which is to govern their construction and may also specify that the written document contains the entire contract between the parties. As regards 'entire contract' clauses it may be said that in general, except in the case of fraud, and subject to any statutory provision, such a clause will bind the parties in accordance with its terms, properly construed.[36] It is always necessary to look carefully at contract documents to see what (if any) provision has been made to resolve interpretational issues.

Effect of printed word

2.7 Many building agreements consist of printed forms with handwritten or typewritten insertions or alterations. Generally, greater effect is given to the handwritten or typewritten words over the printed words.[37] It may be necessary, in order to give effect to the handwritten or typewritten words, actually to disregard inconsistent printed words.[38] When standard terms are incorporated into an agreement, the 'proper' approach, it has been said, going even further, is to disregard those incorporated terms that conflict with the expressly agreed terms.[39]

Words struck out

2.8 In *MA Sassoon and Sons Ltd v International Banking Corp*[40] the Privy Council stated that it was now taken to be settled that the effect of deleting words from a printed form of mercantile contract was 'the same as if the words had never formed part of the print at all'. However, the House of Lords in *Mottram Consultants Ltd v Bernard Sunley & Sons Ltd*[41] had regard to such a deletion as did the Queensland Full Court in *T J Watkins Ltd v Cairns Meat Export Co Pty Ltd*.[42]

Reviewing the authorities in *Mobil Oil Australia Ltd v Kosta*[43] Blackburn J concluded that the better view was that reference to words struck out was

36. *Johnson Matthey Ltd v AC Rochester Overseas Corp* (1990) 23 NSWLR 190 at 196. Quoted in *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)* [2012] SASC 49 at [113].
37. *Addis v Burrows* [1948] 1 KB 444 at 449; *Gesellschaft Burgerlichen Rechts v Stockholms Rederiaktiebolag Svea* [1967] 1 QB 58.
38. *Building and Engineering Constructions (Aust) Ltd v Property Securities No 1 Pty Ltd* [1960] VR 673 at 681.
39. *Ford Motor Co of Aust Ltd v Arrowcrest Group Pty Ltd* [2002] FCA 1156 at [8].
40. [1927] AC 711 at 721.
41. [1975] 2 Lloyd's Rep 197.
42. [1963] Qd R 21 at 27.
43. [1970] ALR 253.

not permissible. This was followed by Jacobs J in *Harrod v Palyaris Construction Pty Ltd*[44] who said that in his view:

> ... it is not ... permissible to have regard to ... printed or written words or phrases which have been deleted ... as an aid to interpreting the words and phrases which have been substituted in their place.

To the same effect are remarks of Young J in *Easyfind (NSW) Pty Ltd v Paterson*.[45] However, in *Hughes Bros Pty Ltd v Telede Pty Ltd*[46] Cole J expressed the view that it 'is permissible in case of ambiguity to have regard to deleted clauses as an aid to construction, at least in a standard form contract'. Similarly, Sheppard J in *Sanko Steamship Co Ltd v Sumitomo Australia Ltd (No 2)*,[47] a charterparty case, had regard to deleted words because of ambiguity in the words remaining. On the other hand, in *Acorn Consolidated Pty Ltd v Hawkslade Investments Pty Ltd*[48] Owen J declined to consider deleted words because they were not deleted from a pre-printed form.

In the interesting case of *NZI Capital Corp Pty Ltd v Child*[49] the deliberate deletion of a clause in a loan agreement produced on a word processor expressly providing for repayment by the borrower was held to have ousted the implied obligation that the borrower repay the loan.

The point is a difficult one in some respects but if 'the starting point ... still [remains] the express terms of the contract' to use the words of Bleby J in *Alstom Ltd v Yokogawa Australia Pty Ltd (No 7)*[50] then reference to words struck out, as a way to ascertain intention, seems inappropriate. For those words have been intentionally discarded and, thus, should not be held to have any contractual effect.

Conflicts in and between documents

2.9 In general one must construe a document as a whole so as to yield an harmonious, not an unworkable, reading which might result if clauses given their normal operation would be in conflict.[51] This is in accordance with the businesslike approach to the interpretation of commercial contracts adopted by the courts.[52] The courts will endeavour to avoid a construction of a document which makes commercial nonsense.[53]

A conflict *between* documents, however, may be so fundamental and far-reaching as to make it obvious that there is no true *consensus*. Alternatively, what appears to be a conflict may be resolved by an internal aid to

44. (1973) 8 SASR 54 at 58.
45. (1987) 11 NSWLR 98 at 101.
46. (1989) 7 BCL 210 at 215.
47. (1995) 63 FCR 227 at 258.
48. (1999) 16 BCL 353 at 365.
49. (1991) 23 NSWLR 481.
50. [2012] SASC 49 at [110].
51. See *Morgan Equipment Co v UMW Corporation Sdn BhD* [2002] NSWCA 193 at [10].
52. *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 550 at 559.
53. *Sydney Organising Committee for the Olympic Games v Zhu* [2002] NSWCA 380 at [173].

construction. Otherwise, however, the rule of construction stated long ago by Jessel MR in *Re Phoenix Bessemer Steel Co*[54] is 'that if contemporaneous documents can be read in two ways, in one of which they appear consistent and in the other inconsistent, the construction is to be preferred which will render them consistent'. Another principle he there stated[55] is 'that if one of two contemporaneous documents is ambiguous in its terms, but the other is clear, then force is to be given to the one whose terms are clear, so as to interpret the one containing ambiguous terms'.

Reasonableness

2.10 If the words used in the contract documents are unambiguous, orthodoxy is that the court will give effect to them notwithstanding that the result may appear capricious or unreasonable and even though it may be guessed or suspected that the parties intended something different.[56] A court is not entitled to reconstruct an agreement on equitable principles, as was held in *Mayfield Holdings Ltd v Meana Reef Ltd*.[57] In *Harrod v Palyaris Construction Pty Ltd*[58] Jacobs J said 'it is not the function of the court to make a new and sensible contract for the parties'. The court will not rewrite the contract for the parties.[59]

On the other hand, as Gibbs J said in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*:[60]

> ... if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious, unreasonable, inconvenient or unjust, even though the construction adopted is not the most obvious, or the most grammatically accurate'.

And as he went on there also to observe,[61] it is permissible 'to depart from the ordinary meaning of the words of one provision so far as is necessary to avoid an inconsistency between that provision and the rest of the instrument'. But as he also observed,[62] the 'court has no power to remake or amend a contract for the purpose of avoiding a result which is considered to be inconvenient or unjust'. For, as Menzies J observed in *SA Railways Commissioner v Egan*,[63] 'it is still true that hard cases tend to make bad law.' Thus was it said by Batt JA in *Etna v Arif*[64] that 'a court must not make

54. (1875) 44 LJ Ch 683.
55. Ibid.
56. *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109.
57. [1973] 1 NZLR 309 at 318.
58. (1973) 8 SASR 54 at 58.
59. *Acorn Consolidated Pty Ltd v Hawkslade Investments Pty Ltd* (2000) 16 BCL 353 at 359.
60. (1973) 129 CLR 99 at 109.
61. Ibid.
62. Ibid.
63. (1973) 47 ALJR 140 at 141.
64. [1999] 2VR 353 at 372.

purchased between them (known as a 'knock-out'), were held to be not against public policy and were enforceable.[99]

Statutory position

5.15 The Competition and Consumer Act 2010 (Cth) does not make collusive tendering and bidding the subject of any specific provision. However, central to the operation of Pt IV of that Act, which deals with restrictive trade practices, is a prohibition on collusion and anti-competitive agreements.[100] While this is to be seen especially in ss 45–45E of that Act, reference may be made in particular to the provisions of s 45(2) which, *inter alia,* provides:

> (2) A corporation shall not:
>
> (a) make a contract or arrangement, or arrive at an understanding, if:
>
> (i) ...
>
> (ii) a provision of the proposed contract or arrangement or understanding has the purpose, or would have or be likely to have the effect of, substantially lessening competition; or
>
> (b) give effect to a provision of a contract, arrangement or understanding ... if that provision:
>
> (i) ...
>
> (ii) has the purpose, or has or is likely to have the effect of substantially lessening competition.

The words 'contract, arrangement or understanding' are not defined in the Act but it is well established that they include both formal and informal agreements.[101] The following statement of French CJ and Kiefel J in *Australian Competition and Consumer Commission v Channel Seven Brisbane Pty Ltd*[102] was quoted by Logan J in *Australian Competition and Consumer Commission v TF Woollam & Son Pty Ltd*:[103] 'An arrangement or understanding ordinarily involves an element of reciprocal commitment even though it may not be legally enforceable. It involves [however] more than a mere hope or expectation that each party will act in accordance with its terms.'

The ACL s 56 also deals with the subject of 'bait' advertising. This may have special importance in the area of tendering, where the practice of underquoting — which may thus be the 'bait' — has historically enjoyed some prominence.

99. *Rawlings v General Trading Co* [1921] 1 KB 635; *Cohen v Roche* [1927] 1 KB 169; *Gomm v England* (1899) 5 ALR (CN) 78; *Harrop v Thompson* [1975] 1 WLR 545.
100. *Refrigerated Express Lines (A'asia) Pty Ltd v Australian Meat and Livestock Corp (No 2)* (1980) 29 ALR 333. For a case see *Queensland v Pioneer Concrete (Qld) Pty Ltd* [1999] FCA 499.
101. See *Re British Basic Slag Ltd Agreements* [1963] 1 WLR 727 at 746; *Top Performance Motors Ltd v Ira Berk (Qld) Pty Ltd* [1975] ATPR 40-004 at 17,116. On price-fixing arrangements see further *Radio 2UE Sydney Pty Ltd v Stereo FM Pty Ltd* (1983) 48 ALR 361.
102. (2009) 239 CLR 305 at [48].
103. (2011) 285 ALR 236; [2011] FCA 973 at [52].

6 TIME FOR COMPLETION

GENERALLY

Time requirement

6.1 If no time for completion is agreed upon, a term will ordinarily be implied that the work be done within a reasonable time having due and equal regard to the interests and convenience of both parties.[1] The court will determine what is fair to both parties and as was said by Mullighan J in the Full Court of South Australia in *Woolcock Engineering Pty Ltd v SWF Hoists & Industrial Equipment Pty Ltd*,[2] a case about a failure to install cranes on time, what 'is fair to the parties will be what they could reasonably have expected to agree upon by reference to the facts as then known by both of them, not by reference to the facts known by only one party which [have] not been disclosed to the other'.

Written building agreements almost invariably make express provision in relation to time for completion. Where the contract documents contained a clause providing that the work was to be done within a certain number of weeks and that number was left blank, a submission that the contract was bad for uncertainty failed, it being held that the clause should be treated as struck out, leaving the contract one for work which was by implication to be performed within a reasonable time.[3]

An agreement may expressly provide for completion within a reasonable period. One standard form contains a promise by the contractor to complete 'within a reasonable time under prevailing conditions' but it would seem that this provision is the same as what would otherwise be implied: the reference to 'prevailing conditions' adds nothing because what is a reasonable time must always depend upon all the circumstances. In some circumstances, time may be made of the essence of the contract by the unilateral act of a party. Where the other party has been guilty of unnecessary delay, a party may serve a notice limiting a time at which the contract will be treated as at an end. That time must be a reasonable time. But whether delay is, of itself,

1. *Dunedin Waterworks Co v Bassett* (1868) 1 NZCA 141 at 151.
2. [2000] SASC 120.
3. *Crowshaw v Pritchard and Renwick* (1899) 16 TLR 45.

sufficient to raise an inference of lack of due diligence, such as to entitle a notice to be served, must depend on the circumstances.[4] In determining the reasonableness of the time so limited, the court will consider not only what remains to be done, but all the circumstances of the case including previous delay and the attitude of the party giving the notice.[5] In *Gold Coast Oil Co Pty Ltd v Lee Properties Pty Ltd*[6] it was held that, as a general rule, where time is not of the essence, a party desiring to rescind a contract for failure to perform on the due date can only do so after giving a notice to complete and after non-compliance with that notice. However, it was also there held that the general rule does not apply where the other party has evinced an intention not to be bound by the contract. Imposing conditions of a kind not warranted by the contract, such as to time, can itself amount to repudiatory conduct.[7]

Bonus or damages

6.2 Building agreements commonly provide liquidated damages to be paid by the contractor in the event of delay in completion. See **6.3**. A provision for a bonus for early completion is much less common.[8] Nevertheless, there are many circumstances where it may make great sense to insert a bonus provision as an incentive to the builder to achieve completion on time. Some employers go so far as to offer the builder cash sums to achieve this objective, entirely unprovided for by the contract and regardless of the legality of doing so.

LIQUIDATED DAMAGES PROVISIONS

Liquidated damages or penalty

6.3 Building agreements very commonly provide for payment by the contractor of a sum described as 'liquidated damages' or 'liquidated and ascertained damages', usually for delay in completion. When a provision of this nature is invoked the contractor may argue that the sum stipulated for is not a genuine pre-estimate of loss or damage but a penalty. A liquidated damages provision is a genuine pre-estimate of loss or damage but a penalty is not.[9] A penalty, on the other hand, is often included in order to induce or compel compliance with the principal obligation under the contract and is in a sense collateral.[10] If the provision is held to be penal, it has no legal

4. *Hometeam Constructions Pty Ltd v McCauley* [2005] NSWCA 303 at [169] per McColl JA.
5. See *Ajit v Sammy* [1967] 1 AC 255 (PC); *Bow v McGrath Builders Ltd* [1974] 2 NZLR 442.
6. (1984) 1 BCL 63 at 66. See also *Ryan v McLachlan* (1987) 4 BCL 155 at 159; *Bartos v Scott* (1993) 26 IPR 27 at 34.
7. *Botros v Freedom Homes Pty Ltd* (1999) 15 BCL 351.
8. For an example see *Ware v Lyttelton Harbour Board* (1882) NZLR 1 SC 191.
9. *Forestry Commn of NSW v Stefanetto* (1976) 133 CLR 507 at 519; *Wollondilly Shire Council v Picton Power Lines Pty Ltd* (1994) 33 NSWLR 551 at 555.
10. *Cameron v UBS AG* [2000] VSCA 222.

effect[11] and is unenforceable[12] but the contractor may not entirely escape liability and will be liable to pay such damages as the employer is able to prove, although the better view appears to be that the penal provision sets a limit beyond which damages may not be recovered.[13] But on a *quantum meruit* it is no objection that the figure arrived at exceeds the figure payable had the contract been performed.[14] On *quantum meruit* see **8.8–8.9**. The doctrine of penalties and its foundations was considered by the High Court in *Andrews v Australia and New Zealand Banking Group Ltd*.[15]

Doctrine of penalties

6.4 It may be said that the doctrine of penalties has pursued such a tortuous path in the course of its long development that it is a risky enterprise to construct an argument on the basis of the old decisions.[16] Davies JA in *Bartercard Ltd v Myallhurst Pty Ltd*[17] referred to the 'arbitrary nature' of the doctrine. Nevertheless, in determining whether a sum stipulated is a penalty or not, reference is usually made to the tests laid down by Lord Dunedin in *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*[18] as follows:

1. The use by the parties of the expression 'penalty' or 'liquidated damages' is by no means conclusive.
2. The essence of a penalty is a payment of money stipulated as *in terrorem* of the offending parties; the essence of liquidated damages is a genuine covenanted pre-estimate of damage.
3. The question whether a sum stipulated is a penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged as at the time of the making of the contract, not as at the time of the breach.
4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive:
   (a) it will be held to be a penalty if the sum stipulated for is extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach;

11. *Citicorp Australia Ltd v Hendry* (1985) 4 NSWLR 1 at 23. Compare, however, *Jobson v Johnson* [1989] 1 WLR 1026 at 1040.
12. *Cedar Meats Pty Ltd v Five Star Lamb Pty Ltd* [2013] VSC 164 at [110].
13. *Fraser v Evans* [1946] VLR 382 at 385. See A H Hudson, Note (1974) 90 *Law Quarterly Review* 31 and 296 and Note (1975) 91 *Law Quarterly Review* 25. However, compare remarks in *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 174, 192.
14. *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234.
15. (2012) 290 ALR 595; [2012] HCA 30.
16. *AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 186. The same observation is made by Clarke JA in *AMEV Finance Ltd v Artes Studios Thoroughbreds Pty Ltd* (1989) 15 NSWLR 564 at 570. See generally F Cahill, 'The Use and Operation of the Liquidated Damages Clause' (1990) 9 *Australian Construction Law Reporter* 88.
17. [2000] QCA 445.
18. [1915] AC 79 at 86–8.

(b) it will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum, which ought to have been paid;

(c) there is a presumption (but no more than that) that it is a penalty when a single lump sum is made payable by way of compensation, and the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage;

(d) it is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties.

In *Cedar Meats Pty Ltd v Five Star Lamb Pty Ltd*[19] Sifris J summarised the law this way:

> The question whether a provision is a penalty is one of characterisation, to be determined as a matter of substance, taking into account all the circumstances. The critical question is whether the burden imposed by the clause is 'extravagant and unconscionable'. The factors to consider include the circumstances of the parties at the date of the contract, their perceptions at that time regarding their respective positions should breach of contract occur at a later and perhaps distant time, and their understanding of the likely imposition generated by the clause.

In that case his Honour found cl 8(a) of the agreement there under consideration to be a penalty and unenforceable on the ground that the stipulation was for an extravagant amount far exceeding the greatest loss suffered by the plaintiff. It was not, however, strictly necessary for him to deal with this issue, as he pointed out.

Following a review of the authorities, Mason and Wilson JJ in *AMEV-UDC Finance Ltd v Austin*[20] referred to the supervisory jurisdiction of the courts, not to rewrite contracts imprudently made, but to relieve against provisions which are so unconscionable or oppressive that their nature is penal rather than compensatory. They then said:[21]

> The test to be applied in drawing that distinction is one of degree and will depend on a number of circumstances, including (1) the degree of disproportion between the stipulated sum and the loss likely to be suffered by the plaintiff, a factor relevant to the oppressiveness of the term to the defendant, and (2) the nature of the relationship between the contracting parties, a factor relevant to the unconscionability of the plaintiff's conduct in seeking to enforce the term.

19. [2013] VSC 164 at [102].
20. (1986) 162 CLR 170 at 193. See RT Varghese, 'Penalties and Agreed Damages' (1992) 8 *Building and Construction Law* 270.
21. (1986) 162 CLR 170 at 193.

And as they then said,[22] 'the courts should not be too ready to find the requisite degree of disproportion lest they impinge on the parties' freedom to settle for themselves the rights and liabilities following a breach of contract'.

This same sentiment was also expressed by the Privy Council in *Philips Hong Kong Ltd v A-G of Hong Kong*[23] where emphasis was given to the extravagance of the sum payable as the test to be applied. To similar effect is the High Court decision in *Esanda Finance Corporation Ltd v Plessnig*.[24] But there is authority in *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd*[25] that a provision which is not open to empirical attack based on quantum may still be objectionable on the ground of unconscionability — the court looking at such matters as 'the circumstances of the parties at the date of the contract, their perceptions at that time regarding their respective positions should breach of contract occur at a later and perhaps distant time, the equality or inequality of bargaining position at the date of contract, and the willingness or unwillingness of a party to accept an imprecise or in some respects ill defined obligation to pay damages as the price of obtaining what presumably was regarded as a profitable contract'.[26] There is also authority in *Wollondilly Shire Council v Picton Power Lines Ltd*[27] that the doctrine of penalties in principle applies to provisions which provide not for the payment of money but for the transfer of money's worth. But a doctrine of proportionality as such is not the law as made clear by the High Court in *Ringrow Pty Ltd v BP Australia Pty Ltd*:[28] 'The principles of law relating to penalties require only that the money stipulated to be paid on breach or the property stipulated to be transferred on breach will produce for the payee or transferee advantages significantly greater than the advantages which would flow from a genuine pre-estimate of damage.' Although Mason and Wilson JJ in *AMEV-VDC Finance Ltd* did use the expression a 'degree of disproportion' they were not to be taken as asserting any doctrine of proportionality of the kind relied on by the appellant, said the High Court.[29]

Where the contract provides for the payment to or deduction by the proprietor of liquidated damages for delay in completion at a stated rate per day, week or other period, the provision will not be regarded as penal unless the sum stipulated is quite unreasonable. Provisions for the payment or deduction of a daily sum were upheld in *Williamson v Murdoch*[30] and *Bysouth v Shire of Blackburn and Mitcham (No 2)*.[31] If the clause fixes a daily sum it will

22. Ibid at 193–4.
23. (1993) 12 Aust Cons LR 20 at 25.
24. (1980) 166 CLR 131.
25. (1992) 33 NSWLR 504 at 509–10.
26. Ibid per Cole J.
27. (1994) 33 NSWLR 551 at 555.
28. (2005) 224 CLR 656; [2005] HCA 71 at [27].
29. Ibid.
30. (1912) 14 WALR 54 (where the clause was in the specification).
31. [1928] VLR 562. See further *Latham v Foster's Australian Fibres Ltd* [1926] VLR 427; *Reynolds v Strelitz* (1901) 3 WALR 143; *Lax v Glenmore Pty Ltd* (1969) 90 WN (Pt 1) (NSW) 703.

ordinarily be construed as requiring payment in respect of every day during the period of delay, and if the parties wish to limit the builder's liability to working days they should do so expressly.[32] While provision for the payment of damages for delay at a specified rate is normally unexceptionable, a provision superadded for payment of a lump sum will usually be obnoxious as a penalty. So where a contract provided for payment of damages for delay at the rate of £10 per week and went on to provide that in case the contract should not be in all things duly performed by the contractors, they should pay to the employer £1,000 as and for liquidated damages, the £1,000 was regarded as in the nature of a penalty.[33] But the mere possibility of unfairness lurking in a formula contained in a provision is not sufficient to characterise the provision as a penalty.[34] Nor is the possibility of a windfall brought about by the operation of a provision enough necessarily to make it a penalty.[35]

FORFEITURE CLAUSES

Forfeiture of deposit

6.5 Conditions of tendering usually provide for the forfeiture of the deposit should the tenderer be unwilling to proceed. Provided that the amount of the deposit is not plainly unreasonable or if there is no argument available based on unconscionability, sums of this kind will not be regarded as penalties. For example, in *Dunton v Warrnambool Waterworks Trust*[36] a provision in the conditions of tendering for forfeiture of the deposit of five per cent if the tenderer failed to sign the formal contract was held by the trial judge not to impose a penalty; on appeal, the point was abandoned by the tenderer. In *Pitt v Curotta*[37] there was 'no doubt' that the defendant was entitled to retain the deposit which was a guarantee of the plaintiff's obligations under the contract.

The nature of a deposit was discussed by Kaye J in *Fiorelli Properties Pty Ltd v Professional Fencemakers Pty Ltd*.[38] His Honour said that in 'any contract, a deposit constitutes an earnest, to bind the bargain, and a guarantee of due performance, of the contract, by the payee'.[39] He rejected the notion that legal principles relating to the forfeiture of deposits are confined to contracts for the sale of real property and held that they are applicable to any contract whatever.[40] He held that the magistrate in the case did not err in law in holding that the first respondent, carrying on the business of manufacturing

32. *Brown v Johnson* (1842) 10 M & W 331; 152 ER 497. See also *J Matheson and Co Ltd v Invercargill City Corp* [1975] 2 NZLR 226.
33. *Re Newman* (1876) 4 Ch D 724.
34. *Esanda Finance Corp Ltd v Plessnig* (1989) 166 CLR 131 at 142.
35. *Bartercard Ltd v Myallhurst Pty Ltd* [2000] QCA 445.
36. (1893) 19 VLR 81.
37. (1931) 31 SR (NSW) 477 at 481.
38. (2011) 34 VR 257; [2011] VSC 661.
39. Ibid at [31].
40. Ibid at [27]–[31].

and installing steel fencing and gates, was entitled to retain the whole of the deposit of $17,300 paid to it by the appellant.

Other forfeitures

6.6 Clauses may provide for the forfeiture of moneys other than the deposit or of materials and plant. In *Ranger v Great Western Railway Co*[41] the contract provided, first, that upon the contractor's default, after seven days' notice, the proprietor might proceed and complete the works itself, paying for the same out of the money then remaining due to the contractor; secondly, that the payments then already made to the contractor were to be taken as full satisfaction for all works then already done; thirdly, that all money being due, or which would thereafter have become due, to the contractor under the contract, and all the tools and materials in and about the works, were to become the absolute property of the proprietor; and fourthly, that if the moneys, tools and materials to become the property of the proprietor were insufficient to cover all charges occasioned by completing the works, then the contractor was to make good the deficiency. Lord Cranworth LC referred to the fact that the right of the proprietor to invoke the forfeiture clause might arise at any period of the contract including a stage at which almost the whole of the work had been done and that on one view of the provisions the proprietor might make a very large profit by forfeiting that which was worth a sum far in excess of the value of the work remaining to be done.[42] Similarly, in *Commissioner of Public Works v Hills*[43] the contract provided that in the event of non-completion by the due date the contractor should forfeit the retention moneys and also certain security money, and it was held that the provision could not be treated as a genuine pre-estimate of loss.

On the other hand, in *Bysouth v Shire of Blackburn and Mitcham (No 2)*[44] it was a condition of a contract for the construction of a road that the municipal council might by writing determine the contract if in the opinion of the engineer the contractor used bad materials or committed other breaches of the contract, and that in that event the moneys previously paid to the contractor should stand in full satisfaction of all claims under the contract and the contractor's deposit and all retention money and all materials and plant upon the works should remain the absolute property of the council. The Full Court was of opinion that, as to moneys already payable to the contractor at the time of the termination, and all property belonging to the contractor at that time, and not vested in the council by the terms of the contract, the clause was a penalty clause.

41. (1854) 5 HLC 72; 10 ER 824.
42. Ibid at 109–10; 839–40.
43. [1906] AC 368. See also *Richardson v Motuhora Stone Quarries Co Ltd* (1918) 20 GLR 518.
44. [1928] VLR 562.

Bysouth's case was distinguished by the majority in *Forestry Commission of NSW v Stefanetto*.[45] In that case the contract provided that, upon the default of the contractor, the principal might take over the work. In that event the principal had the right to take possession of, and use for the purpose of the contract, any materials and construction plant on the site and owned by the contractor without payment or any responsibility to make allowances for fair wear and tear and to retain their possession until any money ultimately due by the contractor had been paid. Barwick CJ and Jacobs J held that these contractual provisions were designed to secure and achieve early completion of the contract work and were not in the nature of a penalty.[46] *Bysouth*'s case was distinguished on the ground that it gave to the principal right of property and not merely possession.[47] Barwick CJ left as an open question whether, if the relevant provisions were held to be penal, the reach of the doctrines of equity against forfeitures and penalties would have provided jurisdiction to grant relief.[48] On the other hand, Jacobs J expressed the view that if the work should be completed for a sum less than the contract price, equity might treat as penal the provision depriving the contractor of compensation or allowance for the use of the plant and require, on a final account, that compensation or allowance be made by the principal.[49]

Forfeiture clauses, such as the one in *Ranger v Great Western Railway Co* or the one in *Bysouth*'s case, these days may be analysed in terms of unconscionability: indeed, the decision of Davies J in *Federal Airports Corporation v Makucha Developments Pty Ltd*[50] is plainly to this effect. There his Honour said that the parties to an agreement cannot oust the jurisdiction of a court of equity to relieve against forfeiture 'for a court of equity will relieve against forfeiture if there is an equity which justifies it in doing so'.[51] As he made clear in that case the 'principles of equity with respect to unconscionable conduct are not limited to contracts for the purchase of land or leases'.[52] However, it has been said to be still 'open to doubt' to what extent those very principles do indeed apply to the grant of such relief.[53]

45. (1976) 133 CLR 507.
46. Ibid at 515, 523–4.
47. Ibid at 515.
48. Ibid. But compare *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 722 cited in *Jobson v Johnson* [1989] 1 WLR 1026 at 1043–4.
49. Ibid at 524.
50. (1993) 115 ALR 679.
51. Ibid at 700.
52. Ibid.
53. *Fiorelli Properties Pty Ltd v Professional Fencemakers Pty Ltd* (2011) 34 VR 257; [2011] VSC 661 at [62] per Kaye J.

LOSS OF RIGHT TO LIQUIDATED DAMAGES

Generally

6.7 A contractor faced with a claim to recover or to retain liquidated damages for delay will often contend that the sum sought to be recovered is in truth a penalty and not liquidated damages: see **6.4**. There are, however, various other grounds on which the contractor may rely when a proprietor seeks to invoke a clause providing for liquidated damages for delay. Unconscionability, not merely as an aspect of the doctrine of penalties, may itself be a ground for saying a clause may not be invoked:[54] see **2.11**. But for other grounds see **6.5** and **6.6**.

Prevention by proprietor

6.8 It is a fundamental principle that one party may not rely upon the failure of the other party to perform the contract where it is the former who has prevented the performance. Or, as it was put in *Panamena Europea Navigacion (Compania Limitada) v Frederick Leyland & Co Ltd*,[55] 'at common law ... no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself'. It was expressed in similar terms by Blue J in *Built Environs Pty Ltd v Tali Engineering Pty Ltd*:[56] 'A party generally cannot rely upon non-fulfilment of a condition the performance of which has been prevented by that party's own breach of contract.' As such it is commonly known as the 'prevention principle'.

One application of this principle, which is to some extent covered by a 'best endeavours' or 'co-operation' clause, is a general rule that a proprietor may not recover or retain damages for delay in completion where timely completion of the work has been prevented by the proprietor's own act. The proprietor may, for example, have failed to give possession of the site or deliver machinery to be erected by the contractor or may have ordered extras, and in either case thereby increased the time required to execute the works. In these circumstances the proprietor will (unless the position is affected by a clause providing for an extension of time) usually be unable to claim damages for delay.[57] This is consistent with the application of the principle

54. Compare remarks of Cole J in *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd* (1992) 33 NSWLR 504 at 508–13.
55. [1947] AC 428 at 436. See also *Covecorp Constructions Pty Ltd v Indigo Projects Pty Ltd* [2002] QSC 322.
56. [2013] SASC 84 at [152].
57. *Dodd v Churton* [1897] 1 QB 562; *Findlay v Cameron* (1878) 4 VLR (L) 191; *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601; *Baskett v Gibbs Beach Gold Dredging Co (Ltd)* (1902) 21 NZLR 201; *Dillon v Jack* (1903) 23 NZLR 547; *Cameron Bunning Bros v Manea* (1911) 13 WALR 148.

by the rule that a court will not order specific performance of a contract where it is required to supervise such performance 'has more recently moderated, especially in relation to building contracts … but not so much where other contracts are involved.'[200] Specific performance is, of course, an equitable remedy subject to the discretionary considerations associated with that jurisdiction.

200. Ibid at [440].

12 DETERMINATION

INTRODUCTION

Kinds of determination

12.1 A building contract, like any other contract, may be determined by the exercise of an express contractual power contained within its terms or by operation of the common law through the acceptance of a repudiation. The contractual power usually only arises on the occasion of a default of a prescribed type by the other party and after delivery of a show cause notice and a continuation of the default. The two means by which a contract may be determined are distinct; however, the same events which give rise to a contractual entitlement to determine a building contract may also be construed as repudiatory conduct in common law.

The question may arise whether the contractual provisions entitling one party to determine the contract in the event of breach by the other party have been agreed as the exclusive means of determining the contract, so that the common law entitlement to determine is excluded. In *Mazelow Pty Ltd v Herberton Shire Council*,[1] it was held that cl 44 of AS 2124-1992 did not have that effect, with the court referring to what was said to be common ground that common law rights are not to be regarded as excluded unless, in the words of McPherson JA, 'the contract manifests a clear intention of doing so'.[2]

A building contract may also be brought to an end by agreement between the parties. That agreement may be express or may be implied from all the circumstances; such as in the case of abandonment.

A building contract may also be brought to an end by frustration. For the principle of frustration to operate, however, the performance called for by the contract must become radically different from that agreed in the contract, to the point where it was not the thing promised to be done at all.[3] Standard form building contracts often provide a contractual overlay to the common law of frustration. For example, cl 40 of AS 4000-1997 has set out what the contractor's contractual entitlement will be in the event the contract is frustrated.[4]

1. (2002) 18 BCL 272.
2. Ibid at [7]. See also *Walter Construction Group Ltd v Walker Corporation Ltd* (2001) 17 BCL 364.
3. *Davis Contractors Pty Ltd v Fareham Urban District Council* [1956] AC 696 at 723; *Codelfa Construction Co Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 357, 380.
4. ABIC MW 2008 provides similarly at cl Q19.

There may also be contractual terms contained within the building contract that have the effect of bringing it to an end in the event that certain factual circumstances either do or do not eventuate.

PC-1 1998 also contains a mechanism by which a clause can be included by agreement between the parties giving rise to a right in the proprietor to terminate the contract at any time for its sole convenience and for any reason. Termination for convenience clauses are becoming more common, and whether or not an overarching obligation (or term) to act in good faith can be implied into the building contract may have an effect on how they may or should be exercised. However, it is unlikely a termination for convenience clause would be limited in any significant respect.[5]

Where work is performed in anticipation of a contract which for some reason does not come into existence, for example because the project is cancelled, the contractor may nevertheless recover the cost of that work, although the legal basis for that recovery is somewhat unclear.[6]

Abandonment

12.2 A building agreement may be terminated by the tacit mutual abandonment of the parties whereby they so conduct themselves in relation to each other as to mutually abandon or abrogate the contract.[7] It has been held that a contract may be abandoned even though not wholly executory.[8] In Australia it appears that the question of whether an agreement has been abandoned does not require an examination of whether the parties actually had the intention of abandoning the agreement, but rather an objective assessment of whether the conduct manifests that intention. The position was summarised in *Mareva Building Consultants v Zevon*[9] by the Australian Capital Territory Court of Appeal as follows: 'Whilst consensus between the parties to abandon a contract must be clear, it need not necessarily be announced or otherwise communicated'.

5. *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* (2000) 16 BCL 130 at 170. This case went on appeal to the High Court as *Placer (Granny Smith) Pty Ltd v Thiess Contractors Pty* Ltd (2003) 196 ALR 257, but this question was not considered.
6. In *Sabemo Pty Ltd v North Sydney Municipal Council* [1977] 2 NSWLR 880, Sheppard CJ permitted recovery on the basis of restitution in quasi-contract, while Byrne J, agreeing with the justice of the decision, questioned this legal analysis in 'Restitution: For Work Done in Anticipation of Contract' (1997) 13 *Building and Construction Law* 4. Compare *BBB Constructions Pty Ltd v Aldi Foods* [2010] NSWSC 1352.
7. *Summers v Commonwealth* (1918) 25 CLR 144; *Wren v Emmett Contractors Pty Ltd* (1969) 43 ALJR 213 at 216. See also *Lombok Pty Ltd v Supetina Pty Ltd* (1987) 14 FCR 226.
8. *Sturt v Cusack* (1989) 12 Qld Lawyer Reps 84 at 92.
9. [2013] ACTCA 28 at [24].

EXPRESS POWERS OF DETERMINATION

Proprietor's powers

12.3 Standard form building contracts typically contain express provision entitling a proprietor to determine the employment of a builder in the event of certain defaults. The principal is required to follow the procedure contained in the contractual provisions. The entitlement does not depend upon the existence of repudiatory conduct per se, but rather the occurrence of the events the contract requires. AS 4000-1997 has entitled the principal to terminate the contract upon the substantial breach of contract by the builder. Clause 39.2 defines some matters that are deemed to be substantial breaches, but does not purport to be an exclusive list. The more important matters listed include:

- failing to comply with the superintendent's direction to remedy defective work;
- substantially departing from the construction program without reasonable cause or the superintendent's approval; and
- where there is no construction program, failing to proceed with due expedition and without delay.

In *Mazelow Pty Ltd v Herberton Shire Council*,[10] the phrase 'substantial breach of contract' was considered where it appeared in AS 2124-1992. It was held the phrase required a substantial breach. The view expressed is consistent with a general perception that contractual rights to determine are included in contracts to expand the common law right to determine.

In *Khoompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*,[11] Gleeson CJ, Gummow, Heydon and Crennan JJ, citing *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd*[12] and its context in subsequent legal developments, concluded the test to determine an essential term as follows:

> It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and … the commercial purpose it served, that determines whether a term is 'essential', so that breach will justify termination.[13]

Upon the commission of a substantial breach (in the terms of AS 4000-1997) the principal is entitled to deliver a notice to show cause under cl 39.3. The formal requirements for the notice are that it must refer to the fact that it is a notice under cl 39, allege the substantial breach, state that the contractor is

10. (2002) 18 BCL 272.
11. (2007) 233 CLR 115.
12. (1938) 38 SR (NSW) 632.
13. *Khoompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at 48.

required to show cause in writing why the principal should not exercise its rights under cl 39.4, specify a date and time (not less than seven days) by which the contractor must have shown cause, and specify the place at which cause must be shown.

If the contractor fails to show reasonable cause by the stated date and time, then the principal may take out of the contractor's hands part or all of the works remaining to be completed and suspend payment or terminate the contract.[14] If the principal takes works out of the contractor's hands, it may use the materials and equipment of the contractor without compensation.[15] In addition to these rights, the contract provides that the proprietor would have the same entitlement that it would have had as a result of a repudiation and determination of the contract 'under the law governing the contract'.[16]

The previous version of AS 4000 (AS 4000-1995) contained a similar regime in cl 44, as did AS 2124-1992 cl 44.

ABIC MW 2008 also contains a similar regime, although referring to a breach of 'a substantial obligation' without any additional definition, as being the triggering event for a show cause notice.[17]

PC-1 1998, like AS 4000-1997, entitles a show cause notice to be given upon substantial breach by the contractor, and lists a number of specific events that entitle delivery of the written notice. Those events include failing to proceed with the contractor's activities regularly and diligently (apparently regardless of whether there is a contract program or not) and failing to comply with any direction of the contract administrator made in accordance with the contract.[18] The notice that is delivered has formal requirements that must be met[19] and requires the breach to be remedied within 21 days.[20] In addition to an entitlement to take over and use the contractor's plant and equipment, and providing relief from any requirement to pay the contractor further and providing an entitlement to recover additional costs, losses or damages incurred, PC-1 1998 also required the contractor to hand over to the proprietor immediately all copies of documents provided by the proprietor and design documentation prepared by the contractor prepared up to the date of termination (whether complete or not).[21]

Importantly, in *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)*,[22] Dixon J considered the right to terminate following a

14. AS 4000-1997 cl 39.4.
15. Ibid cl 39.5.
16. Ibid cl 39.10.
17. ABIC MW 2008 cl Q1.
18. See cl 14.2.
19. PC-1 1998 cl 14.4.
20. The absolute requirement to remedy the breach contained in PC-1 1998 can be compared with the requirement to show reasonable cause contained in the AS 4000 and AS 2124 contracts.
21. Clause 14.6.
22. (2013) 29 BCL 19.

substantial breach by a contractor pursuant to AS 2124-1992. His Honour found that a principal is not entitled to terminate the contract or to take the works out of the contractor's hands as of right upon a substantial breach:

> The right to take either cause of action does not automatically follow failure to rectify the breach after service of a notice. The contractor has the opportunity to influence the principal's choice about its response to [the contractor's] substantial breach by showing reasonable cause to the notice that the principal had served. The process affords to the contractor an opportunity to show cause why the principal should not exercise those rights at all.[23]

Further, the court in this case found that the regime provided for in cl 44 of AS 2124-1992 does not stipulate that the contractor is required to rectify the breach within the notice period: rather, the contractor must show cause as to the action it proposes to take to rectify the alleged breach. Most standard form building contracts give an immediate right to the proprietor to terminate on an insolvency event (which is defined) by the contractor.

A power to determine the employment of the builder was given by cl 22 of the old Ed 5b. The clause required expiration of a period of time referred to in the warning notice. Clause 22(b) conferred a power to determine the employment of the builder forthwith in certain events, being events reflecting on the builder's financial stability. Clause 22(c) dealt with the consequences of the determination. The specific events entitling the giving of the notice were set out in cl 22(a) and included failing to proceed with the works with reasonable diligence or in a competent manner and refusing to or persistently neglecting to comply with a written notice from the architect in certain circumstances.

Under the JCC form of contract, determination of the employment of the builder is governed by cl 12. The events that entitle the giving of the notice are generally similar to those in cl 22 of Ed 5b, but there are differences.

By cl 12.03, after receiving notice of default, the builder has 10 days (not 14 days as in Ed 5b) to remedy the default. If not remedied, the proprietor may (within a further 10 days) by written notice determine the builder's employment. Unlike Ed 5b, there is no provision that the notice must not be given unreasonably or vexatiously. Under cl 12.01, determination for the builder's bankruptcy or the like may be effected at any time and not merely 'forthwith' as provided in cl 22(b) of Ed 5b. There is also provision in cl 12.04 that permits determination in the event of the builder's deregistration under builders' licensing legislation.

Builder's powers

12.4 Standard form building contracts give the builder the right to determine the contract or to suspend works in certain circumstances.

23. Ibid at 385.

Commonly, the contractual regime contemplates the builder first suspending works before becoming entitled to terminate the contract. Suspension of the works is sometimes seen as a tactical means by which the principal can be encouraged to remedy a default in making payment. The contractual power to suspend has often been used for this purpose; however, under security of payments legislation a statutory right to suspend is also available. In order to exercise the statutory entitlement to suspend, builders (or subcontractors) are required to follow strictly the procedures set out in the legislation: see **9.20**. However, the statutory regime does not entitle the builder to determine the contract; to do that the contractual provisions must be followed or the common law of determination upon repudiation relied on.

AS 4000-1997 provides in cl 39.7 that if the principal commits a substantial breach of the contract the contractor may deliver a show cause notice. As discussed in **12.3**, the term 'substantial breach' is not exclusively defined, but this clause includes a failure to make a payment due and payable pursuant to the contract or to rectify inadequate possession. Notably, a failure by the superintendent to give a certificate of practical completion is also a substantial breach committed by the principal.

Clause 39.8 sets out the formal requirements of the notice. The notice must state that it is a notice under cl 39, state the alleged substantial breach and specify that the principal is required to show cause in writing why the contractor should not exercise a right under cl 39.9 within a set period (seven clear days or more) at a specified place: see **12.10**.

If the principal fails to show reasonable cause the contractor may, by written notice, suspend the whole or part of the works. The suspension must be lifted if the principal remedies the breach, but if the principal fails to remedy the breach within 28 days of suspension (or make other arrangements to the reasonable satisfaction of the contractor) the contractor is entitled to terminate the contract by a third written notice.

ABIC MW 2008 entitles the contractor to give a proprietor a written notice requiring it to rectify the default within 10 working days if the proprietor fails to meet any substantial obligation under the contract, suspends the work for more than 20 days under cl G9 or fails to make a progress payment on time.[24]

There are formal requirements for this notice set out in the clause, which include that a copy of the notice must be given to the architect. If the proprietor fails to rectify the default or fails to show reasonable cause why it cannot be remedied within 10 working days after receiving the notice, the contractor may immediately suspend the works by giving the owner a further written notice. A copy of that notice must also be given to the architect and comply with formal requirements. Thereafter the contractor is entitled to terminate the contract by a third notice.

24. Clause Q11.

Both AS 4000-1997 and ABIC MW 2008 entitle the contractor to damages on the same basis as if the proprietor had repudiated the contract and the builder had accepted that repudiation.[25]

PC-1 1998 entitles a builder to give a proprietor a notice of default in three specified circumstances. They are: insufficient access to the site; failure to pay an amount due and payable; and a failure to appoint a person to act as contract administrator.[26] There are formal requirements for the notice,[27] and on a failure to remedy the breach within 21 days of receipt of the notice, the contractor may suspend the whole or part of the works by written notice. The contractor may terminate the contract 21 days after the date of suspension, if the proprietor has failed to remedy the breach or, if the breach is not capable of remedy, to make arrangements satisfactory to the contractor.

Unlike AS 4000 and ABIC MW 2008, PC-1 1998 purports specifically to limit the contractor's rights to claim under a *quantum merit*, which it would otherwise have under common law.[28]

Older standard form contracts tended to be more prescriptive about the circumstances allowing the giving of a show cause notice on which a contractual right to determine might be founded. They also tended to be less clear in setting out the steps that had to be followed.

Clause 23(a) of Ed 5b provides that the builder, by written notice sent by certified mail to the proprietor, may suspend operations or determine employment in any of a list of events there set out. Some of the events require a previous default notice to have been given (for example, failure to pay on a certificate or issue a certificate) while others do not.

Clause 23(a) provides that the builder's rights under such clause are without prejudice to any other rights and remedies the builder may possess. The clause also provides that the builder's notice must not be given unreasonably or vexatiously. This type of restriction is becoming less common in modern contracts. It is discussed in **12.12**.

Clause 12.06 of the JCC form of contract provided that the builder, by written notice hand delivered or sent by certified mail to the proprietor, may suspend operations or determine employment in certain events. As in Ed 5b, some of the events require a previous notice to have been delivered, while others do not.

As with cl 23(a) of Ed 5b, the builder's rights under cl 12.06 are expressed to be without prejudice to any other rights or remedies. Unlike cl 23(a), however, cl 12.06 does not stipulate that the builder's notice must not be given unreasonably or vexatiously.

25. AS 4000-1997 cl 39.10; ABIC MW 2008 cl Q15.
26. PC-1 1998 cl 14.3.
27. Ibid cl 14.4.
28. Ibid cl 14.7.

Clause 44.7 of AS 2124-1992 is expressed differently to both cl 23(a) of Ed 5b and cl 12.06 of the JCC form. It follows the current style of a show cause notice being required as a first step towards termination. A 'substantial breach' is the trigger for the entitlement to serve the show cause notice and examples of what events are deemed to be substantial breaches are provided.

It is no requirement of AS 2124-1992 that the builder's notice not be given unreasonably or vexatiously. However, it is a requirement by cl 44.8 that the notice specify, *inter alia*, the alleged substantial breach. The notice must give the principal at least seven clear days to show cause why the contractor should not exercise a right referred to in cl 44.9. Thereafter a notice suspending the works can be given (on the principal's failure to show cause) and 28 days later termination may be possible by a third notice.

REPUDIATION

Meaning of 'repudiation'

12.5 In order for a contract to be determined at common law there must be a repudiation of the contract by one party and an acceptance of that repudiation by the other. Repudiatory conduct will often also be a significant breach of the express terms of the contract. For example, the time for performance of a particular obligation may not have arisen and yet the conduct of one party may make it clear that when the time for performance arises the contractual obligation will not be met. Such conduct is often termed an anticipatory breach.[29] As discussed above, repudiatory conduct may give rise to an express contractual right to determine the contract; or there may be an express contractual entitlement to determine a contract even though the conduct complained of is not necessarily a repudiation.

The term 'repudiation' implies conduct or acts evincing an intention no longer to be bound by the terms of the contract. In *Kennedy v Collings Construction Co Pty Ltd*,[30] Giles J said:

> The question then is whether the [builder] had repudiated the contract. By that is meant the evincing of an intention not to be bound. That may take the form of straight-out refusal to perform the contract, or may be found if the party shows that he intends to fulfil [sic] the contract only in a manner substantially inconsistent with his obligations … or only if, or as and when, it suits him.

In *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*,[31] Deane and Dawson JJ had said that an issue of repudiation turns upon objective acts

29. In *Bysouth v Shire of Blackburn and Mitcham (No 2)* [1928] VLR 562 at 578, Mann J referred to the situation as 'a breach of contract by anticipation'.
30. (1989) 7 BCL 25 at 39; see also *Shevill v Builders Licensing Board* (1981) 149 CLR 620 at 625–6 and 633.
31. (1989) 166 CLR 623 at 658.

and omissions and not upon uncommunicated intention; accordingly, Giles J summarised:

> … repudiation turns upon objective acts and omissions, not on uncommunicated intention, and it is sufficient that, viewed objectively, the conduct of the relevant party has been such as to convey to a reasonable person, in the situation of the other party, repudiation or disavowal either of the contract as a whole or of a fundamental obligation under it.[32]

These remarks were referred to by Ashley J in *Wilson v Kirk Contractors Pty Ltd*,[33] who added that when deciding whether there has been a repudiation 'all the circumstances of a matter must be considered'.[34]

Citing *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*, Gleeson CJ, Gummow, Heydon and Crennan JJ concluded in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*[35] that repudiation was used in different senses.

First, it may refer to conduct evincing an unwillingness or an inability to render substantial performance of the contract. 'The test is whether the conduct of one party is such to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.'[36]

Second, repudiation may be used at breach of contract which justifies termination by the other party:

> There may be cases where a failure to perform, even if not in breach of an essential term … manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives.[37]

A 'renunciation' of a contract is an absolute refusal to perform the contract.[38]

A party may terminate a building contract if the other party, through insolvency, is 'wholly and finally' disabled from performing under its terms.[39] A contract may be repudiated by a party putting itself in a position where it

32. (1989) 7 BCL 25 at 39.
33. (1991) 7 BCL 284 at 29.
34. See also *Sopov v Kane Constructions Pty Ltd* [2007] VSCA 257.
35. (2007) 233 CLR 115.
36. Ibid at [44].
37. Ibid at [44].
38. *Mersey Steel and Iron Co v Naylor Benzon & Co* (1884) 9 App Cas 434 at 439. See also *Robert Joseph Ryan and Martha Maria Ryan v Maxwell George McLachlan* (1987) 4 BCL 155 and *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (No 3)* (2013) 29 BCL 19.
39. See *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1992) 111 ALR 649 at 663–4.

18 BUILDING DISPUTES

INTRODUCTION

Disputation

18.1 'Building contracts are pregnant with disputes' said Lord Browne-Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd.*[1] And as he went on there to observe: 'The disputes frequently arise in the context of the contractor suing for the price and being met by a claim for abatement of the price or cross-claims founded on an allegation that the performance of the contract has been defective'.[2] Defects and delay are 'classical' areas of dispute.[3] Some of these 'disputes can become so complex that many issues arising under [such] contracts are almost untriable in the courts'.[4] In *Tickell v Trifleska Pty Ltd*[5] Rogers CJ Comm D expressed the view that it 'is only in the last resort that a dispute should proceed to trial and to determination'.

Avenues for resolution

18.2 Building disputes may range from large commercial construction disputes to small house building disputes. Depending on the nature of the dispute, and the circumstances of the parties, several alternatives may be open for its resolution ranging from litigation to some form of alternative (or appropriate, as some have called it) dispute resolution (ADR).[6] Rogers CJ

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1. [1994] 1 AC 85 at 105; referred to in *Alucraft Pty Ltd (in liq) v Grocon Ltd (No 2)* [1996] 2 VR 386 and *Fulham Partners LLC v National Australia Bank Ltd* [2013] NSWCA 296. See also *Canterbury Pipe Lines Ltd v Christchurch Drainage Board* [1979] 2 NZLR 347 at 353 and P Davenport, 'The Unpaid Builder's Right To Stop Work' (1994) 32(9) *LSJ* 36.
2. [1994] 1 AC 85 at 105.
3. *L U Simon Builders Pty Ltd v H D Fowles* [1992] 2 VR 189 at 194 per Smith J, referred to in *Sopov v Kane Constructions Pty Ltd* [2007] VSCA 257 at [79].
4. R Fitch, *Commercial Arbitration in the Australian Construction Industry*, Federation Press, Sydney, 1989, p 17.
5. (1990) 25 NSWLR 353 at 354, referred to in *Ziliotto v Hakim* [2013] NSWCA 359 at [11].
6. See generally Hon Justice Smart, 'Resolution of Construction and Associated Disputes' (1987) 3 *Building and Construction Law* 11; Hon Justice Legoe, 'Dispute Resolution, The Options, The Obstacles and The Openings' (1989) 8 *Arbitrator* 70; S Hibbert, 'Construction Claims Dispute Resolution — Future Directions' (1990) 6 *Building and Construction Law* 239; D S Jones, 'Arbitration and Alternative Dispute Settling' (1990) 9 *Australian Construction Law Reporter* 86; Hon Justice von Doussa, 'ADR The Changing Scene'

Comm D in *Beveridge v Dontan Pty Ltd*[7] said that in 'the more enlightened climate of legal thinking today it should be accepted that there is not one exclusive method of dispute resolution that will lead to a just result'. Or, as Mahoney JA observed in *Ferris v Plaister; Stap v Grey*:

> The courts now increasingly recognise that the procedures available for the resolution of disputes extend over a wide spectrum. [They] are … increasingly recognising that no single means of resolving disputes is appropriate in all cases: there is 'no magic wand' for the settlement of disputes.[8]

LITIGATION

Jurisdiction of courts

18.3 Generally, a matter may only be brought in the court which has jurisdiction to hear and determine it. But this is subject to the operation of the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Cth),[9] the Jurisdiction of Courts (Cross-Vesting) Act 1987 (Vic) and the Courts (Case Transfer) Act 1991 (Vic) and equivalent legislation in other States and Territories.

The Federal Court has only such jurisdiction as is vested in it under Commonwealth laws.[10] A building case however may involve a matter arising under Commonwealth law.[11] Often, such cases will include claims for misleading and deceptive conduct or unconscionable conduct, as provided for under the former Trade Practices Act 1974 (Cth), which has since been replaced by the Australian Consumer Law which, as noted elsewhere in this work, is Sch 2 to the Australian Competition and Consumer Act 2010 (Cth).[12]

(1991) 10 *Arbitrator* 105; M Black, 'The Courts, Tribunals and ADR' (1996) 7 *Australian Dispute Resolution Journal* 138; I Lulham, 'Domestic Building Disputes and VCAT' (1998) 72 *Law Institute Journal* 51; A Burr and M Odams de Zylva, 'New Statutory Regime for Construction Disputes in England' (1998) 14 *Building and Construction Law* 7; J Sierra, 'Dispute Resolution in Building Matters in Country Victoria' (2002) 5(3) *ADR* 37.

7. (1991) 23 NSWLR 13 at 24. See also *Eko Investments Pty Ltd v Austruc Constructions Ltd* [2009] NSWSC 208.
8. (1994) 34 NSWLR 474 at 494–5 referred to in *Savcor Pty Ltd v State of New South Wales* (2001) 52 NSWLR 587.
9. In *Re Wakim; Ex parte McNally* [1999] HCA 27, the High Court held that part of the Act which conferred state jurisdiction on the Federal Court to be constitutionally invalid. Since then Commonwealth, State and Territory governments have introduced legislation aimed to ensure that any affected decisions of the Federal (and Family) Court remain valid and continue to be enforced.
10. Federal Court of Australia Act 1976 (Cth) s 19(1).
11. For example: *Trade Practices Commission v Collings Construction Co Pty Ltd* (1994) ATPR 41-350 and (1996) 142 ALR 43; *Graham Evans Pty Ltd v Stencraft Pty Ltd* [1999] FCA 290; *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd* [2003] FCA 174; *GEC Marconi Systems Pty Limited v BHP Information Technology Pty Ltd* [2003] FCA 50; *Plastec Australia Pty Ltd v Plumbing Solutions Pty Ltd* [2012] FCA 510.
12. See in particular s 18 in Sch 2.

The Federal Magistrates Court was created by the Federal Magistrates Act 1999 and is now known as the Federal Circuit Court of Australia.[13] That court's jurisdiction is that vested in it under Commonwealth laws as well as certain associated or ancillary jurisdiction.[14]

The Supreme Court in each State and Territory is governed by its version of a Supreme Court Act.[15] Each has general jurisdiction in civil cases unlimited as to quantum.

The intermediate courts, in those States and Territories which have them, are named District Courts but in Victoria, the County Court, and are creatures of and subject to, the jurisdictional limits set by their respective establishing Acts.[16] For instance, the Victorian County Court has no monetary limit on claims it can hear within its civil jurisdiction. In Queensland, the District Court has a limit of $750,000.

Similarly, the jurisdiction of the lower courts, Magistrates or Local, is limited by their enabling Acts. The Victorian Magistrates' Court is limited to claims not exceeding $100,000 in all civil cases whether a claim is for equitable relief or not.[17]

Where permitted, a monetary jurisdictional limit may be extended by consent of the parties.[18] Jurisdiction in a court to hear a matter usually extends to jurisdiction to hear a counter-claim or cross-action. But in some cases, for example in Victoria under the Domestic Building Contracts Act 1995 (Vic) s 57, the courts' jurisdiction is excluded and jurisdiction is conferred on a specialist tribunal (VCAT).

Procedure

18.4 Rules of court govern the progress of an action from its inception to final disposition. They govern such matters as:

1. commencement of proceedings;
2. service of documents;

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13. Federal Circuit Court of Australia Legislation Amendment Act 2012 (Cth).
14. Federal Circuit Court of Australia Legislation Amendment Act 2102 (Cth) ss 10 and 18.
15. Supreme Court Act 1986 (Vic). Elsewhere see: ACT: Supreme Court Act 1933 (Cth); Supreme Court Act (NT); Supreme Court Act 1970 (NSW); Supreme Court of Queensland Act 1991 (Qld); Supreme Court Act 1935 (SA); Supreme Court Act 1959 (Tas); Supreme Court Act 1935 (WA).
16. For example: County Court Act 1958 (Vic) ss 3(1), 37(1), 39(2); District Court Act 1973 (NSW) s 44; District Court of Queensland Act 1967 (Qld) s 68; District Court Act 1991 (SA) s 8; District Court of Western Australia Act 1969 (WA) s 50.
17. Magistrates Court Act 1989 (Vic) ss 3(1), 100(1). Elsewhere see: Magistrates Court Act 1930 (ACT) s 257; Local Court Act (NT) ss 3, 14; Local Court Act 2007 (NSW) s 29; Magistrates Courts Act 1921 (Qld) ss 2, 4; Magistrates Court Act 1991 (SA) s 8; Magistrates Court (Civil Division) Act 1992 (Tas) ss 3, 7; Magistrates Court (Civil Proceedings) Act 2004 (WA) ss 4, 5 and 6.
18. For example Magistrates Court Act 1989 (Vic) s 100(1)(c) discussed in *Whelan Kartaway Pty Ltd v Donnelly* [2012] VSC 45 at [29].

decided, may result in the case being determined. It may identify an issue or issues which, unless determined, will stand in the way of the orderly and expeditious determination of the whole case.[29]

These remarks were referred to by Byrne J (the learned judge in charge of the former Building Cases List) in *Pizzey Noble Pty Ltd v H D Fowles*,[30] who spoke of his duty 'to identify at the earliest stage the real issues between the parties and to focus … attention upon their resolution' putting aside other matters not in serious contention or lacking substance.

In Victoria, r 47.04 of both the Supreme and County Court Rules provides for early determination of a separate question or preliminary point which might dispose of the proceedings in their entirety or at least reduce the issues left to be determined. Although there are obvious advantages in endeavouring to isolate a preliminary issue for determination (as pointed out in *Evans Deakin Industries Ltd v Commonwealth*),[31] it is a power that has traditionally been exercised with 'great caution'.[32] Kirby and Callinan JJ in *Tepco Pty Ltd v Water Board*[33] described the 'attractions of trials of issues rather than of cases in their totality', as being 'often more chimerical than real' and that 'common experience demonstrates that savings in time and expense are often illusory.' They expressed the view that single–issue trials 'should only be embarked upon when the utility, economy and fairness to the parties are beyond question.'

However, as Forrest J observed in *Birti v SPI Electricity Pty Ltd*,[34] the cases expressing those reservations pre-dated the Civil Procedure Act 2010. After referring to the breadth of ss 8 and 49 of that Act, his Honour approached the question of whether to embark on determining a separate question by asking what was 'the most efficient and just way to deal with' the plaintiff's claim.

From a practical perspective, separate questions or preliminary points tend to prove most efficacious on relatively one dimensional issues such as the construction of a contractual provision which will effectively provide a 'win or lose' answer to the underlying dispute; or where all relevant factual issues are agreed such that the remaining controversy may be a succinctly stated question of law to be applied to those agreed facts. On the other hand, where for example, a court is asked, prior to a full hearing on all issues, to examine and determine conflicting factual evidence, or (worse) make credit findings about witnesses, who, if the matter is not entirely resolved, may have

29. [1973] VR 753 at 755.
30. [1994] 1 VR 371 at 376–7; cited in *Knorr v Commonwealth Scientific and Industrial Research Organisation (CSIRO) (No 2)* [2012] VSC 268 at [46].
31. [1983] Qd R 40 at 45; considered in *Heery v Criminal Justice Commission* [2001] 2 Qd R 610.
32. *Dunstan v Simmie & Co Pty Ltd* [1978] VR 669; *Verwayen v Commonwealth* [1988] VR 203 at 206; *Utiger v Brown* [2002] VSC 306.
33. [2001] HCA 19 at [168]–[170]; referred to in *E A Negri Pty Ltd v Technip Oceania Pty Ltd* [2009] VSC 543 at [34].
34. [2011] VSC 566 at [23].

to give further evidence later in the proceeding, the procedure can be very problematic. It is in those difficult cases that the cautions expressed above have greatest foundation, and often, the only safe course is to proceed to a full hearing.

Offer of compromise

18.7 The importance of making an offer of compromise in many building cases cannot be over-estimated. But, as a practical matter, it is often difficult to persuade someone to make a realistic assessment of their position for this purpose whether with a view to making or accepting an offer.

Offer of compromise generally has replaced the procedure for payment into court in Victoria. The offer, which must be in writing, may be served at any time before judgment on the claim. It is then open to be accepted within the time stipulated, usually not less than 14 days. There are significant cost implications for a party who does not accept an offer but does not recover more than was offered. See Supreme Court (General Civil Procedure) Rules 2005 (Vic) O 26; County Court Civil Procedure Rules 2008 (Vic) O 26; Magistrates' Court General Civil Procedure Rules 2010 (Vic) O 15.[35]

Expert evidence

18.8 A party in a building case intending to rely upon expert evidence must, before the hearing, provide the other parties with a statement that identifies the expert witness, describes the qualifications of the witness and gives the substance of the proposed evidence. See Supreme Court (General Civil Procedure) Rules 2005 (Vic) O 44; County Court Civil Procedure Rules 2008 (Vic) O 44; Magistrates' Court General Civil Procedure Rules 2010 (Vic) O 19.[36]

35. Elsewhere see: Federal Court Rules 2011 (Cth) Part 25; ACT: Court Procedures Rules 2006 (ACT) Pt 2.10; NT: Supreme Court Rules (NT) O 26; Local Court Rules (NT) Pt 20; NSW: Uniform Civil Procedure Rules (2005) r 51; Qld: Uniform Civil Procedure Rules 1999 (Qld) s 353 (offer to settle); SA: Supreme Court Civil Rules 2006 (SA) Part 11; District Court Civil Rules (SA) Pt 11 r 41; Magistrates Court (Civil) Rules 1992 (SA) r 55 (and Magistrates Court (Civil) Rules 2013 (SA) r 55); Tas: Supreme Court Rules 2000 (Tas) Pt 9; Magistrates Court (Civil Division) Rules 1998 (Tas) Pt 5; WA: Rules of the Supreme Court 1971 (WA) O 24, 24A; District Court Rules 2005 (WA) r 6; Magistrates Court (Civil Proceedings) Rules 2005 (WA) Pt 12.
36. Elsewhere see: Federal Court Rules 2011 (Cth) Div 23.2; Federal Circuit Court Rules 2001 (Cth) Div 15.2; ACT: Court Procedures Rules 2006 (ACT) Pt 2.12; NT: Supreme Court Rules (NT) O44; Local Court Rules (NT) Pt 24; NSW: Uniform Civil Procedure Rules 2005 (NSW) r 51.47; SA: Supreme Court Civil Rules 2006 (SA) Part 9; District Court Civil Rules 2006 (SA) Pt 9; Magistrates Court (Civil) Rules 1992 (SA) r 69 (and Magistrates Court (Civil) Rules 2013 (SA) r 69); Tas: Supreme Court Rules 2000 (Tas) Pt 19; Magistrates Court (Civil Division) Rules 1998 r 105; WA: Rules of the Supreme Court 1971 (WA) O 36A; District Court Rules 2005 (WA) Pt 5A; Magistrates Court (Civil Proceedings) Rules 2005 (WA) r 72.

Expert evidence is or contains opinion. Ordinarily, opinion evidence is inadmissible. However, s 79 of the Evidence Act 1995 (Vic)[37] provides for the admissibility of opinion evidence derived from specialised knowledge based on a person's training, study or experience. In *Dasreef Pty Ltd v Hawchar*,[38] the High Court affirmed the 'rules' for admissibility of expert evidence discussed in *Makita (Australia) Pty Ltd v Sprowles*.[39] Admissibility of opinion evidence is to be determined by application of the requirements of the Evidence Act. A failure to demonstrate that an opinion expressed by a witness is based on the witness' specialised knowledge based on training, study or experience is a matter that goes to the admissibility of the evidence, not to its weight. The expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. The expert must provide a statement of reasoning showing how the 'facts' and 'assumptions' related to the opinion stated to reveal whether that opinion was based on the expert's claimed expertise.

References out of court

18.9 One form of reference out is to a special referee: see **18.10**. Other forms of ADR include reference to a mediator and reference to arbitration. On this point, see Supreme Court (General Civil Procedure) Rules 2005 (Vic) O 50.07, 50.08; County Court Act 1958 (Vic) s 47A; County Court Civil Procedure Rules 2008 (Vic) rr 50.07, 50.08; Magistrates' Court General Civil Procedure Rules 2010 (Vic) rr 50.01, 50.04.[40]

In both the Supreme and County Courts in Victoria, a reference out of a proceeding or any part thereof may be made at any stage of the proceeding whether with or without the consent of any party. In the Supreme Court, it may be made with the consent of any party and by an Associate Justice with the consent of all the parties.

A reference of a proceeding to arbitration also may be made at any stage of the proceeding in either the Supreme or the County Court but in the former may only be made with the consent of all the parties. Thereafter, the arbitration is conducted in accordance with the Commercial Arbitration Act 2011 (Vic).

37. See also the equivalent provisions in the corresponding Commonwealth, NSW and Tasmanian Acts.
38. [2011] HCA 21 at [37]–[42]. See also Dixon J in *Dura (Australia) Constructions Pty Ltd v Hue Boutique Living Pty Ltd (formerly SC Land Richmond Pty Ltd)* [2012] VSC 99.
39. (2001) 52 NSWLR 705 at 743–4.
40. Elsewhere see: Federal Court Rules 2011 (Cth) Pt 28; Federal Circuit Court Rules 2001 (Cth) Pt 27; Civil Procedure Rules 2006 (ACT) Div 2.11.7 Civil Procedure Act 2005 (NSW) Pts 4, 5; Uniform Civil Procedure Rules 1999 (Qld) Pt 4; Supreme Court Act 1935 (SA) s 65; District Court Act 1991 (SA) ss 32, 33; Magistrates Court Act 1991 (SA) ss 27, 28; Supreme Court Rules 2000 (Tas) Pt 20; Magistrates Court (Civil Division) Rules 1998 (Tas) Pt 4; Supreme Court Act 1935 (WA) Pt 6; District Court Rules 2005 (WA) Pt 4.2; Magistrates Court (Civil Proceedings) Rules 2005 (WA) Pt 11.

Special referee

18.10 In a complex building case, there are obvious advantages in a court being able to refer matters of detail to an expert.[41] In the Federal Court, there is power to appoint a court expert: see Federal Court Rules 2011 (Cth) Pt 23.[42] In the Supreme Court and in the County Court, but not in the Magistrates' Court of Victoria, there is power to refer any question of fact in any proceeding to a special referee for a decision or an opinion on such question: see Supreme Court (General Civil Procedure) Rules 2005 (Vic) O 50.01; County Court Civil Procedure Rules 2008 (Vic) O 50.01.[43]

There is Victorian authority in *A T & N R Taylor & Sons Pty Ltd v Brival Pty Ltd*[44] that a matter will not be referred to a special referee where a party objects, unless the case is of an exceptional nature.[45] It has been pointed out,[46] however, that this decision was given before the Commercial Arbitration Act 1984 (Vic) was enacted.[47] Certainly, a court will be 'understandably cautious' about appointing a referee against the wishes of *both* parties.[48]

By the rules, as the interests of justice require, there is power to adopt the special referee's report or to decline to do so in whole or in part. For example, r 50.04 provides the court with a discretion, as the interests of justice require, to adopt the report of a special referee or decline to adopt the report in whole or in part, and make such order or give such judgment as it thinks fit. The discretion whether to adopt a report or not was said to be 'a wide one' by Brooking J in *Nicholls v Stamer*.[49]

41. See *Najjar v Haines* (1990) 7 BCL 145 at 150 and see appeal decision (1991) 25 NSWLR 224; applied in *Sinclair & Lindsay Sinclair Pty Ltd v Bayly & Earle* (1994) 11 BCL 439.
42. Formerly O 34, Federal Court Rules 1979 (Cth). See also, for example, *Newark Pty Ltd v Civil & Civic Pty Ltd* (1987) 75 ALR 350.
43. Elsewhere see: Court Procedures Rules 2006 (ACT) Div 2.15.4; Supreme Court Rules (NT) r 50.01; Uniform Civil Procedure Rules 2005 (NSW) Pt 20 Div 3; Uniform Civil Procedure Rules 1999 (Qld) Pt 7; Supreme Court Civil Rules 2006 (SA) rr 208, 213; District Court Civil Rules 2006 (SA) rr 208, 213 82; Magistrates Court (Civil) Rules 1992 (SA) r 69A; Supreme Court Rules 2000 (Tas) Pt 22 Div 5; Rules of the Supreme Court 1971 (WA) O 35; District Court Rules 2005 (WA) r 26.
44. [1982] VR 762 at 765. See also *Hoogerdyk v Condon* (1990) 22 NSWLR 171. Compare, however, *Maritime Services Board of NSW v Australian Shipping Commission* (1991) 27 NSWLR 258; *Super Pty Ltd (formerly known as Leda Constructions Pty Ltd) v SJP Formwork (Aust) Pty Ltd* (1992) 29 NSWLR 549; *Netanya Noosa Pty Ltd v Evans Harch Constructions Pty Ltd* [1995] 1 Qd R 650; *Bold Park Senior Citizens Centre & Homes Inc v Bollig Abbott & Partners (Gulf) Pty Ltd* (1998) 19 WAR 281.
45. However, also see *Talacko v Talacko* [2009] VSC 98 at [27]–[28] per Kyrou J.
46. *Park Rail Developments Pty Ltd v R J Pearce Associates Pty Ltd* (1987) 8 NSWLR 123 at 128.
47. Since replaced by the Commercial Arbitration Act 2011 (Vic).
48. (1987) 8 NSWLR 123 at 129. See also *Tropeano v Monogram Pty Ltd* [1992] 2 Qd R 324 at 329–30; applied in *Netanya Noosa Pty Ltd v Evans Harch Constructions Pty Ltd* [1995] 1 Qd R 650.
49. [1980] VR 479 at 494; applied in *Abigroup Contractors Pty Ltd v BPB Pty Ltd* [2000] VSC 261. See also *Wenco Industrial Pty Ltd v W W Industries Pty Ltd* [2009] VSCA 191 at [17].

Cole J in *Chloride Batteries Australia Ltd v Glendale Chemical Products Pty Ltd*[50] said that if a report shows 'a thorough, analytical, and scientific approach' the court will be disposed to accept it. This was approved in *Super Pty Ltd (formerly known as Leda Constructions Pty Ltd) v SJP Formwork (Aust) Pty Ltd*.[51] Cole J in *State Authorities Superannuation Board v Property Estates (Qld) Pty Ltd*[52] regarded the report in that case as satisfying the requirements he referred to in the *Chloride Batteries* case. But it will be different if the referee has 'missed the point, failed to answer questions asked, failed to give adequate reasons or provided inconsistent reasons'; or dealt with matters not referred to the referee.[53] The reasons given by the referee should lead 'logically and cohesively' to the referee's opinion.[54] The court should have a 'comfortable feeling of satisfaction' about a report.[55] The fact that the court would have reached a different conclusion does not mean the referee's opinion must be rejected.[56] In *Oddy v Fry*[57] the court rejected part of a referee's report which was inconsistent with a finding of fact the court had made. The court then made the relevant finding itself.

Consistent with statements above, the approach to be taken in considering whether to adopt the report of a referee was recently summarised in *Wenco Industrial Pty Ltd v W W Industries Pty Ltd*: 'The Court has a wide power which is to be exercised "as the interests of justice require".'[58] The purpose of rr 50.01 and 50.04 is to provide, where the interests of justice so require,

50. (1988) 17 NSWLR 60 at 67. See also *Oddy v Fry* [1998] 1 VR 142; *Milne v Benjafield* [2002] NSWSC 1126; *Parker v Muir Family Investments* [2002] NSWSC 240; *A & P Parkes Constructions Pty Ltd v Como Hotel Holdings Pty Ltd* (2006) 22 BCL 45; [2004] NSWSC 588; *CPC Energy Pty Ltd v Bellevarde Constructions Pty Ltd* [2007] NSWSC 1397.
51. (1992) 29 NSWLR 549 at 564; cited in *Road & Traffic Authority of NSW v Welling* [2003] NSWCA 14.
52. (1991) 11 BCL 28 at 31.
53. *Leighton Contractors (SA) Pty Ltd v Hazama Corp (Australia) Pty Ltd* (1991) 56 SASR 47 at 56 per Debelle J. See also *Cape v Maidment* (1991) 103 FLR 259; *Re Markbys Renaissance Pty Ltd* [1999] 3 VR 851; *Unley Property Development Pty Ltd v Lelio Bisbo Pty Ltd* [2000] SASC 388; *Milne v Benjafield* [2002] NSWSC 1126.
54. *Skinner & Edwards (Builders) Pty Ltd v Australian Telecommunications Corp* (1992) 27 NSWLR 567 at 575 per Cole J; followed in *Presmist Pty Ltd v Turner Corporation Pty Ltd* (1992) 30 NSWLR 478; considered in *Gorczynski v Leichhardt Municipal Council* (2001) 113 LGERA 422. See also 'Referees' Reports' (1993) 9 *Building and Construction Law* 241.
55. *White Constructions (NT) Pty Ltd v Commonwealth* (1990) 7 BCL 193 at 196; applied in *Cape v Maidment* (1991) 103 FLR 259; *Goliath Portland Cement Company Ltd v Gardiner Willis & Associates (a firm)* [1996] Vic SC 369; *DF McCloy Pty Ltd v Taylor Thomson Whiting Pty Ltd* [2000] NSWSC 1142; considered in *Gorczynski v Leichhardt Municipal Council* (2001) 113 LGERA 422; approved in *A & P Parkes Constructions Pty Ltd v Como Hotel Holdings Pty Ltd* (2006) 22 BCL 45; [2004] NSWSC 588.
56. *Skinner & Edwards (Builders) Pty Ltd v Australian Telecommunications Corp* (1992) 27 NSWLR 567 at 575. But see *W Jeffreys Holdings Pty Ltd v Appleyard & Assocs* (1990) 10 BCL 298. On referees and natural justice see: *Beveridge v Dontan Pty Ltd* (1990) 23 NSWLR 13; *Telecomputing PCS Pty Ltd v Bridge Wholesale Acceptance Corp (Aust) Ltd* (1991) 24 NSWLR 513.
57. [1998] 1 VR 142.
58. [2009] VSCA 191 at [17].

a form of partial resolution of disputes alternative to traditional litigation. Further, that purpose would be frustrated if the reference were to be treated as 'some kind of warm-up for the real contest'. Insofar as the subject matter of dissatisfaction with a report is a question of law, or the application of legal standards to established facts, a proper exercise of discretion requires the judge to consider and determine that matter afresh.

Where a report shows a thorough, analytical and scientific approach to the assessment of the subject matter of the reference, the court will have a disposition towards accepting the report, for to do otherwise would be to negate both the purpose and the facility of referring complex technical issues to independent experts for inquiry and report. If the referee's report reveals some error of principle, absence or excess of jurisdiction, patent misapprehension of the evidence or perversity or manifest unreasonableness in fact finding, that will ordinarily be a reason for rejection. In this context, patent misapprehension of the evidence refers to a lack of understanding of the evidence as distinct from giving particular aspects of it different weights; and perversity or manifest unreasonableness means a conclusion that no reasonable tribunal of fact could have reached.

The test denoted by these phrases is more stringent than 'unsafe and unsatisfactory'. Generally, the referee's findings of fact should not be re-agitated in the court where there is factual material sufficient to entitle the referee to reach the conclusions reached, particularly where the disputed questions are in a technical area in which the referee enjoys an appropriate expertise. The court is entitled to consider the futility and cost of re-litigating an issue determined by the referee where the parties have had ample opportunity to place before the referee such evidence and submissions as they desire. Even if it were shown that the court might have reached a different conclusion in some respect from that of the referee, it would not ordinarily be a proper exercise of the discretion conferred by r 50.04 to allow matters already agitated to be re-explored so as to lead to qualification or rejection of the report.

View

18.11 In many building cases, a view may be crucial. It will ordinarily involve inspection of the works the subject matter of the proceeding by the court, with the parties, their legal representatives and any experts to be called. In *Unsted v Unsted*[59] Davidson J said that 'the rule is that a view is for the purpose of enabling the tribunal to understand the questions that are being raised, to follow the evidence and to apply it, but not to put the result of the view in place of evidence'. Treyvaud J said in *Marriage of Fust*[60] that as

59. (1947) 47 SR (NSW) 495 at 498. See *Scott v President, Councillors and Ratepayers of the Shire of Numurkah* (1954) 91 CLR 300 at 313; *Theocharis Polykarpou* (1985) 18 A Crim R 288 at 290; *R v Murphy* [2001] VSC 319; *Kira Holdings Pty Ltd v Liverpool City Council* [2004] NSWLEC 81.
60. (1991) 105 FLR 124 at 128.