Recent Developments in the Law of Contract

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1. Penalties

Background: It has long been accepted that the parties are free, at the time they contract, to agree on the damages that will be payable in the event that one or other of the parties fail to perform their obligations under the contract. Such liquidated damages clauses are enforceable and, if there is a failure to comply with a nominated performance obligation, the sum specified is recoverable by the other party as a debt rather than as damages, thereby rendering the normal compensation principle as well as the normal requirement to prove causation, remoteness, quantification and mitigation redundant.

The one requirement for validity of a liquidated damages clause is that the sum specified must be a genuine pre-estimate of likely loss. If the sum specified bears no real relationship to the loss likely to be incurred as a result of the non-performance, the stipulation is not a liquidated damages clause but a penalty and penalties will not be enforced. Instead, the courts disregard the clause and substitute their own determination of what damages are properly payable.

Until recently, the accepted view was that for a clause to be a penalty, and therefore unenforceable, it had to have, as the trigger for its operation, a breach of contract by the party against whom is was sought to be enforced. That view was challenged and dismissed by the High Court in:

Andrews v ANZ Banking Group Limited (2012) 290 ALR 591; 86 ALJR 1002; [2012] HCA 30

Facts: The appellants sought declarations in the Federal Court that certain 'exception fees' that the ANZ Bank charged for honouring unauthorised debits and accepting other irregular transactions on their banking and credit card accounts (in particular for late payment, honour, dishonour, non-payment and over-limit transactions)were penalties and, consequently, unenforceable. The judge at first instance (Gordon J), following the decision of the New South Wales Court of Appeal in *Interstar Wholesale Finance Pty Ltd v Integral Home Loans Pty Ltd* (2008) 257 ALR 292, held that a fee could only be characterised as a penalty if it became payable as a result of a breach of contract. In the present instance she found that the late payment fee, being payable on a breach of contract by the customer, was capable of being characterised as a penalty but that the other fees, not being triggered by either a breach of contract by customers doing something that they had an obligation or responsibility to avoid were not so capable of characterisation. Consequently, even though ANZ had conceded that it did not determine the quantum of those fees by reference to a sum that would have constituted a genuine pre-estimate of the damage it would suffer as a result of allowing customers to overdraw their accounts, those fees were held not to be penalties and that they were, as a result, enforceable. The appellants sought leave of the Full Federal Court to appeal those findings and that application was removed to the High Court pursuant to s 40(2) of the *Judiciary Act 1903* (Cth).

Held: In a unanimous decision the High Court (French CJ, Gummow, Crennan, Kiefel and Bell JJ) allowed the appeal and held that a provision need not be triggered by a breach of contract in order to be a penalty. They held that relief could be granted where a provision imposed a penalty for non-performance of a condition in the contract even those there was no express contractual promise to perform the condition. In the present case this meant that even though the 'dishonour, non-payment and over-limit fees were not charged by [the ANZ bank] upon breach by its customers and that the customers had no responsibility or obligation to avoid the occurrence of events upon these fees were charged', that did 'not render the fees incapable of characterisation as penalties'. The orders by the primary judge in relation to that point were therefore set aside.

It is important to note though that the High Court expressly noted and approved the distinction that was pivotal to the earlier decision in *Metro-Goldwyn-Mayer v Greenham* [1966] 2 NSWLR 717, between a penalty and an agreement under which an additional fee was consensually payable for some additional entitlement or accommodation. The *Metro-Goldwyn-Mayer* case involved a contract for the hiring of films to exhibitors for public showing under which the exhibitors had the right to show one screening only. If they wanted to show additional screenings the fee for each additional screening was four times the fee for the original. It was held that that was not a penalty - merely a fee paid for the option to purchase the right to an additional screening. In the context of the present case, the High Court noted that, while it had held that the fees charged by the bank could be characterised as penalties, whether they were in fact penalties or, as in the *Metro-Goldwyn-Mayer* case, fees – albeit significantly higher fees - for additional services or accommodation was a matter for further trial.

Importance: The importance of the finding is clear. There are a number of instances where additional 'fees' are charged apparently simply because one party does not perform a 'condition' in the contract (in the sense of being some occurrence or event, the non-performance of which triggers the obligation to pay the stipulated sum). Contracts in which this occurs can include leases, franchise agreements, construction contracts, shipping contracts, service level agreements (especially in IT), amounts payable under contracts of indemnity, any contract imposing late payment fees and others – potentially even including 'take-or-pay' agreements (though there is some UK authority that such agreements are not penalties because their intent is to provide commercial certainty to parties of generally equivalent bargaining power and are not used principally as a means of deterring breach – see *M & J Polymers Ltd v Imerys Minerals Ltd* [2008] EWHC 388 (Comm) and *E-Nik Ltd v Department for Communities and Local Government* [2012] EWHC 3027 (Comm).

If such fees are, in reality imposed to secure the performance of some primary obligation and if they are not a genuine pre-estimate of the damage that the other party is likely to suffer as a result of non-performance, they will be penalties and, therefore, will not be enforceable.

On the other hand, if they are, in reality, for the provision of some additional service or accommodation (as in *Metro-Goldwyn-Mayer*), they may be enforceable.

It is salutary to note though that, as the High Court was careful to note (at [10], 'a stipulation prima facie imposes a penalty … if, *as a matter of substance,* it is collateral (or accessory) to a primary stipulation … and this collateral stipulation, upon the failure of the primary stipulation, imposes on the first party an additional detriment'.

One final point: In addition to the above, the High Court, citing *Waterside Workers' Federation of Australia v Stewart* (191) 27 CLR 119, noted (at [11]) that the penalty doctrine cannot apply 'if the prejudice or damage to the interests of the second party by the failure of the primary stipulation is insusceptible of evaluation and assessment in money terms'.

In that case a £500 bond given by the appellant union on condition that it pay £50 if and so often as its members in combination should go on strike was held to be enforceable. As the High Court noted, 'whilst refusal to work almost inevitably would cause loss to employers, "no one can ever tell how much loss is sustained by not doing business" and … no relief was to be given against payment of the £50'. This qualification to the general principle does potentially leave the door open, in appropriate cases, for a party to argue that a challenged stipulation cannot be a penalty because it is not possible to quantify the monetary loss that it stands to suffer as a consequence of the non-performance.

Subsequent decision – *Kellas-Sharpe v PSAL Ltd* [2012] QCA 371; [2013] QConvR 54-788; [2013] ANZ ConvR 13-003.

Facts: This case concerned a bridging loan made for the purchase of property on the common stipulation as to interest that a 'standard rate' be provided for (in this case 7.5% per month) with a further stipulation that "while the borrower is not in default .. .the Lender will accept interest at the concessional rate of 4.00% per month'. The Borrower fell into default and sought, inter alia, to have the 'standard rate' invalidated as a penalty. While noting that the distinction between the present provision and an alternative provision under which interest would be payable at 4% but increasing to 7.5% on default seemed to contradict equity's preference for 'substance over form' , all three judges (McMurdo P, Gotterson JA and Fryberg J) found that the rule that such provisions were not penalties was well established, had been affirmed by a number of intermediate courts of appeal in Australia and, while it had not been 'affirmed after a deliberate examination of it by the High Court', it had been 'acknowledged more than once by members of that Court'. As a result their Honours all felt that it was 'not open' to them 'to gainsay the long line of authority which supports the distinction' (per McMurdo P at [3]) – though Fryberg J did indicate (at [59]) that 'If the problems are susceptible of judicial resolution, they should be *examined nationally at the highest level*' [emphasis added].

Andrews v ANZ was cited in argument but was not referred to in the judgments.

2. Restitution

Background: The law of unjust enrichment, as it applies in Australia following the High Court's decision in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221, does not found or reflect any 'all-embracing theory of restitutionary rights and remedies'. What it does is to refer to or explain the categories of cases where the law does not allow one person to keep a benefit obtained from another. Cases involving vitiating factors such as mistake, duress, illegality or failure of consideration can give rise to a finding of unjust enrichments and, therefore , can trigger a prima facie obligation to make restitution to the plaintiff, subject to any defences such as the change of position defence (which would make an order for restitution, in turn, unjust).

The question of whether and when a claim for restitution can succeed when an original obligation to, in this case, make payment is unenforceable as a consequence of illegality was the subject of the High Court's decision in:

Equuscorp Pty Ltd v Haxton (2012) 86 ALJR 296 [2012] HCA 7

Facts: The case involved five appeals being heard together and involved the question of whether restitution was available as a remedy to the appellant finance company Equuscorp. The case had its origins in a tax scheme involving the farming of blueberries in northern New South Wales. Investors were invited to participate in the scheme under which a company controlled by the scheme's promoters carried on the actual business for an annual fee to be pre-paid by the scheme's participants. To finance their prepayments the scheme participants also entered into a loan agreement with Rural Finance Pty Ltd (Rural), a company that was also controlled by the scheme's promoters.

In 1997, following the collapse of the scheme, the receivers and managers for Rural sold Rural's interests in the loan agreements to Equuscorp – assigning its interests in the loan agreements and in the debts thereunder to Equuscorp (some $52.5 million in debt was assigned for a consideration of $500,000). Equuscorp subsequently instituted action against the scheme participants to recover the amount outstanding under the loan agreements.

Unfortunately the scheme, as constituted, involved 'prescribed interests' for which a prospectus was required under s 170(1) of the Companies (NSW) Code 1981. No prospectus (or valid prospectus) was ever registered and the result was that the scheme was illegal under the provisions of that Act. Consequently, when the appellant's action came before the Victorian Supreme Court, the primary judge held that the loan agreements, having been entered into in furtherance of an illegal enterprise, were unenforceable. The appellant's alternative claim for restitution (based on an action for money had and received) was the subject of the present appeal to the High Court.

In essence the High Court was asked to answer three questions:

1. Given the illegality of the loan agreements, had Rural had an alternative right to claim restitution of the loan amounts as money had and received (based on a failure of consideration)?
2. If so, had Rural been entitled to assign that right to Equuscorp?
3. If so, had the right been validly assigned to Equuscorp when the receiver and manager had sold Rural's interests under the loan agreement to Equuscorp?

The High Court's answer to the first of those questions (5:1) was a qualified 'No'. The Court found an alternative action in restitution was possible but that whether a claim in restitution can succeed where the underlying contract is unenforceable for statutory illegality will depend on whether it is unjust that the recipient of the benefit be permitted to retain that benefit. In making that determination it is relevant to consider matters such as the scope and purpose of the invalidating statute, the central policy consideration and the coherence of the law. It was also relevant to consider whether the recipients of the benefit fell within the class of persons that the statutory provision was designed to protect.

Here, it was clear that permitting Rural to recover the loan monies advanced under the agreements would have defeated or frustrated the clear purpose of the statutory prohibition. As a result, restitution was not available. This was a clear case where the requirement for coherence in the law, coupled with the need to avoid self-stultification of the statutory purpose dictated that restitution should not be available to permit Rural (and, through it, any assignee), to enforce debts which the statute made unenforceable.

In answer to the second question the High Court held (6:0) that, if Rural had been able to maintain a claim in restitution against the scheme participants it would have been able to validly assign that claim. The scheme participants had argued that a claim for money had and received was not a proprietary right but a bare right of action which is not assignable at common law. That argument was rejected in the current case, their Honours finding that the claim was not assigned as a bare right of action if the assignment included the assignor's contractual rights and if the assignee acquired a 'genuine commercial interest' (or a 'genuine and substantial commercial interest') in the enforcement of the claim.

On the third question the High Court split 3:3. French CJ, Crennan and Kiefel JJ held, on the wording of the deed (which, in assigning 'all legal and other remedies', had adopted the exact wording of s 199(1) of the *Property Law Act 1974* (Qld) which had been previously interpreted to refer merely to the rights to 'recover or enforce' the debt or chose in action that had been assigned) that the phrase did not extend to grant the assignee any additional causes of action including, as here, the right to claim in restitution for monies had and received.

Gummow and Bell JJ, on the other hand, held that the reference to 'other remedies' in the deed of assignment included alternative claims as well as the claims to the debts themselves and, in this view, Heydon J concurred.

Importance: The critical importance of the decision was the finding that where a contract has been rendered unenforceable an alternative claim in restitution will not be available if that would defeat the policy behind the invalidity (in this case it would have 'stultified' the statutory policy of protecting investors through the protections provided under the *Companies (NSW) Code 1981*) and diminish the coherence of the law.

On the other hand restitution may be available as an alternative remedy in appropriate cases where the invalidity is not to protect the parties involved but is for some other purpose – such as to protect the revenue where refusal of the remedy might result in unjustly enriching one of the parties. As Gummow and Bell JJ noted at [103], quoting Palmer's *The Law of Restitution*:

> *'The illegality of the transaction will preclude recovery of damages for breach, or any other judgment aimed at enforcement of the contract, and the problem is whether the plaintiff can nonetheless obtain restitution of values transferred pursuant to the contract. The fact that public policy prohibits enforcement of the contract is not a sufficient reason for allowing one of the parties to retain an unjust enrichment at the expense of the other. Such a retention is warranted only when restitution is in conflict with overriding policies pursuant to which the transaction is made illegal.'*

The decision is also important in that it clarifies the position with assignments of causes of action in contract. Until *Equuscorp* the situation was unclear in Australia with different approaches being taken by the state Supreme Courts on one hand, which were broadly supporting of the House of Lords decision in *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679 (holding that they could be) and by the Federal Court, which was not, on the other. This decision now confirms, following *Trendtex*, that a bare cause of action can be validly assigned so long as the assignment includes the assignor's contractual rights and the assignee acquires a 'genuine commercial interest' (or a 'genuine and substantial commercial interest') in the enforcement of the claim.

In terms of the practical consequences of the case there are at least two: Firstly, assignees of contractual rights need to ensure, before agreeing to the assignment, that the underlying contract is not tainted and therefore unenforceable (or even void) or, if they are, that that invalidity does not also taint any alternative rights that might accrue under the assignment.

Secondly, those involved in the drafting of the deed of assignment will need to ensure that the deed accurately and unequivocally assigns not only the rights under the contract but also any other rights that the assignee may have had to claim restitution and/or other legal or equitable remedies in relation to the subject matter of the assignment.

3. Exclusion Clauses and a Prior Course of Dealing

Background: The law relating to the validity of exclusion clauses requires that the clause have been brought to the attention of the party against who it is to be used either before or at the time of contracting. Where there has been a prior course of dealing between the parties an exclusion clause can be implied if:

a. The person against whom the clause is to be used was or should have been aware of its existence from the prior course of dealing; and
b. He or she was or should have been aware that the proferens only ever contracted on the basis that the clause would be included.

A prior course of dealing is not however enough per se to establish that a previously used exclusion clause has been incorporated into the present contract. The proferens still has to show:

a. That, at some point he or she did what was sufficient to bring the existence and contents of the clause to the other party's attention – either actually or constructively; and
b. That the clause was actually intended to form part of the present contract.

An interesting twist on the standard question fell to be resolved by the Western Australian Court of Appeal earlier this year in:

La Rosa v Nudrill Pty Ltd [2013] WASCA 18

Facts: La Rosa was the proprietor of a transport business. Nudrill was a long-time customer. In 2001 La Rosa was contracted to deliver a drill rig from Perth to Kalgoorlie. While negotiating a round-about on the outskirts of Kalgoorlie the wheels on the right hand side of La Rosa's low-loader lifted from the road, causing the drill rig to topple to the ground. It was extensively damaged. Nudrill sued La Rosa in bailment, for breach of contract and for negligence. La Rosa argued that if he was liable (as was found in the court below) his liability was covered by an exclusion clause printed on the back of his invoices which, he argued, had been incorporated into the present contract by a prior course of dealing. The exclusion clause read:

> *'All goods are handled, lifted or carried at owner's risk. The Contractor shall not be liable for any loss or damage of property and/or goods of the Client whether such damage was caused by any act, default or negligence on the part of the Contractor, and/or his servants.'*

In the normal course of events that wording would have been sufficient to exclude La Rosa from liability. The problem was that it was not included in a quote of other contractual document provided to Nudrill at or before the time of contracting. Instead it was referred to on the front, and written on the reverse, of the invoices that Nudrill received after each job specifying the equipment that had been carried, the location of pick-up, the place of delivery and the cost of the work and, critically, those invoices were only ever provided to Nudrill after each job had been completed. Over time La Rosa had provided Nudrill with 27 such invoices, each containing that clause on their reverse – but that that was the only possible source of notice or knowledge of the exclusion clause that Nudrill had received – and there was no evidence that either the Nudrill employee who was responsible for authorising payment of those invoices or anyone else at Nudrill had ever received actual notice of the existence or contents of the clause.

La Rosa argued though that his prior course of dealing with Nudrill was sufficient to incorporate the term on the earlier invoices into later contracts. He argued that, having continued to engage his services after consistently receiving invoices for earlier work all containing the same exclusion clause Nudrill must be taken to have done so on terms which included that exclusion clause.

Held: The Court held that the critical consideration was whether La Rosa could show that the parties, by their conduct, had accepted and treated the exclusion clause as contractual – by past notifications or other similar means. The timing of notification was not necessarily determinative; nor was it critical that the clause have been formally incorporated into any previous contract. What was critical was whether there was evidence that the clause was seen by both parties as part of the contract in question. That could occur by actual notice or by providing the clause in a contractual document through which constructive notice could be assumed.

Here, there had been no actual notice - and the invoice, as a mere demand for payment for work already done, was not a 'contractual document' of the type in which the parties would expect terms to be specified. Consequently, there was not sufficient constructive notice either. As a result, the clauses had not been incorporated into the present contract by the prior course of dealing and therefore La Rosa could not rely on it to escape liability. Importantly, the court noted that the outcome would, in all probability, have been different if La Rosa had drawn the terms, or even the fact of their existence (by, perhaps, some reference to them on a quote or similar document provided to Nudrill at the start of the contract) had been drawn to Nudrill's attention before the job was complete.

Importance: The case reinforces the critical need for notice – actual or constructive – of the existence and content of exclusion clauses. In commercial contracts, especially those involving repeat business, it is dangerous to rely on what might be found to be constructive notice from a prior course of dealing and the parties' documentation should ideally include express reference to the clause and be provided in such a way that the clause does or would come to the notice of a reasonable person.

If reliance is to be placed on some prior course of dealing the manner of those dealings will need to be examined to determine whether what has occurred previously is sufficient to satisfy that the requirements that need to be satisfied before the clause can be incorporated in that way.

4. 'Best Endeavours' Clauses

Background: A requirement for the parties (or one of them) to use their 'best endeavours' or 'reasonable endeavours' of 'all reasonable endeavours' to secure a specified outcome (or outcomes) are not unusual – especially in contracts where there is some uncertainty about whether that outcome can be practically achieved, as may be the case where the obligation involves the registration of plans or permits or the gaining of approvals that may required for a project to progress.

The meaning of such clauses and, in particular, the difference between 'best endeavours', 'reasonable endeavours' and 'all reasonable endeavours' has been the subject of significant court attention, with the early cases adopting a literal approach to the interpretation of, especially, the word 'best' and interpreting it to mean that 'no stone should be left unturned'.

In Australia this early literal approach has given way to a more 'commercial' approach and the requirements under all three sets of words are now almost identical (depending on the facts and the parties intentions) and are interpreted as meaning that the parties should do what they could 'reasonably do in the circumstances' (see, for example Gibbs J in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 64 – where he said, 'an obligation to use "best endeavours" does not require the person to go beyond the bounds of reason; he is required to do all he reasonably can in the circumstances to achieve the contractual object, but no more.').

The High Court has not been called upon to give any further significant consideration to the meaning of the terms but a number of state Supreme Court decisions have all followed Gibbs J's lead. In *Centennial Coal Company Ltd v Xstrata Coal Pty Ltd (2009) 76 NSWLR* 129, for example, the Supreme Court of New South Wales, in examining the meaning of 'all reasonable endeavours' held that there did not appear to be any substantive difference between the meanings ascribed ' reasonable endeavours' and 'best endeavours'.

A recent decision of the New South Wales Court of Appeal has followed this line in interpreting the meaning of the hybrid phrase 'best reasonable endeavours' but with a result that encourages caution in use of such words without further expalantion of what exactly is required. The case was:

Foster v Hall [2012] NSWCA 122

Facts: The appellants contracted to sell the respondents part of the land they owned on a steep ridge and in an area prone to bushfires at Mount Kembla in NSW. The contract required the parties to use 'their best reasonable endeavours' to have a proposed plan of subdivision of the land registered within 12 months. That did not occur and the vendors purported to rescind the contract. The purchasers, alleging that the vendors had failed to use their 'best reasonable endeavours' to have the plan of subdivision registered, sought specific performance but then treated the vendors' purported rescission as a repudiation of the contract, terminated it and sued for and were awarded in excess of $1.6 million in damages for breach of contract (on a contract for sale valued at $510,000).

The vendors appealed, arguing that they had used their 'best reasonable endeavours' to achieve the stipulated objective but that it had not been possible to comply with Condition 6 of the development consent that had been issued by the Wollongong Council, which required the construction of an all-weather accessway to the subject land for fire trucks (which required gradients of not greater than 1 in 6 and at points the land had gradients of up to 1 in 4). They argued that they were not required to attempt compliance with a condition that was impossible to satisfy, which did not in any event fulfil its intended purpose of ensuring access for fire trucks and in relation to which there was 'no reasonable possibility that it might have the desired outcome'.

The problem for the vendors was that it had been informed that the Council had issued the development consent with that condition because it had believed that the accessway could be built with a maximum 1 in 6 gradient and had no information to the contrary. They had also been advised to liaise with the Council to have the consent amended in line with the real situation. Regrettably they took no steps to have access requirements in the development consent amended and, when work was not commenced on the development after two years - and the vendors had not applied to have the consent extended - it expired.

Held: The Court held that, in this case the term 'best reasonable endeavours' was not significantly different, at least for present purposes, from the term 'best endeavours'. It went on to note that, had the vendors acted reasonably, they would have requested the Council to amend Condition 6. By not doing so they failed to use their 'best reasonable endeavours' to get the proposed plan of subdivision registered.

The Court did note however that 'best reasonable endeavours' does not mean that a party must always seek amendment in such cases – where there is a problem with compliance – BUT that, in this case, there were circumstances that suggested that there were good prospects of successfully obtaining an amendment to Condition 6 and, in not pursuing an application, they had not used their 'best reasonable endeavours' to obtain registration of the proposed subdivision plan. The appeal was dismissed.

Importance: This case is important for a number of reasons:

a. It is yet another in a line of cases which indicates that there in in many cases no substantive difference between 'best endeavours', 'reasonable endeavours' or other variations on that theme and that if the parties wish to impose a heightened obligation they would do well to do so with specific stipulation of the steps to be taken (and the associated expenses that are expected to be met);
b. In the same context care should also be taken to ensure that the terminology used throughout the document is consistent
c. Those on whom such obligations are imposed but who do not want to be obliged to pursue steps they regard as 'pointless' or unlikely to achieve the desired objective would be well-advised to ensure that the steps they are required to take 9and the expenses they are expected to meet) are specified with some particularity in the contract. They may, otherwise, inadvertently be required to take steps, and incur expense, in pursuing solutions they believe are not reasonably achievable.

5. *Masters v Cameron*

Background: The decision in *Masters v Cameron* (1956) 91 CLR 353 is authority for the proposition that agreements that appear to be conditional because they are made 'subject to formal contract' may in fact be immediately binding – if that is what the parties intended. The critical test is whether the parties have reached 'finality' in their agreement and the case recognised that there were three categories into which such 'conditional' agreements could fall – those where the parties intend to be immediately bound but want their agreement set out in more precise but not materially different terms, those where they have reached finality but want to defer performance of their agreement until it has been incorporated into a formal document and those where they do not intend to make a concluded bargain until they sign a formal contract.

To those categories a fourth has been added – where the parties have reached agreement, intend to be immediately and exclusively bound by it BUT also intend to make a further agreement in substitution for it (after they have agreed on other terms) at some point in the future (see McHugh JA In *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* (1986) 40 NSWLR 631 at 634).

A recent decision of the NSW Court of Appeal highlights the dangers of not being careful in the wording of a 'preliminary agreement'. The case was:

Malago Pty Ltd v AW Ellis Engineering Pty Ltd [2012] NSWCA 227

Facts: The parties (the 'James' interests and the 'Ellis' interests) entered into a contract to purchase a marina business from the Maritime Authority of NSW. They subsequently fell into dispute, the dispute went to mediation at the end of which the James interests agreed to buy out the Ellis interests and a Heads of Agreement – drafted by the mediator - was signed, setting out the core aspects of that agreement. The parties solicitors subsequently sought to agree on the terms of a more formal document giving effect to the Heads of Agreement but, before further agreement could be reached the James interests withdrew from the negotiations, apparently because of a lack of funds. The Ellis interests then sued for specific performance of what they alleged was a binding agreement for sale in the Heads of Agreement. They relied on clause 1(g) of the Heads of Agreement which read:

'Without affecting the binding nature of these Heads of Agreement the parties within 7 days to execute a formal document or documents as agreed between their respective solicitors to carry out and express in more formal terms and additional terms as these Heads of Agreement …'

Held: Referring to McHugh JA's judgment in *GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd* the court held that this was a clear example of a case where the parties objectively determined intention had been reach final agreement by which they intended to be immediately and exclusively bound but also intended to make a further agreement in substitution for it at some point in the future. That much was clear from the express words of cl. 1(g). The James interests were bound to buy out the Ellis interests on the terms set out in the Heads of Agreement.

Importance: The case emphasises the need to take care in the wording of preliminary agreements that may or may not be intended to have final legal effect. If in doubt the parties should expressly note their intention that the preliminary agreement is or is not to be binding. It also emphasises that the courts will normally enforce freely negotiated commercial agreements – especially if the objective evidence indicates the parties' intent to be immediately bound.

Other matters coming out of the decision were that in ordering specific performance of such agreements the courts will not enforce terms that have not been specifically agreed (ie will only enforce those matters that form part of the Heads of Agreement) and will not find such agreements void for uncertainty or vagueness where any ambiguity can be resolved by recourse to the surrounding circumstances (a proper function for any court charged with adjudicating the dispute.

6. Estoppel

Background:

Enforcing family arrangements can be problematic because of the problem of demonstrating an intent to be legally bound. Where the promise is to transfer some interest in property alternative avenues for recourse may be found in the law of proprietary or equitable estoppel – or in the law governing constructive trusts. Two recent decisions have highlighted the importance of claimants pursuing estoppel being able to demonstrate 'detrimental reliance' if their suit is to have any hope of success.

In *Duic v Duic* [2013] NSWCA 42 the question was whether a promise by a father to transfer property on which his son conducted his radiator repair business to the son was enforceable. The case was argued on the question of proprietary estoppel requiring the son to prove that he had changed his position in reliance on the father's promise. A proprietary estoppel arises where there has been *detrimental reliance* by a party on an assumption, as to his or her ownership or future acquisition of a property, which has been induced by representations of the property owner (see *Giumelli v Giumelli* (1999) 196 CLR 101 at [6]). To establish the required 'detrimental reliance' the son had to show that, in reliance on his father's promise, he had changed his position in such a way, and to such an extent, that it would be unconscionable for the father not to keep his promise. The son's arguments were that the required detrimental reliance was established by his failure to buy an alternative property across the road from which to conduct his business when he had had the opportunity to do so and the fact that he had made improvements to his father's property – both because of his father's promise. Unfortunately for the son, the court found that 'There was no express evidence of [his] reliance other than his own and and the objective circumstamces that were proved did not give rise to any inference of reliance'. It held that the improvements he had carried out were wholly consistent with him facilitating his carrying on of the radiator business on the property on the rent-free, long-term basis that was applicable'. There was also no evidence of reliance in the circumstances surrounding the non-purchase of the property across the road (which the court found would not have been suitable for the carrying on of the business without significant improvements). Consequently, without any evidence of reliance, the son's proprietary estoppel claim had to fail.

Quinn v Bryant [2012] NSWCA 377 concerned a dispute between a grandmother and granddaughter over property purchased by the grandmother but into which the granddaughter and her family had moved under an arrangement with the grandmother. That arrangement had come about after the grandmother expressed a desire to live with the granddaughter, so she could be looked after in various ways. The granddaughter did not immediately agree and, in fact, asked the grandmother what would happen if the arrangement did not work out. The grandmother told the granddaughter that if that happened she would provide the granddaughter with money so she could provide a place for herself and her children to live. The grandmother also subsequently told the granddaughter that she would leave the granddaughter half of her estate – and did, in fact, make such a will. The granddaughter then vacated her subsidised Department of Housing flat and moved into the property – on which a granny-flat was being built for the grandmother to live in. The relationship between the parties quickly deteriorated and the grandmother and her partner vacated the property and moved into a rented retirement villa. The grandmother subsequently altered her will to disinherit the granddaughter and sought a declaration that the granddaughter had no interest in the property which, it appeared, the grandmother wished to sell. The granddaughter cross-claimed seeking a variety of orders including one that she be permitted to remain in possession of the property and that she receive compensation in the nature of equitable damages for the detriment she had sustained in relying on her grandmother's promises.

The case was again approached, inter alia, on the basis of estoppel (the other bases were constructive trust and breach of contract) and the key was again the question of detrimental reliance. The trial judge found that there was clear evidence of such reliance. The grandmother had been aware, at the time of proposing the arrangement, that the granddaughter lived in subsidised housing. The granddaughter had also clearly expressed to her grandmother her concerns and uncertainty about leaving that subsidised accommodation in the event that the arrangement did not work out – and had clearly left that accommodation as a result of the grandmother's representations. The effect of vacating the flat and terminating her tenancy with the Department of Housing was that she relinquished her subsidised housing in which she would otherwise have been entitled to remain, without reassessment of her subsidy even if her income increased (in fact she subsequently applied to the Department of Housing for reinstatement of her tenancy but was refused on the basis that she no longer met the income test.

Perhaps not surprisingly, the court below held that in giving up her previous tenancy in reliasnce on her grandmother's promises she had suffered detriment in reliance on the grandmother's promises and, therefore, had established the necessary elements for her equitable estoppel claim. The Court of Appeal agreed.

Importance: The cases illustrate the importance of being able to demonstrate not only reliance on representations but the incurring of detriment as the result of that reliance. Further that detriment must be such that the court is satisfied that it would be unconscionable for the promise not to be kept – and in making that determination it is not enough that the applicant established that he or she *would be* disadvantaged if the promise was not kept but that he or she had already incurred detriment as a result of relying on the promise. That is, as the High Court had previously noted in *Giumelli v Giumelli* at [6] '… equitable estoppel [by contrast] with contract … does not look forward into the future [it] looks backward when the promise falls due to be performed and asks whether, in the circumstances which have actually *happened,* it would be unconscionable for the promise not to be kept'.