SUPREME COURT OF QUEENSLAND

CITATION:	*Body Corporate for Ocean Pacifique v Pugliese & Anor* [2023] QCA 129
PARTIES:	**BODY CORPORATE FOR OCEAN PACIFIQUE CTS 8379** (appellant) **v** **ELVIO PUGLIESE** (first respondent) **BODY CORPORATE FOR ORCHID 17 CTS 11906** (second respondent)
FILE NO/S:	Appeal No 15423 of 2022 SC No 5963 of 2022
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2022] QSC 246 (Cooper J)
DELIVERED ON:	16 June 2023
DELIVERED AT:	Brisbane
HEARING DATE:	29 May 2023
JUDGES:	Flanagan and Boddice JJA and Kelly J
ORDER:	**Appeal dismissed with costs.**
CATCHWORDS:	CONTRACTS – DISCHARGE, BREACH AND DEFENCES TO ACTION FOR BREACH – CONDITIONS – CONDITIONS PRECEDENT AND SUBSEQUENT – where the appellant and second respondent are body corporates for neighbouring buildings – where the appellant and second respondent were in a dispute regarding, inter alia, water ingress into the basement of the appellant's building – where the parties signed a deed of settlement in respect of the dispute ('the Deed') – where the primary judge determined that, save for an obligation upon the appellant to repay a specified sum of money, the Deed was no longer valid and binding because it was subject to a condition precedent to performance which had not been satisfied – where the appellant contended on appeal that the primary judge's construction of the Deed was incorrect – where the appellant contended that the Deed contained no condition precedent to performance – where the appellant contended that the Deed only provided for repayment in the event of non-compliance, and that non-compliance was contemplated to be a 'fundamental breach' of the Deed – whether the primary

judge's construction of the Deed was correct

CONTRACTS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the appellant contended that the primary judge's construction of the contract involved the court impermissibly remaking or amending a contract for the purpose of avoiding a result considered to be inconvenient or unjust – where, in construing the relevant clause, the primary judge had regard to additional information beyond the text of the Deed regarding the context in which the Deed had been executed and the commercial object of the relevant clause – whether the primary judge erred in having regard to certain matters of context for the purpose of construing the relevant clause

Body Corporate and Community Management Act 1997 (Qld), s 310

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99; [1973] HCA 36, applied
Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd (2017) 261 CLR 544; [2017] HCA 12, cited
Electricity Generation Corporation v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7, cited
H Lundbeck A/S v Sandoz Pty Ltd (2022) 96 ALJR 208; (2022) 399 ALR 184; [2022] HCA 4, cited
Maggbury Pty Ltd v Hafele Australia Pty Ltd (2001) 210 CLR 181; [2001] HCA 70, cited
Meehan v Jones (1982) 149 CLR 571; [1982] HCA 52, cited
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104, cited
Pacific Carriers Ltd v BNP Paribas (2004) 218 CLR 451; [2004] HCA 35, cited

COUNSEL: M D Martin KC, with G J Radcliff, for the appellant
A B Crowe KC, with M R Bland, for the respondents

SOLICITORS: Radcliffs for the appellant
QBM Lawyers for the respondent

[1] **FLANAGAN JA:** I agree with Kelly J.

[2] **BODDICE JA:** I agree with Kelly J.

[3] **KELLY J:** The appellant ("19 Orchid") is the Body Corporate for a community title scheme situated at 19 Orchid Avenue, Surfers Paradise. The second respondent ("17 Orchid") is the Body Corporate for a neighbouring community title scheme situated at 17 Orchid Avenue. The first respondent ("Mr Pugliese") is the secretary of the committee for 17 Orchid. In 2019, the parties were in dispute about several matters. The parties agreed to settle their dispute on the terms set out in a deed dated 19 July 2019 ("the Deed"). By an originating application, 19 Orchid sought

to specifically enforce the Deed. The primary judge decided a preliminary question as to whether the Deed was valid and binding. That question itself raised separate issues. One issue concerned whether, as a matter of construction, the operative effect of the Deed was subject to 19 Orchid validly ratifying the Deed within 90 days of the date of its execution.[1] It is uncontroversial that the Deed was not validly ratified within 90 days of its execution. The primary judge found that, save for an obligation on 19 Orchid to repay a specified sum of money, the Deed ceased to have operative effect after 90 days passed from the date of its execution without the members of 19 Orchid in general meeting having lawfully resolved to ratify the Deed.[2] In this regard, the primary judge reasoned that the Deed was subject to a condition precedent to performance which had not been satisfied.[3] On this appeal, 19 Orchid contended that the primary judge's construction of the Deed was incorrect.

The context in which the Deed was executed

[4] Prior to the Deed, the parties were in dispute. The principal issue concerned water ingress into the basement of 19 Orchid but there were other issues, including issues concerned with electricity misappropriation and historical dealings with fire service authorities.[4] 19 Orchid had obtained a report from a plumber dated 18 May 2019 ("the plumbing report") which concluded that blocked stormwater drains and grease traps had been the cause of the water ingress into 19 Orchid's basement. The plumbing report expressed the view that the water ingress could have been avoided had 17 Orchid performed maintenance and it identified necessary rectification works because of the ingress. The rectification works included replacing fire service pumps and switchboards, cleaning out storm water manholes and supplying and installing a new stormwater pit with new wiring and switch. 19 Orchid then obtained a quotation dated 23 May 2019 for the rectification works and certain other works ("the plumbing quote"). The amount of the plumbing quote was $17,831.00. 19 Orchid had also arranged for a consultant engineer to undertake a site inspection and provide a report on the water ingress and related issues. The site inspection was undertaken on 31 May 2019 and the report was dated 10 June 2019 ("the engineering report"). The plumbing report and the plumbing quote formed an appendix to the engineering report.

[5] On 16 July 2019, three days before the date of the Deed, there had been a meeting of 19 Orchid's committee. At that time, 19 Orchid's committee consisted of at least three people, Mr Craig Duffy, Mr Robert Fraresso and Mr Gerald Pauschmann. Mr Duffy was in dispute with other members of 19 Orchid as to whether three further people, Ms Melanie Day, Mr Satya Gupta and Mr Geoffrey Foote were also members of the 19 Orchid committee.

[6] The minutes of the 19 Orchid committee meeting for 16 July 2019 record that:

(a) Mr Duffy declared the positions of Mr Fraresso and Mr Pauschmann vacant and called for nominations for appointment of those positions from the floor.

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1 AB 28 [3B] and AB 31 [25]–[29].
2 AB 8 [18].
3 AB 12 [41].
4 AB 27 [3], AB 28 [1].

(b) In response to that call, Mr Kalvin Duffy and Ms Amanda Barnes were nominated and elected to the committee.

(c) Mr Duffy then declared the positions of Ms Day, Mr Gupta and Mr Foote vacant and called for nominations for appointment to those positions from the floor.

(d) In response to that further call, Ms Yvonne Gay and Mr Muhammed Fatih Kara were nominated and elected to the committee.

[7] On 17 July 2019, Mr Duffy had emailed the new members of the 19 Orchid committee attaching a resolution authorising the proposed execution of the Deed. The new members voted in favour of that resolution. On the same day, Mr Duffy met with Mr Pugliese. Mr Pugliese recalled that the meeting was to discuss the Deed. Mr Duffy recalled meeting with Mr Pugliese to show him the resolution authorising the execution of the Deed. Mr Pugliese recalled that when they met, he had told Mr Duffy that he knew that Mr Duffy "had sacked everyone on [the 19 Orchid committee]". Mr Pugliese recalled that Mr Duffy replied to the effect that "he had set them up and now had all his crew on board". Mr Pugliese recalled that he told Mr Duffy that he would need something to give to his lawyer. In response, Mr Duffy had made a phone call and, a short time later, Ms Barnes had arrived with emails attaching the resolution of 16 July 2019.

[8] On 19 July 2019, Mr Duffy and Ms Barnes signed the Deed under 19 Orchid's seal.

The Deed

[9] The Deed's recitals materially provide:

> "A. [17 Orchid] is the Body Corporate for 17 Orchid Avenue, Surfers Paradise in the State of Queensland ('17 Orchid Avenue').
>
> B. [Mr Pugliese] is the … Chairperson of the Committee for [17 Orchid].
>
> C. … [19 Orchid] is the Body Corporate for 19 Orchid Avenue, Surfers Paradise in the State of Queensland ('19 Orchid Avenue').
>
> D. As at the date of this Deed, there are various matters in dispute between the Parties, including:
>
> (a) water ingress issues referred to in Recitals E to H below;
>
> (b) overcharging levies to commercial owners;
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> (c) negligence in relation to dealing with fire service authorities resulting in fines and penalties;
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> (d) electricity misappropriation;
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> (e) previous conduct between the Parties;
>
> (f) actions by body corporate managers engaged by the Parties; and
>
> (g) any and all other matters communicated in writing between the Parties prior to entering into this Deed.
>
> ('the Dispute')

E. 17 Orchid Avenue and 19 Orchid Avenue share a retaining wall which has been subject to water ingress into the basement area of 19 Orchid Avenue.

F. On 31 May 2019, [Mr Duffy], the Chairperson of the Committee for [19 Orchid], and [19 Orchid] commissioned Jeffrey Hills & Associates to report on water ingress into the basement of 19 Orchid Avenue, water drainage issues and in relation to the deterioration of the groundwater sump pump.

G. On 10 June 2019, Jeffrey Hills & Associates issued [the engineering report], a copy of which is Schedule 1 to this Deed.

H. Without any admission of liability, the parties have agreed to settle the Dispute on the terms set out in this Deed."

[10] The operative provisions of the Deed included the following:

"**1. Definition and Interpretation**

1.1. In this Deed the following words and expressions are defined and interpreted as follows:

…

(c) 'Claims' means, to the fullest extent permitted by law, all past, present or future, actual or contingent, known or unknown, actions, suits, causes of action, arbitrations, debts, dues, damages, losses, liabilities, proceedings, compensation, costs, claims, cross-claims, demands, remedies, verdicts, injunctive relief and judgments either at law or in equity or arising under a Statute;

(d) 'General Meeting' means an annual general meeting or extraordinary general of [19 Orchid];

(e) 'Parties' means each of the parties to this Deed;

…

(g) 'Settlement Payment' means the payment referred to in clause 3.1 of this Deed inclusive of any GST;

…

2. Acknowledgement

The parties acknowledge and agree that:

2.1 this Deed is intended to be legally binding;

2.2 they have the power and authority to legally enter into it (sic) this Deed.

…

3. Settlement Terms

The parties hereby acknowledge and agree that:

At the time of the Parties entering into this Deed, [17 Orchid] shall have already paid to [19 Orchid] the amount of $17,831.00 ('the Plumber Amount') for the purpose of [19 Orchid] attending to the replacement of the pump and fire equipment in 19 Orchid Avenue according to [the plumbing quote].

3.1 [Mr Pugliese] and [17 Orchid] agree to promptly do all things necessary, at their cost, to remedy the water ingress in accordance with the recommendations in [the engineering report], including but not limited to:

(a) engage a licensed plumber to complete a camera probe of the stormwater system;

(b) repair any cracks and/or breakages identified in the stormwater pipe system by virtue of the investigations referred to in sub-paragraph (a) above;

(c) seal the wall area between 17 Orchid Avenue and 19 Orchid Avenue and apply a waterproof membrane 300mm up the wall and out 200mm onto the concrete pathway the visible length of the building;

(d) lift the cool/storage room in the rear area of 17 Orchid Avenue at least 100mm clear of the finished concrete;

(e) install signage in the near vicinity of the stormwater drain with words to the effect of 'no materials are to be tipped into the stormwater drain';

(f) allow samples of water/sludge from the wall and/or floor of the basement in 19 Orchid Avenue to be tested by a reputable company to determine contents of the water;

3.2 [Mr Pugliese] and [17 Orchid] agree to provide evidence in writing to [19 Orchid] of all acts done and remedial work carried out in accordance with clause 3.2 (sic) above, within 7 Business Days of completion of same.

3.3 For the purpose of clause 3.1, the payments shall be made to [19 Orchid] by submitting a cheque payable to the Body Corporate to the body corporate manager for [19 Orchid].

3.4 It is acknowledged that [19 Orchid] may sign and enter into this Deed by resolution of the Committee of [19 Orchid]. If [Mr Pugliese] and [17 Orchid] have not

received a copy of minutes of the General Meeting (signed by the Secretary of [19 Orchid] as a record of the resolutions passed at the meeting) at which [19 Orchid] lawfully resolved to enter into and/or ratify the Committee's resolution to enter into, of (sic) this Deed ('the Minutes'); within 90 days of the date of this Deed, [19 Orchid] must repay any of the Plumber Amount paid within 3 days of written demand by [Mr Pugliese] or [17 Orchid]. Failure to repay the Plumber Amount shall be a fundamental breach of the terms of this Deed by [19 Orchid]. [19 Orchid] indemnifies [17 Orchid] and [Mr Pugliese] for any costs, loss or damage (Including legal costs) incurred by [17 Orchid] or [Mr Pugliese] on account of the failure by [19 Orchid] to repay the amount due.

4. Release & Indemnity

4.1 In consideration of and upon payment of the Settlement Payment in accordance with clause 3.1 of this Deed, [19 Orchid] releases, discharges and forever holds harmless [17 Orchid] (including any former or current employees, contractors, agents and/or body corporate managers) and [Mr Pugliese] (including any Related Entity), with respect to any or all Claims which [19 Orchid] may have had, may now have or may at any time hereafter have, or but for the execution of this Deed could have had, against [17 Orchid] (Including any former or current employees, contractors, agents and/or body corporate managers) and/or [Mr Pugliese] (Including any Related Entity), with respect to and In any way connected with, the facts and circumstances giving rise to and/or associated with the Dispute.

4.2 In consideration of and upon [19 Orchid] agreeing to enter Into this Deed, [17 Orchid] and [Mr Pugliese] release, discharge and forever hold harmless [19 Orchid] (Including any former or current employees, contractors, agents and/or body corporate managers),with (sic) respect to any or all Claims which [17 Orchid] and/or [Mr Pugliese] may have had, may now have or may at any time hereafter have, or but for the execution of this Deed could have had, against [19 Orchid] (including any former or current employees, contractors, agents and/or body corporate managers),with (sic) respect to and in any way connected with, the facts and circumstances giving rise to and/or associated with the Dispute.

4.3 The parties agree that paragraphs 4.1 and 4.2 above may be pleaded as a bar to any action or civil proceeding commenced now or taken at any time."

[11] Although clause 3 referred to the Plumber Amount as having already been paid as at the time of the Deed, the amount was in fact paid by 17 Orchid to 19 Orchid on 23 July 2019.[5]

The primary judge's construction of the Deed

[12] In construing clause 3.4 of the Deed, and for the purpose of discerning context, the primary judge made reference to various provisions of the Deed, notably, the recitals, the definition of "Settlement Payment" and clauses 2, 3 and 4. The primary judge construed the term "Settlement Payment" as including "both the Plumber Amount and the costs to be paid by Mr Pugliese and [17 Orchid] to remedy the water ingress".[6] Nothing in this appeal turns upon that matter of construction.

[13] The primary judge found that the commercial purpose of clause 3.4 "… was to provide certainty to the parties, but most particularly Mr Pugliese and [17 Orchid], that the settlement terms set out in the Deed were legally binding upon [19 Orchid]".[7] This certainty was required to "preclude the possibility that [19 Orchid], perhaps represented by a differently constituted committee containing members in dispute with Mr Duffy, might later seek to challenge the effectiveness of the Deed, and in particular the release granted to Mr Pugliese and [17 Orchid] under cl 4.1".[8]

[14] The primary judge went on to observe that the commercial purpose was consistent with the context of the Deed, as discernible from the language used within the Deed[9] and from the objective facts known to both parties at the time of the Deed. As to this latter matter, his Honour made these findings:

(a) Mr Pugliese knew that Mr Duffy had "sacked" previous members of 19 Orchid's committee and had replaced those people with "his crew".[10]

(b) Mr Pugliese was "sufficiently interested in that state of affairs to have asked Mr Duffy how he achieved it".[11]

(c) Mr Pugliese's knowledge concerning the change in the constitution of 19 Orchid's committee might have removed protections under the *Body Corporate and Community Management Act 1997* (Qld) ("the Act"), which were otherwise available to persons who deal with a body corporate.[12]

(d) A requirement that the members of 19 Orchid in general meeting confirm the binding effect of the Deed by lawfully resolving to ratify it would have addressed any issue that might have arisen in respect of the protections available under the Act.[13]

[15] Having identified the commercial purpose of clause 3.4, the primary judge found that compliance with the clause required, within the 90 day period, the members of

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5 AB 81.

6 AB 10 [27], AB 11 [29].

7 AB 11 [30].

8 Ibid.

9 AB 11 [31].

10 AB 11 [32].

11 Ibid.

12 Ibid; The protection arose under s 310 of the Act. The background knowledge reasonably available to parties may include matters of law and it was appropriate to consider the reasonable person in the position of these parties, operating as they did under the Act, as having an appreciation of the Act: *Maggbury Pty Ltd v Hafele Australia Pty Ltd* (2001) 210 CLR 181 at 188 [11]; *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 240 CLR 45 at 53 [12].

13 AB 11 [32].

19 Orchid in general meeting lawfully resolving to ratify the Deed and evidence of that legally effective resolution, in the form of a copy of the minutes of the meeting, being provided to Mr Pugliese and 17 Orchid.[14] For the purposes of this appeal, it is uncontroversial that 19 Orchid did not comply with these requirements of clause 3.4.

[16] Finally, the primary judge considered the effect of 19 Orchid's failure to comply with the requirements of clause 3.4 on the operation of the Deed. His Honour's reasoning in relation to this issue was as follows:

> "[37] If cl 3.4 was interpreted literally, the only consequence of such non-compliance would be that [19 Orchid] was required to repay the Plumber Amount. Mr Pugliese and [17 Orchid] would still be obliged to undertake and pay for work to remedy the water ingress. Presumably, the releases in cl 4 would also remain effective as long as the effectiveness of the Deed was not challenged.
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> [38] The difficulty with this construction is, absent [19 Orchid] having complied with the requirements of cl 3.4, Mr Pugliese and [17 Orchid] could not be certain that [19 Orchid] would never challenge the effectiveness of the Deed. That is, Mr Pugliese and [17 Orchid] might undertake and pay for remedial works to address the water ingress, only for [19 Orchid] to challenge the effectiveness of the release under the Deed and seek some further remedy in respect of the Dispute.
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> [39] Having regard to the context of the Deed as a whole, and the commercial purpose of cl 3.4 discerned from that context, I am unable to accept that literal construction.
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> [40] It seems to me that, on its proper construction, cl 3.4 had the effect that, save in one respect, the Deed operated conditionally until the requirements of the clause were satisfied or the period in which [19 Orchid] had to satisfy those requirements expired.
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> [41] It is clear from cl 2.1 that the Deed had legal effect from the time it was executed. That was necessary because [19 Orchid] was immediately liable to pay the Plumber Amount. However, [19 Orchid's] compliance with the requirements in cl 3.4 was a condition precedent to performance by Mr Pugliese and [17 Orchid] of the obligation to undertake and pay for remedial works. It was also a condition precedent to the releases in cl 4 taking effect.
>
> [42] Upon [19 Orchid] failing to satisfy the ratification condition within the 90 day period prescribed in cl 3.4, both the obligation to undertake remedial works and the release, which was given in exchange for (at least in part) the assumption of that obligation, ceased to have operative effect. In that circumstance, Mr Pugliese and [17 Orchid] would lose the benefit of the release, but they would not be at risk of undertaking

[14] AB 12 [34].

remedial works without having certainty as to the effectiveness of the release.

[43] The reason cl 3.4 only addressed repayment of the Plumber Amount is that this was the only act of performance required during the period of conditional operation of the Deed prior to satisfaction of the requirement in cl 3.4. There was no need to address the cost of remedial work undertaken by Mr Pugliese and [17 Orchid] because, in the event [19 Orchid] failed to satisfy cl 3.4, the obligation to perform that work would not arise."[15]

Consideration of the ground of appeal

[17] 19 Orchid's fundamental contention was that the primary judge's construction involved the court impermissibly remaking or amending a contract for the purpose of avoiding a result considered to be inconvenient or unjust. 19 Orchid argued that the Deed contained no condition precedent to performance and the obligations of Mr Pugliese and 17 Orchid to promptly do all things necessary, at their cost, to remedy the water ingress in accordance with recommendations in the engineering report, were "immediate and not dependent upon any subsequent ratification by [the general meeting] of [19 Orchid]".[16] The argument emphasised that the Deed only provided for repayment of the Plumber Amount in the event of non-compliance with clause 3.4. If the Plumber Amount were not repaid, clause 3.4 contemplated that being a "fundamental breach" of the Deed. The language of fundamental breach was submitted to be inconsistent with the primary judge's construction, according to which, the Deed, apart from the obligation to repay the Plumber Amount, ceased to have operative effect in the event of non-compliance with clause 3.4.

[18] Before addressing these arguments, it is necessary to refer to some relevant principles of interpretation. A convenient starting point is the often cited statement in *Australian Broadcasting Commission v Australasian Performing Right Association Ltd*,[17] where Gibbs J said:

> "It is trite law that 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. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another. If the words used are unambiguous the court must give effect to them, notwithstanding that the result may appear capricious or unreasonable, and notwithstanding that it may be guessed or suspected that the parties intended something different. 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. On the other hand, if the language is open to two constructions, that will be preferred which will avoid consequences which appear to be capricious,

15 AB 12–13.
16 Outline of submissions of the appellant [2(a)].
17 (1973) 129 CLR 99 at 109–10.

> unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate', to use the words from earlier authority cited in *Locke v Dunlop* (1888) 39 Ch D 387, at p 393, which, although spoken in relation to a will, are applicable to the construction of written instruments generally; see also *Bottomley's Case* (1880) 16 Ch D 681, at p 686. Further, it will be 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. Finally, the statement of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* (1932) 147 LT 503, at p 514, that the court should construe commercial contracts 'fairly and broadly, without being too astute or subtle in finding defects', should not, in my opinion, be understood as limited to documents drawn by businessmen for themselves and without legal assistance (cf. *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429, at p 437)."

[19] The terms of a commercial contract are to be understood objectively by what a reasonable businessperson would have understood them to mean.[18] The reasonable businessperson is someone placed in the position of the parties at the time of the contract.[19] It is from that person's perspective that the court considers the language used by the parties, the surrounding circumstances known to them and the commercial purpose and objects of the contract.[20] A court is entitled to approach the task of giving a commercial contract a business like interpretation on the assumption "that the parties intended to produce a commercial result".[21] A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".[22]

[20] In many cases, it may be possible to undertake the process of construction by reference to the contract alone. Usually, the process of construction occurs by reference to the contractual text and contextual notice provided by that text. It is always legitimate to look to context apparent from, or provided by, the contractual language.[23] It may sometimes be legitimate to have recourse to events, circumstances and things external to the contract and which were known to the parties. Recourse to events, circumstances and things external to the contract may be necessary to identify the commercial purpose or objects of the contract "where that task is facilitated by an understanding 'of the genesis of the transaction, the background, the context … in which the parties are operating'".[24]

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18 *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544 at 551 per Kiefel, Bell and Gordon JJ.

19 Ibid.

20 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at 461-462 [22] per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ; *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656 [35] per French CJ, Hayne, Crennan and Kiefel JJ.

21 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 657 [35].

22 Ibid.

23 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [46] per French CJ, Nettle and Gordon JJ; *Eureka Operations Pty Ltd v Viva Energy Australia Ltd* [2016] VSCA 95 at [45].

24 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 117 [49] per French CJ, Nettle and Gordon JJ citing *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 657 [35].

[21] In *H Lundbeck A/S v Sandoz Pty Ltd*,[25] Edelman J relevantly said:

> "There are ephemeral borders, to which lawyers sometimes cling, between three categories of interpretation of words in legal instruments: (i) interpretation of the meaning of express words in a clause; (ii) drawing inferences that recognise implications within a clause; and (iii) drawing inferences that recognise the implication of a new 'term'. All three are 'an exercise in interpretation'. All three are concerned with 'what the [instrument] actually means'. And all three involve drawing inferences and recognising matters that are implied in the sense that they are not confined to the semantics of literally expressed meaning. For instance, like the latter two categories, even the first category will often involve drawing inferences from context by recognising explicatures from the express text. In all three categories, context and purpose supply additional information for the meaning that combines with the literal text. By this means, the 'implication is included in [the meaning of] what is expressed'. … a simple approach is generally taken in the category where the meaning of express words is concerned. In that category, the task of interpretation is commonly said simply to be a matter of ascertaining what would have been intended by a reasonable person in the position of the parties, with inferences about that meaning to be drawn from the information reasonably available to the parties."

[22] As to the commercial object which clause 3.4 sought to secure, the language of the Deed revealed that the parties had been in dispute and intended to enter into a binding legal agreement to settle the dispute. The language also revealed a concern or interest about whether 19 Orchid had power and authority to legally enter into the Deed. Hence, whilst clause 2.2 spoke in terms of the parties having "the power and authority to legally enter into" the Deed, clause 3.4 implicitly recognised that the respondents were concerned to be satisfied by proof that a general meeting of 19 Orchid had lawfully resolved "to enter into and/or ratify the committee's resolution to enter into" the Deed. That concern, which was objectively apparent from the terms of the Deed, was explicable, and confirmed, by objective facts known to both parties, notably that Mr Duffy had recently "sacked" previous members of 19 Orchid's committee and replaced them with "his crew". Those extrinsic facts provided an understanding of the background or context in which the parties were operating at the time of the Deed. The primary judge committed no error in having regard to those matters for the purpose of discerning the commercial object of clause 4.3.

[23] The construction of clause 4.3 identified by the primary judge was wholly consistent with the commercial object of the clause. 19 Orchid was unable to identify any commercial purpose consistent with its construction of clause 3.4. Rather, 19 Orchid's substantive point was that the literal meaning of clause 3.4 did not support the recognition of a condition precedent to performance. That submission overlooked the entitlement of a court of construction to draw inferences and recognise matters that are implied in language. A court of construction is not confined to "the semantics of literally expressed meaning".[26] The primary judge

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25 (2022) 399 ALR 184 at 204 [93]–[95].

26 *H Lundbeck A/S v Sandoz Pty Ltd* (2022) 399 ALR 184 at 204 [93].

was entitled to construe clause 3.4 by reference to the text and the additional information supplied by the context in which the Deed had been executed and the commercial object of clause 4.3. Confronted with a literal meaning, the primary judge undertook the task of construction by ascertaining what would have been intended by a reasonable businessperson in the position of the parties and drew inferences about the meaning of the language from the information known to the parties.

[24] The primary judge found that 19 Orchid's performance of clause 3.4 was properly regarded as precedent to its right to call for the respondents' performance of the Deed.[27] That conclusion was not inconsistent with the literal meaning of the language used in clause 3.4. Clause 3.4, and the Deed more generally, did not contain express language to the effect that the Deed was "subject to" or "conditional upon" compliance with clause 3.4. Equally, there was no express language to the effect that 19 Orchid was entitled to call for performance of the Deed in circumstances where there had been non-compliance with clause 3.4. The repayment of the Plumber Amount, and the provision of an indemnity if that sum were not repaid, were the only matters of performance specified by the Deed to occur in the event of non-compliance with clause 3.4. No other performance rights were specified in that event. The primary judge was correct in inferring that the parties did not objectively intend to confer upon 19 Orchid a right to call for the performance of the Deed without its having complied with clause 3.4. In this respect, the matters of context to which the primary judge referred, and the commercial purpose found by his Honour, were important to the proper construction of the language used.

[25] Two further matters may be noted. First, interpreting the whole of the Deed, and construing all of its clauses harmoniously, the reference in clause 4.2 to "upon [19 Orchid] agreeing to enter into this Deed", fell to be interpreted as a reference to the point in time within the 90 day period prescribed by clause 3.4, when the general meeting of 19 Orchid had lawfully resolved to enter into, or ratify a resolution to enter into, the Deed and minutes of that meeting had been received by 17 Orchid and Mr Pugliese. Secondly, 19 Orchid placed particular significance upon the use of the expression "fundamental breach" as it appears in clause 3.4. Both parties accepted that the Deed was not a sophisticated document.[28] Some parts of the Deed were nonsensical. For example, clause 3.1 referred to Mr Pugliese and 17 Orchid doing "all things necessary at their cost" to remedy certain matters and yet clause 3.3 contemplated "for the purposes of clause 3.1", payments being made by cheque to 19 Orchid. The Deed also included typographical and grammatical errors. As an unsophisticated commercial agreement, its terms fell to be construed "fairly and broadly."[29] Consistent with the Deed's commercial object, it is objectively unlikely that the parties intended to use the expression "fundamental breach" in its technical legal sense. Rather, by that expression, the parties should be taken as having merely emphasised the importance of the obligation to repay the Plumber Amount. The use of the expression was not directed to a ground for termination of the Deed and did not vitiate the construction identified by the primary judge.

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27 AB 12 [40]; *Meehan v Jones* (1982) 149 CLR 571 at 592.

28 Outline of Submissions of the Appellant [3].

29 *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109–10.

[26] No error has been established in the reasoning of the primary judge.

[27] I would order that the appeal be dismissed with costs.