Contractual Composition, Construction and the Matrix of Facts

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Arbitrators frequently face a daunting task when part of their determination involves issues concerning the composition and construction of a contract comprised of a chain of documents. Arbitrators must sift the negotiations and puffery from items of contractual significance. They must separate offers from counter offers and then identify the point in time at which the parties have arrived at a final and binding agreement. Where the subject matter of the contract is commercially sophisticated and the documents which are said to comprise the contract are technical in nature, the task of identifying the contract may very well be a difficult one. Once the contract's constituent documents have been ascertained, the arbitrator is then required to construe the agreement, usually against the "*matrix of facts*" in which the agreement came into existence. The matrix of facts in the context of an agreement of which the subject matter is highly technical may itself be enormously complicated. Such an exercise is replete with pitfalls and its scope for reviewable error of law is immense.

In a carefully reasoned decision which was handed down on 21 December 2000, the Honourable Mr Justice Gillard in the Supreme Court of Victoria addressed those issues in the context of a contract for the hire of trucks. The case was *Howtrac Rentals Pty Ltd v Thiess Contractors (NZ) Ltd*.[2] Arbitrators will undoubtedly benefit form his Honour's distillation of applicable legal principals.

The Facts

Howtrac Rentals Pty Ltd ("Howtrac") operated an earth moving hire business, mainly of heavy earth-moving equipment. Thiess Contractors (NZ) Ltd ("Thiess") was the New Zealand subsidiary of the Australian parent, which (though not important, His Honour found) conducted the largest construction business in Australia. In 1997 Thiess entered into a contract with the Electricity Corporation of New Zealand ("ECNZ") to perform dam strengthening works at the Matahina Dam on the northern island of New Zealand. Thiess required heavy earth-moving equipment to perform the works. Thiess retained Howtrac to provide six heavy Caterpillar dump trucks on certain terms relating to hire, equipment use, compensation for equipment damage and other terms. After the trucks had been on the dam project for more than twelve months, Howtrac and Thiess fell into disagreement and the hire

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2 [2000] VSC 415

contract was terminated by mutual agreement in October 1998. Howtrac submitted to Thiess a final invoice claiming over $1.09m in respect of more than six separate items including hire charges, tyre damage and servicing costs. Thiess declined to pay the sum claimed and instead criticised Howtrac in the performance of the work. Howtrac issued a proceeding in the Supreme Court of Victoria. Thiess counterclaimed raising four issues, although ultimately Thiess abandoned all but one of those counterclaim issues at trial.

The trial before the Honourable Mr Justice Gillard ran for nine days commencing on 29 November 2000 and ending on 13 December 2000. His Honour delivered a 74-page judgment on 21 December 2000.

The most significant factual issue at trial related to Howtrac's entitlement to be paid "*standby*" time. The evidence was that "*standby*" rates of hire in the civil construction industry was compensation to the owner for making the equipment available to the hirer in a ready state at the request of the hirer, when for reasons beyond the control of the hiring company, such as the particular needs of the project, the equipment was not in fact used. A standby rate was paid to the hiring company to compensate for overhead costs, such as finance, insurance, costs of mechanics, workshop equipment and off-site expenses, which continued to accrue even if the equipment was not in fact used. The standby rate was generally negotiated at a lesser rate than the working rate because the equipment was not subject to the same wear and tear as occurred when the equipment was in use.[3]

The other significant factual issue at trial related to the contention in the counterclaim by Thiess that the contract contained an implied term to the effect that Thiess was entitled to modify Howtrac's trucks so as to increase the payload capacity of the trucks.

Of the two principal issues at trial, the one to which his Honour devoted most attention in the judgment was the first, namely the term of the contract relating to hire charges. In turn, that required his Honour to construe the contract, which in turn required his Honour to make findings of fact as to the document, which were said to constitute the contract.

Composition of the Contract

The chain of documentation in issue in the case began on 3 July 1997. On that date, Thiess, which had earlier contracted with Howtrac, enquired by fax whether Howtrac had equipment available to perform certain work. In that fax, Mr Sparkman of Thiess requested Mr Howard of Howtrac to telephone Mr Sparkman to discuss the issue. The next day Mr Howard spoke to Mr Sparkman. They discussed the equipment which Howtrac could supply and the servicing facilities Howtrac had available to it. By letter dated 8 July 1997, Mr Howard confirmed to Thiess the equipment which Howtrac had available. Controverted evidence was led by Thiess to the effect that between 1 and 6 August 1997, Mr Sparkman and Mr Howard either met or spoke by telephone during which minimum monthly cash flow issues and the circumstances in which standby hours would be paid were canvassed. His Honour resolved the controversy by finding as a matter of fact that there was no such conversation as alleged by Thiess.

On 4 August 1997, in response to an inquiry from Mr Sparkman of the same date, Mr

3 Paragraphs 28 and 194 of Gillard J's reasons for judgment as extracted from exhibits filed on behalf of Howtrac.

Howard sent a fax to Mr Sparkman saying that Howtrac could supply six dump trucks at A$95 per hour per unit and Howtrac then set out in detail the conditions on which such supply would be made. On 6 August 1997 Thiess sent a fax to Howtrac setting out what it was prepared to agree to including terms relating to hours of operation, rates and payment. On the same day Howtrac sent a fax agreeing to some of the matters raised by Thiess but not others. The following day, that is to say on 7 August 1997, Thiess sent a further fax to Howtrac to which Howtrac responded indicating that Howtrac agreed in principle with many matters but others required clarification. On 8 August 1997, Howtrac sent a fax to Thiess stating that Howtrac accepted the payment terms and methodology, stating further that the matters raised "in the various correspondences" had been resolved and agreed but there had to be a site inspection before finalisation of the agreement.

On 11 August 1997, Thiess sent a fax to Howtrac informing Howtrac that plant hire order number 83301 would be despatched that afternoon. On that day, Thiess sent plant hire order number 83301 to Howtrac, which incorporated standard conditions of hire all in printed format.

Mr Howard of Howtrac inspected the Matahina Dam project on 13 August 1997. On his return, Mr Howard sent to Thiess a letter dated 19 August 1997, which set out the terms and conditions upon which Howtrac was prepared to agree to the hiring of the equipment. That letter incorporated part of the printed conditions of plant hire. The letter also attached a schedule containing special conditions. The letter dated 19 August 1997 from Howtrac contained many terms which were different to the terms set out in the plant hire order from Thiess. The changes included the minimum guaranteed number of hours, the period of hire, the payment terms and transportation costs.

Also on 19 August 1997, Thiess sent a fax back to Howtrac with hand-written amendments to the special conditions inserted by Mr Howard. Later that day Mr Howard sent to Thiess a fax containing responses to the comments made in hand on behalf of Thiess.

On 21 August 1997, Thiess sent a hand written fax to Howtrac confirming discussions on 19 and 21 August 1997 and agreement with items one to five of Howtrac's fax dated 19 August 1997.

As an important finding of fact, his Honour said that on any view, the facsimile dated 19 August 1997 constituted a counter offer by Howtrac and that was not disputed between the parties.[4]

By very early October 1997, all six trucks had been delivered to site. One of Howtrac's employees recorded the hours when each truck was operating as well as the hours when it was not operating even though available, that is to say, on standby. Thiess refused to pay Howtrac's final invoice dated November 1998 which gave rise to the litigation.

Howtrac and Thiess disputed not only the composition of the contract but how it was interpreted as well. Howtrac contended that the contract was wholly in writing comprised of the plant hire order, Howtrac's fax dated 19 August 1997, Thiess's handwritten amendments to that fax of the same date, Howtrac's response also dated 19 August 1997 and the handwritten facsimile from Thiess dated 21 August 1997. Howtrac contended that the parties had entered into a concluded and binding contract by 21 August 1997.

4 Paragraph 83 of Gillard J's reasons for judgment.

For its part, Thiess contended that the agreement was partly oral and partly in writing. Thiess contended that documentation between 4 August and 11 August 1997 also made up the contract in addition to the documents which Howtrac said made up the contract.

Thus, even before his Honour construed the agreement, his Honour was required to determine what constituted the agreement.

Ultimately, his Honour found that the contract was wholly in writing[5] and that on 21 August 1997 the parties had entered into a concluded and binding agreement.[6]

His Honour found that determining whether or not a binding concluded contract had come into existence was a question of fact. His Honour held that a plaintiff has the burden of persuading the court that an agreement was in fact reached with respect to essential terms to effect their commercial purpose and that the parties intended to be bound in law by the agreement. His Honour held that in determining such a question, the court considers all relevant facts including facts which occurred after the date of the alleged contract.[7]

Citing *Air Great Lakes Pty Ltd v KS Easter (Holdings) Pty Ltd*[8], his Honour held that a threefold enquiry was involved. The first was whether the parties arrived at a consensus. The second was, if they did, whether the consensus was such that it was capable of forming a binding contract in the circumstances. The final element was whether the parties intended the consensus at which they arrived should constitute a binding agreement. Applying that threefold enquiry, Gillard J held that as a general proposition the court is concerned with the objective manifestation of both the fact of the agreement and intention to be bound and that as a general rule it is not appropriate to look into the minds of the parties to seek what they actually intended. Citing *Hussey v Horne-Payne*,[9] Gillard J held that in determining whether or not the parties had arrived at a final, binding and concluded contract, it is necessary to look at the whole of the correspondence in order to see whether they have reached that agreement.[10]

On the facts, his Honour held that the contract was embodied wholly in writing and was constituted by Howtrac's fax dated 19 August 1997 which incorporated a portion of the conditions of hire found attached to the plant hire order form, the handwritten amendments made by Thiess to that fax, Howtrac's responding fax dated 19 August 1997 and the Thiess fax dated 21 August 1997. Gillard J rejected the Thiess contention that the contract was also comprised of the conversations between the parties between 4 and 11 August 1997. His Honour found that if matters were discussed during that period they were part of negotiations only which were subsequently addressed in the written chain of correspondence.

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5 Paragraph 154 of his Honour's reasons for judgment.

6 Paragraphs 116 and 134 of his Honour's reasons for judgment.

7 His Honour referred to Hussey v Horne - Payne (1879) 4 App. Cas. 311; Howard Smith & Co Ltd v Varawa (1907) 5 CLR 68, and Toyota v Ken Morgan [1994] 2 VR 106,134.

8 [1985] 2 NSWLR 309, 326

9 (1879) 4 App. Cas. 311

10 Paragraph 124 of his Honour's reasons for judgment.

Construing the Agreement

The conflicting contentions

His Honour said this was Howtrac's real claim in the litigation.[11] It involved a claim for over $820,000 in hire charges. His Honour expressed the dispute on the point in the following terms:

> *"In a nutshell, the dispute between the parties concerns Howtrac's claim for payment for standby when the trucks were available during the course of the shift but were not used by Thiess. Thiess for its part contends that Howtrac is entitled to the payment of 21,000 working hours measured on the Keinzle clock[12] at the rate of A$95 but is not entitled to any amount for standby over and above 21,000 working hours. In fact the hours worked by each of the trucks did not total 21,000 working hours but in fact totalled 19,714.28 working hours. Thiess submits that Howtrac is entitled to receive the balance of the working hours up to 21,000 at A$95 per hour but it is not entitled to be paid for standby".*[13]

When calculated, Howtrac claimed the amount up to 21,000 working hours, that is the additional but not worked hours, 1285.72 hours at $95 plus 11,690.29 standby hours at A$60. His Honour calculated the amount for standby hours was $701,417.40 which together with the working hours of $1,285.72 at $95 per hour made a grand total of the hire charges outstanding of $823,560.80.

His Honour expressed the real issue between the parties to be whether Howtrac was entitled to charge for standby hours over and above the figure of 21,000 for working hours. His Honour recited that Thiess contended that Howtrac was only entitled to be paid for 21,000 at $95 per hour and was not entitled to any standby.

Thus, the battle lines were drawn.

The legal propositions

Mr Justice Gillard postulated a collection of rules governing the construction of contracts. First, his Honour said the court's object in interpreting a contract is to determine the common intention of the parties as at the date that the contract was concluded. The primary source of the common intention is the words of the contract which are to be considered in context after taking into account the whole document.[14]

His Honour held that words are to be given their normal every day meaning unless the words bear a special meaning because they are technical or because of trade usage or custom or because the admissible surrounding circumstances show that the parties used a word in a particular sense. If the language used is clear and definite then there is no necessity to resort

11 Paragraph 193 of his Honour's reasons for judgment.

12 The Keinzle clock measured the time when the truck was actually moving; paragraph 195 of Gillard J's reasons for judgment.

13 Paragraphs 194 of his Honour's reasons for judgment.

14 Paragraphs 155 to 157 of his Honour's reasons for judgment.

to any aids to interpret the agreement as the clear language must be given effect to. But if the language is obscure, uncertain, ambiguous or susceptible to more than one meaning then the court seeks to determine what the parties intended by resort to admissible evidence and aids to construction. His Honour referred to the speech of Lord Hoffman in *Investors Compensation Scheme v West Bromwich B.S*[15] and S*chenker & Co (Aust) Pty Ltd v Maplas Equipment and Services Pty Ltd*.[16] It is interesting to observe that in a subsequent decision of the Supreme Court of Victoria concerning the construction of an agreement, Nettle J, in *Katelis v Adalia Pty Ltd*[17] held that inconsistencies in provisions of an agreement should be resolved in favour of the meaning which is to be supposed that ordinary reasonable business people in the position of the parties would have intended the provisions to bear.[18]

Gillard J referred to the decision in *L. Schuler AG v Wickham Machine Tool Sales Ltd*[19] and held that the court avoids a result which is unreasonable and absurd when viewed in a commercial setting. His Honour observed that the court's function is to read the words intelligently in the meaning the parties understood and give effect to them. His Honour held that only if the meaning of the words is open to reasonable doubt does the court consider the consequences.[20] In also referring to Lord Tomlin's speech in *Hillas & Co v Arcos Ltd*[21] and to the judgment of the Court of Appeal in *First Energy (UK) Ltd v Hungarian International Bank Ltd*[22] stating that a philosophy of the law of contract is that the reasonable expectations of honest men should be protected.

"The matrix of facts"

Under the rubic construction of agreement, his Honour addressed the concept of the matrix of facts in the context of the courts not construing a contract in a vacuum. After referring to Lord Wilberforce's speech in *Prenn v Simmonds*[23] Gillard J said that the evidence concerning the matrix of facts should be restricted to evidence of the factual background known to the parties at or before the date of the contract, including evidence of the genesis and objectively the aim of the transaction.

Gillard J also referred to the speech of Lord Wilberforce in *Reardon Smith Ltd v Yngvar Hansen-Tangen*[24] where his Lordship said that the court must place itself in thought in the same factual matrix as that in which the parties were. Gillard J also referred to the speech of

15 [1998] 1 WLR 896, 913.

16 [1990]VR 834, 837, et seq.

17 [2002] VSC 497.

18 Nettle J. referred to other well established authorities such as Cohen & Co v Ockerby & Co Ltd (1917) 24 CLR 288,300; Schenker & Co (Aust) Pty Ltd v Maplas Equipment & Services Pty Ltd [1990]VR 834; Di Dio Nominees Pty Ltd v Brian Mark Real Estate Pty Ltd [1992] 2 VR 732, and Murray Goulburn Co operative Co Ltd v Cobram Laundry Service Pty Ltd [2001] VSCA 57.

19 [1974] AC 235, 251, 255-6, 264, 272

20 Gillard J referred to the decision of the House of Lords in Total Gas Marketing Ltd v Arco British Ltd [1998] 2 Lloyd's Rep 209 (the House of Lords was comprised of Lord Slynn of Hadley, Lord Nolan, Lord Steyn, Lord Hope of Craighhead and Lord Hutton.)

21 Hillas & Co Ltd v Arcos Ltd (1932) 38 Com Cas 23.

22 [1993] 2 Lloyd's Rep 194.

23 [1971] 1 WLR 1381.

24 [1976] 1 WLR 989, 995.

Lord Hoffman in ICS[25] where Lord Hoffman said that the matrix of fact includes absolutely anything that would have affected the way in which the language of the document would have been understood to a reasonable man.

Of Australian authority, Gillard J referred to the judgment of Mason J in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*[26] where Mason J said that generally speaking, facts existing when the contract was made will not be receivable as part of the surrounding circumstances as an aid to construction unless they were known to both parties.

So far as post contractual conduct was concerned, Gillard J said that a court does not construe an agreement in the light of what the parties did or said after the date of the contract.[27]

Applying those principles of construction to the agreement itself, Gillard J was persuaded that Howtrac's construction of the agreement and therefore Howtrac's entitlement to payment for standby charges was correct. His Honour said that in the context of six very expensive large trucks having a value on the second hand market of approximately $1.8m, commercial common sense dictated that income had to be received whether the plant was being used or whether it was standing idle.[28]

The Counterclaim

The principal issue advanced on behalf of Thiess by way of counterclaim related to an assertion that Howtrac breached various terms of the plant hire agreement by not permitting the installation of metal boards to increase the carrying capacity of the trucks. Thiess founded its counterclaim on implied terms to the effect that Howtrac would permit modification of the vehicles thereby enabling Thiess to have the benefit of the agreement. After observing that the contract contained no express term in respect of vehicle modification, Gillard J held that the five limb criteria for the implication of a term espoused by the Judicial Committee of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[29] were not met in the facts of the case. Nor, as his Honour held, did the evidence support a term implied by custom and usage in the civil engineering industry so as to give business efficacy to the agreement, as

25 [1998] 1 WLR 896, 912.

26 (1982) 149 CLR 337, 352.

27 In this context Gillard J referred to L Schuler AG v Wickham Machine Tools Sales Ltd [1974]. AC 235; FAI Traders Insurance Company Ltd v Savoy Plaza Pty Ltd [1993] 2 VR 343; Ryan v Textile Clothing & Footwear Union of Australia [1996] 2 VR 235.

28 Paragraph 214 of his Honour's reasons for judgment.

29 (1977) 180 CLR 266,282.

canvassed in *Byrne v Australian Airlines Ltd*[30] or by the High Court in *Constan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd.*[31]

In the course of his Honour's review of the authorities on implied terms, his Honour considered the general rule of construction that a duty will be implied into the contract imposing upon a party to cooperate in the doing of acts which are necessary to the performance by each party of its obligations under the contract. In that context, his Honour referred to the observations of the High Court in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*[32]. His Honour said that in certain circumstances a term will be implied that the contracting parties will comply with the reasonable request of the other party and his Honour referred to *Mackay v Dick,*[33] *Electronic Industries Ltd v David Jones Ltd*[34] a decision of the High Court of Australia, and to a decision of the Court of Appeal of the Supreme Court of New South Wales in *Alcatel Australia Ltd v Scarcella.*[35] Applying those authorities, his Honour held as follows -

> *"On a proper analysis of the facts here neither party was exercising any obligation and neither party was exercising any right given to it by the contract. What Thiess wanted to do was to vary the plant hire agreement to enable the six trucks to be modified to take a greater volume of material. Clearly it had no right to modify the contract and accordingly what it was seeking was a variation of same. None of the implied terms entitle a party to demand that the other party agree to a variation. Further, the implied terms did not oblige Howtrac to agree to any variation ... In any event, I am not persuaded on the evidence that Howtrac did not act reasonably or in good faith or that it did not comply with reasonable requests made by Thiess."*[36]

In the context of a case concerning consumer protection under the Trade Practices Act, Gzell J of the Supreme Court of New South Wales agreed with Gillard J in the above quoted observations in *Commonwealth Bank of Australia v Spira.*[37]

Ultimately, Gillard J dismissed the counterclaim by Thiess saying "*there was no substance in the counterclaim at all*".[38]

30 (1995) 185 CLR 410, 422.

31 (1986) 160 CLR 226.

32 [1979] 144 CLR 596.

33 (1881) 6 APP Cas 251.

34 (1954) 91 CLR 288.

35 (1998) 44 NSWLR 349.

36 Paragraphs 417 and 418 of Gillard J's reason for judgment.

37 [2002] NSWSC 905.

38 Paragraph 422 of his Honour's reasons for judgment.

The Appeal

Thiess appealed against the orders and judgment of Gillard J by appeal entitled *Thiess Contractors (NZ) Ltd v Howtrac Rentals Pty Ltd*.[39] There, the Court of Appeal (Callaway, Buchanan and Vincent JJA) construed the agreement in respect of standby charges in such a way that Howtrac had no independent entitlement to be paid for standby hours – it was merely paid for working hours at $95 per hour and no more. Subsequently, the Court of Appeal dealt with consequential orders based on its earlier decision, in *Thiess Contractors (NZ) Ltd v Howtrac Rentals Pty Ltd (No.2)*.[40] However, in neither of the decisions of the Court of Appeal did the Court of Appeal upset any of the learning of Gillard J in respect of the composition of the contract and its construction including the matrix of fact issues and issues relating to implied terms.

Although the facts of the case are complex, it is submitted that the treatment given by the Honourable Mr Justice Gillard to the legal issues relating to the composition and construction of the contract and to the implied terms of the contract is scholarly. Those observations will assist practitioners who are faced with the unenviable task of endeavouring to discern legal issues such as the formation of the contract, contractual intent and construction, particularly in the context of bulding and engineering contracts where it is commonplace for a contract to be comprised of letters passing between the parties. Naturally, his Honour's observations apply with full force and effect to more sophisticated contracts, including those formulated by lawyers after several rounds of negotiation.

Authorities after Howtrac

Three notable authorities since Gillard J's decision have addressed the question of the use of surrounding circumstances to assist in the interpretation of a written agreement and the question of the covenant of good faith and fair dealing implied in contracts. Two of those authorities emanate from the High Court of Australia and one from the Court of Appeal of the Supreme Court of Victoria. The first is *Royal Botanic Gardens & Domain Trust v South Sydney City Council*.[41] That case concerned a rental determination under a lease which permitted the lessor to "have regard to" various matters. One of the issues for the court was the extent to which it was permissible to have regard to those matters. The majority of the High Court (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) said it was unnecessary to resolve whether the House of Lords in *ICS v West Bromich*[42] and in *Bank of Credit and Commerce International SA v Ali*[43] took a broader view to the admissible "background" than was taken in *Codelfa* or, if so, whether those views should be preferred to

39 [2002] VSCA 195.
40 [2002] VSCA 220.
41 [2002] HCA 5.
42 [1998] 1 WLR 896.
43 [2001] 2 WLR 735.

the views of the High Court. The majority said that until such a determination was made by the High Court, other Australian courts should continue to follow *Codelfa* if they discerned any inconsistencies with *Codelfa*. So far as the scope of the "good faith doctrine" was concerned, the majority said it was an inappropriate occasion to consider the matter.

Kirby J delivered separate reasons for judgment. His Honour applied earlier High Court authority[44] and held that the very purpose of a formal contract is to put to an end disputes which would inevitably arise if the matter were left upon verbal negotiations or upon mixed communings partly consisting of letters and partly of conversations. Kirby J said that the practical utility of the rule and the reason for its persistence as a matter of legal doctrine is based on a desire to uphold the more formal bargains that parties commit to writing. His Honour held that on the availability of contextual materials and extrinsic evidence, the position remains as stated by Mason J in *Codelfa*.

Then came the decision of the High Court in *Ermogenus v Greek Orthodox Community of SA Inc*.[45] That case concerned the engagement of a minister of religion and whether the intention to create contractual relations was evident between the parties. The majority of the court (Gaudron, McHugh, Hayne and Callinan JJ) held that the enquiry to discern whether the parties intended to create legal relations permitted a search of "surrounding circumstances". However, the court held that in the end, what objectively was said or done having regard to the circumstances in which those statements and actions happened is important, and the court relied on *Codelfa*.

On 13 April 2003, the Court of Appeal of the Supreme Court of Victoria considered an informally drawn commercial agreement and the evidence, if any, relevant to its interpretation. In *Collins Hill Group Pty Ltd v Trollope Silverwood and Beck Pty Ltd*,[46] Ormiston, Charles and Batt JJA held that the agreement must be interpreted in a straight-forward and common sense way. Ormiston JA referred to the right to have recourse to "the matrix " or "the commercial background surrounding the parties' relationship". His Honour held that such a right was most succinctly expressed in the judgment of the majority of the High Court in *Royal Botanic Gardens and Domain Trust v South Sydney City Council*[47] where it was said that if the language be ambiguous or susceptible of more than more meaning, it was appropriate to have regard to more than internal linguistic considerations and to consider the circumstances with reference to which the words in question were used and, from the circumstances, to discern the objective which the parties had in view. Ormiston JA quoted from the *Royal Botanic* case:

44 Such as Gordon v Macgregor (1909) 8 CLR 316 and Petelin v Cullen (1975) 132 CLR 355.

45 [2002] HCA 8.

46 [2002] VSCA 205.

47 [2002] HCA 5.

> *"In particular, an appreciation of the commercial purpose of the contract: presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating"*.[48]

Ormiston JA said that evidence of subsequent conduct was inadmissible for the purpose of interpreting a contract and his Honour referred to *FAI Traders Insurance Pty Ltd v Savoy Plaza Pty Ltd*,[49] *Ryan v Textile Clothing & Footwear Union of Australia*[50], to the decision to the Court of Appeal in New South Wales in *Brambles Holdings Ltd v Bathurst City Council*[51] and *CH Magill v National Australia Bank Ltd*.[52] In a very recent decision of the Federal Court of Australia in *GEC Marconi Systems Pty Ltd v BHP Information Technology Pty Ltd*,[53] Finn J. considered the duty of good faith and fair dealings and the authorities relevant to such a duty.

Although still left open for determination on another day by the High Court, the prevailing authority at Court of Appeal level and at High Court level is to the effect that *Codelfa* is the governing authority in assessing whether it is permissible to take into account "the matrix of fact", so called, in which the contract is set.

Some Practical Considerations

The foregoing legal principles are complex and may be difficult in their application. The following may help the arbitrator in his or her tasks:

a) First, ascertain that the parties have arrived at a formal, binding and concluded contract. This requires the arbitral tribunal to determine whether the parties have arrived at consensus, that the consensus is capable of forming a binding contract, and that the parties in fact intended such consensus to constitute a binding contract;

b) In order to ascertain whether parties have in fact arrived at a final, binding and concluded contract, the arbitral tribunal is entitled to look at the whole of the chain of correspondence;

c) Next, the arbitral tribunal seeks to determine the common intention of the parties as at the date the contract is concluded and the primary source of such common intention is the words of the contract itself taking into account the whole document;

d) Next, the words of the contract are to be given their normal everyday meaning, unless the words bear a special meaning according to technical use or trade usage and custom;

e) Clear language must be given effect to;

f) However, where the language is obscure, uncertain, ambiguous or susceptible to more than one meaning, the arbitral tribunal seeks to determine what the parties intend by resort to admissible evidence and aids to construction;

48 [2002] HCA 5 at paragraphs 9 & 10.

49 [1993] 2 VR 343.

50 [1996] 2 VR 343.

51 (2001) 53 NSWLR 153.

52 [2001] NSWCA 221.

53 [2003]FCA 50.

g) Generally speaking, facts existing when the contract is made will not be receivable as part of the surrounding circumstances unless they are known to both parties;
h) It is not permissible to construe an agreement in light of what the parties did or said after the date of the contract.

It is submitted that arbitrators and practitioners alike will benefit from the observations of Mr Justice Gillard in the *Howtrac* case.