RECTIFICATION OF CONSTRUCTION CONTRACTS

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Introduction

1. This paper is an introduction to the rectification of construction contracts by rectification for common mistake.[1]

2. Rectification of a written instrument is an equitable remedy. Its purpose is to make a written instrument conform to the true agreement of the parties, in circumstances where, as a result of the parties' common mistake, the written instrument fails to accurately express that true agreement.[2]

Key elements of a rectification claim

3. In the High Court decision of *Simic v New South Wales Land and Housing Corporation* [2016] HCA 47 (***Simic***), Gageler J, Nettle J and Gordon J stated a party seeking to rectify a written contract must establish that:

    a. the contracting parties had a common intention (whether or not this intention amounted to an enforceable agreement) in respect of a particular matter in the instrument to be rectified;[3]

    b. the common intention existed at the time of the execution of the contract; and

    c. as a result of the parties' common mistake, the written contract did not express that common intention.[4]

[1] Rectification is also sometimes available in other circumstances, for example, unilateral mistake, but this is not the subject of this paper.
[2] *Simic* at [103].
[3] *Simic* at [103].
[4] *Simic* at [103].

4. There is no requirement for communication of the common intention by express statement.[5] However, the alleged common intention must be the actual intention of both parties, viewed objectively from their words or actions.[6]

5. Unless those matters are established, the "*hypothesis arising from execution of the written instrument, namely, that it is the true agreement of the parties*" cannot be displaced.[7]

Rectification versus implication of terms

6. The similarity between rectification and the implication of terms is that in each case there is a problem with a contract caused by a deficiency in the written contract – typically a term which should have been included was omitted.[8]

7. The difference between rectification and implication of terms is that, in the case of rectification, a term which should have been included in the written contract was actually agreed upon by the contracting parties; whereas, in the case of implication, the term to be implied is a term which it is to be presumed that the contracting parties would have agreed upon had they turned their minds to it.[9]

8. Hence, rectification ensures a contract gives effect to the parties' actual intentions whereas the implication of terms gives effect to the parties' presumed intentions.[10]

Establishing common intention – a heavy burden

9. A litigant seeking to rectify a contract for common mistake faces a difficult evidentiary task. This is because of the way courts have described the proof required to establish a common intention.

10. In *Simic*, the Kiefel J of the High Court stated that "*the intention of the parties up to the time the relevant instrument was made*" has to be "*proved to a high standard*".[11] [Emphasis added.]

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[5] *Simic* at [104]. However, in *Simic*, at [44] and [45], while Kiefel J referred to "*an outward expression of accord*", she went on to cite authority for the view that an outward expression of the parties' common intention is not a requirement for rectification.
[6] *Simic* at [104].
[7] *Simic* at [104].
[8] *Codelfa Construction Pty Ltd v State Rail authority of NSW* 41 ALR 367 (***Codelfa***), at 370, per Mason J.
[9] *Codelfa*, at 370, per Mason J.
[10] *Codelfa*, at 370, per Mason J.
[11] *Simic* at [41].

11. In *Thiess Pty Ltd v FLSMIDTH Minerals Pty Ltd* [2010] QSC 006 (***Thiess v FFE***), the Queensland Supreme Court indicated that an alleged common intention must be proved by "*clear and convincing proof*".[12]

12. In *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liquidation)* [2019] NSWCA 11 (***Seymour v Ostwald***)[13], Sackville AJA referred with approval to the following passage in *Fowler v Fowler* (1859) 4 De G & J 250 at 265:

> "*It is clear that a person who seeks to rectify a deed upon the ground of mistake must be required to establish, in the clearest and most satisfactory manner, that the alleged intention to which he desires it to be made conformable continued concurrently in the minds of all parties down to the time of its execution, and also must be able to shew exactly and precisely the form to which the deed ought to be brought.*"[14] [Emphasis added].

13. Clear words in a contract will generally make it harder to establish rectification claim. In *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603, the New South Wales Court of Appeal stated (at 638) that "*the fact that words used in a contract convey a clear, and unambiguous and unmistakeable meaning or legal effect renders it less likely that the parties were mistaken as to that meaning or effect [and] that they had a common intention which was fundamentally inconsistent with the words they had deliberately employed*".

14. Rationales for a high degree of proof include that:[15]

    a. those who record their agreements in writing, especially when they are assisted by lawyers, must generally be presumed to intend their written bargain to prevail over what they have not written; and

    b. it is easy for a contracting party, on becoming unsatisfied with a term of some written contract, to seek to brand it as inaccurate.

15. The type of intention that is relevant to rectification for common mistake is the subjective intention of the parties, sometime called their "actual intention".[16] This accords with what Mason J said in *Codelfa* at 370, which is that rectification for common mistake ensures a contract gives effect to the parties' actual intentions, whereas, in contrast, the implication of

[12] *Thiess v FFE* at [131].
[13] This paper is based on the AustLII verify version of the decision retrieved from AustLII on 4 March 2019.
[14] *Seymour v Ostwald* at [122].
[15] *Seymour v Ostwald* at [123].
[16] *Samm Property Holdings Pty Ltd v Shaye Properties Pty Ltd* [2017] NSWCA 132 at [114].

terms gives effect to the parties' presumed intentions. Hence, evidence of the parties' subjective state of mind may be important.

16. In rectification proceedings extrinsic evidence of the parties' intentions may be admitted (in contrast to the usual rule that such evidence is inadmissible on questions of contractual interpretation). For such evidence to be admitted, it is not necessary to show that the terms of a written contract are ambiguous.[17]

Broad summary of the cases examined below

17. The discussion below examines four cases in which courts have considered rectification claims.

18. In broad summary, the cases indicate that:

    a. errors in instruments may not alone be sufficient to establish a rectification claim and will be considered in light of the communications between the parties;

    b. courts are likely to give little weight to evidence of a party's alleged intention which is at odds with the party's commercial interests;

    c. where corporations are contracting, it may be necessary to determine whether the relevant decision maker is a director or an employee - this may require obtaining evidence from all those involved in contractual negotiations and contract execution, including evidence of internal management processes leading to contract execution;

    d. courts may be reluctant to order rectification where a party fails to obtain evidence from all those involved in contact negotiations and contract execution;

    e. evidence of pre-contractual negotiations may be of limited weight; and

    f. where negotiations include counter-offers and involve "commercial brinksmanship", courts may be especially critical of evidence of alleged common intention.

19. Success in rectification proceedings requires a close analysis of the evidence of contract negotiation and contract execution, and what that evidence reveals about the intention of the parties. Early and fulsome consideration of these issues by a party considering filing proceedings is critical to its legal strategy.

[17] *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* [2009] NSWCA 234 at [1] to [3].

Errors in documents considered in light of the express communications between the parties

20. In *Simic*, the High Court considered errors in bank guarantees and whether those instruments should be rectified to correct those errors.

21. The New South Wales Land and Housing Corporation ("**the Corporation**") awarded Nebax a tender to construct units blocks. The letter of award required Nebax to provide security and enclosed a draft "Unconditional Bankers Certificate" addressed as follows:[18]

> "*TO: NEW SOUTH WALES LAND AND HOUSING CORPORATION ABN (24 960 729 253) trading as Housing NSW ABN (45 754 121 940)…(hereinafter called the 'Principal')*".

22. The construction contract defined the Corporation as the "Principal" and as: "*NEW SOUTH WALES LAND AND HOUSING CORPORATION ABN (24 960 729 253…a statutory authority constituted pursuant to…*").[19]

23. The construction contract included a term stating "*…security must be in the form of an unconditional undertaking to pay on demand, in a form and by a financial institution approved in writing by the Principal.*" [Emphasis added.][20]

24. Mr Simic, a Nebax director, went to an ANZ branch seeking two banks guarantees. It is here that errors occurred.

25. He told Ms Hanna, an ANZ employee, that Nebax had "*just obtained a contract from Housing NSW*" and needed two bank guarantees "*made out to New South Wales Land & Housing Department trading as Housing NSW*".[21]

26. He did not give Ms Hanna a copy of the construction contract or the draft "Unconditional Bankers Certificate". Two forms of indemnity and application for guarantee ("**the Applications**") were produced by Ms Hanna and signed by Mr Simic. Each application requested ANZ to execute a security to facilitate Nebax's transaction with "*New South Wales Land & Housing Department Trading As Housing NSW ABN 45 754 121 940".*[22]

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[18] *Simic* at [57] to [59].
[19] *Simic* at [61].
[20] *Simic* at [62].
[21] *Simic* at [63].
[22] *Simic* at [63] and [64].

27. Ms Hanna provided two undertakings. These undertakings had errors:[23]

a. The favouree was described as "*New South Wales Land & Housing Department Trading As Housing NSW ABN 45 754 121 940 (The Principal)*". The favouree should have been the "*New South Wales Land & Housing Corporation…*" not the *New South Wales Land & Housing Department…*". [Emphasis added.]

b. They also included the incorrect ABN. The ABN used was for the trading name "Housing NSW", not the ABN of the Corporation.

c. The references in the undertakings to the construction contract were also wrong.

i. The undertakings referred to "Job Number P0409021", a reference that did not appear in the construction contract.

ii. The "Contract Number" in the undertakings "BG2J8" did not match the "Contract Number" in the construction contract "51384".

28. As a result of these errors, the Applications were not for an instrument in favour of the Corporation, and the undertakings were not in favour of the Corporation.

29. The Corporation sought to call on the undertakings. ANZ refused to except that a called had been made.[24]

30. The primary Judge declared that the description of "Principal" in the undertakings should be construed as referring to the Corporation and hence declined to deal with the rectification claim. The High Court found that it could not be construed in that way and ordered that the undertakings and the Applications be rectified to refer to the Corporation.[25]

31. The High Court noted that while there is no requirement that a common intention be communicated by express statement, here such a communication had occurred when Mr Simic spoke to Ms Hanna. The High Court found that all parties intended that the undertakings should be for the benefit of the party with which Nebax had entered into the construction contract. Mr Simic's intention, and hence that of Nebax, was that the undertakings should operate in favour of Nebax's counterparty to the construction contract. Similarly, Ms Hanna's understanding, and

[23] *Simic* at [65] to [70].
[24] *Simic* at [71] and [72].
[25] *Simic* at [73], [74] and [120].

hence that of ANZ, was that the undertakings were to be entered into in relation to the construction contract.[26]

32. The High Court also noted that while Mr Simic had misdescribed the construction contact to Ms Hanna, by providing an incorrect "Job Number" and "Contract Number", it was not suggested that there was ever more than one contract for the construction of the particular unit blocks in question.[27]

33. The High Court considered the errors in the description of the Corporation and its ABN in light of the communication between Mr Simic and Ms Hanna at the ANZ branch.[28]

    a. Mr Simic had erroneously stated that the name of Nebax's counterparty was ""*New South Wales Land & Housing Department Trading As Housing NSW ABN 45754121940*", and this error was unwittingly repeated by Ms Hanna and hence ANZ in the Applications and the undertakings.

    b. However, Mr Simic told Ms Hanna, and hence ANZ knew, that Nebax had obtained a contract with the entity trading as "Housing NSW" and that the Applications and the resulting undertakings were required under that contract.

34. In the High Court's view, if someone had pointed out to Mr Simic and Ms Hanna (when they were in the ANZ branch) that the name of the counterparty was wrong, the error would have been plain and obvious to both of them. On that basis, the High Court said that here can be no doubt that their actions were the result of a common mistake.[29]

35. The High Court concluded that the actual intention of each party, viewed objectively, and hence the common intention of both parties, was to provide security to the entity with which Nebax had contracted.[30]

Use of draft versions of instruments exchanged in negotiations, identifying the relevant decision maker, calling evidence from all negotiators and decision makers.

36. In *Thiess v FFE*, the Queensland Supreme Court considered a claim to rectify a side deed of settlement between a contractor and its subcontractor.

[26] *Simic* at [104] and [105].
[27] *Simic* at [106].
[28] *Simic* at [107].
[29] *Simic* at [108].
[30] *Simic* at [109].

37. A plant owner sought to recover losses, resulting from the failure of process plant, from a contractor, Thiess Pty Ltd ("**Thiess**"), and the subcontractor design consultant, FLSMIDTH Minerals Pty Ltd ("**FFE**").

38. The project agreements required FFE to effect a primary insurance policy providing $20M of cover and an excess insurance policy providing a further $40M of cover.

39. Thiess commenced proceedings against FFE. A main deed of settlement was entered into by the plant owner, Thiess and FFE, and a side deed of settlement was entered into by Thiess and FFE. The proceeding remained on foot and an issue which arose was the degree to which the side deed would limit FFE's liability to Thiess in the proceeding.

40. The executed side deed limited FFE's liability to Thiess to the funds recoverable by FFE from the primary insurance policy only.[31]

41. Thiess sought to rectify the side deed alleging that both Thiess and FFE intended that FFE's liability to Thiess would be limited to the funds recoverable by FFE from both the primary insurance policy and the excess insurance policy. The Court ordered that the side deed be rectified in line with that common intention.[32]

42. To determine the intentions of the parties the Court considered:

    a. draft versions of the side deed;

    b. a party's alleged intention versus the reality of its commercial position;

    c. who the relevant decisions makers were and their intentions regarding the side deed;

    d. who was called to give evidence for each party – and who was not; and

    e. whether a mistake as to an instrument's effect, as opposed to a mistake as to an instrument's words, would preclude rectification.

Drafts versions of the side deed

43. Some draft versions of the side deed circulated between the parties before 27 May 2005 accorded with the common intention alleged by Thiess.[33]

[31] *Thiess v FFE* at [89], (although it was common ground between the parties that the side deed of settlement was ambiguous, see [130]).
[32] *Thiess v FFE* at [141].
[33] *Thiess v FFE* at [24].

44. In those draft versions, the preservation clause, the clause which preserved Thiess' rights in the proceeding against FFE, provided that Thiess would release FFE from claims where those claims exceeded "*indemnification by QBE [i.e., the primary insurer] or any excess insurer*".[34]

45. However, on 27 May 2005, FFE's solicitor circulated a revised version of the side deed with a preservation clause under which Thiess would release FFE from claims where those claims exceeded "*any indemnification by ~~the Insurer~~ QBE*".[35] The meaning of "*the Insurer*" included the primary insurer and the excess insurer.[36] Thus, replacing "*the Insurer*" with "*QBE*" meant that Thiess was limited to the primary insurance policy and could not obtain any benefit from the excess insurance policy.

46. The relevant change from the previous version of the side deed was not identified by FFE's solicitor, in particular, there was no mark up in the form set out at paragraph 45 above.[37]

47. The Court found that Thiess' solicitors intended that Thiess' rights were defined by the cover of both insurance policies and that this intention did not change during the drafting process for the side deed.[38] The Court noted that there had been no discussion, let alone negotiation, about whether Thiess' rights should be defined by one rather than both insurance policies and that Thiess' solicitors had overlooked the effect of FFE's solicitor's revised side deed circulated on 27 May 2005.[39]

48. FFE's solicitor gave evidence that he produced the revised version because his client instructed him during a discussion to limit FFE's liability to the primary insurance policy only.[40] For at least two reasons, the Court rejected this evidence and found that there was no such discussion.

49. First, the Court's view was that had such a discussion occurred, it would have canvassed whether there was any advantage to FFE in proposing such a limit on Thiess' rights, when the extent of FFE's uninsured liability would not be affected.[41]

50. Second, FFE's own evidence about its alleged intention was inconsistent with its commercial position. FFE's solicitor had provided to FFE a draft letter to the excess insurer seeking indemnity to the extent that the primary policy would not be sufficient to cover the relevant

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[34] *Thiess v FFE* at [36].
[35] *Thiess v FFE* at [63].
[36] See the definitions of "*Insurer*" and "*Project Specific PI Policy*", and the discussion at *Thiess v FFE* at [10], [11], [13], [36] and [37]. See also the definition of "*insurer*" in the rectified instrument at [141].
[37] *Thiess v FFE* at [70].
[38] *Thiess v FFE* at [105].
[39] *Thiess v FFE* at [105] to [107].
[40] *Thiess v FFE* at [67].
[41] *Thiess v FFE* at [67].

claims. The Court noted that had FFE or its solicitor thought that Thiess' rights pursuant to the side deed would extent only so far as FFE was indemnified under the primary insurance policy, there would have been no reason to write to the excess insurer in such terms.[42]

The relevant decision maker for Thiess – not the directors who executed the side deed but the Thiess line manager who negotiated the side deed

51. Two Thiess directors executed the side deed. FFE argued that their intention was to have Thiess contract according to the terms of the side deed.[43] The Court was not persuaded by this argument.

52. The directors were not involved in the side deed negotiations. They executed the side deed based on a document called an "*application for use of common seal*" prepared by Thiess' inhouse lawyer and a Thiess line manager, Mr Halpin, both of whom were involved in the side deed negotiations.[44]

53. The application described the side deed and its purpose very briefly, indeed there was no explanation of, or even reference to, any particular terms.[45] There was also no hint in the application that Thiess' right would in any way be diminished by excluding the excess insurer from the side deed's preservation clause.[46]

54. The Court indicated that the intention of the Thiess directors was that the side deed would have the effect as described in the application for use of common seal and as Mr Halpin and Thiess' inhouse lawyer had intended.[47] The Court went on to state that the Thiess directors were not the relevant decision makers.[48] The Court noted that the relevant decision maker was Mr Halpin whose job was to make the necessary business judgment as to the terms upon which Thiess should contract and that it was his state of mind that must be considered for the rectification claim.[49]

55. The Court found that the intention of Thiess, constituted by the intention of Mr Halpin, was that Thiess' rights would not be diminished but preserved such that FFE's liability to Thiess

[42] *Thiess v FFE* at [77].
[43] *Thiess v FFE* at [116] and [125].
[44] *Thiess v FFE* at [32], [116], [117], [119] and [121].
[45] *Thiess v FFE* at [122].
[46] *Thiess v FFE* at [123].
[47] *Thiess v FFE* at [125].
[48] *Thiess v FFE* at [126].
[49] *Thiess v FFE* at [126] and [128].

would have regard to the funds recoverable by FFE from both the primary insurance policy and the excess policy.[50]

FFE's intention was the same as Thiess' intention

56. The Court found that FFE's intention was the same as Thiess' intention.[51] The basis on which the Court made this finding includes the following four matters.

57. First, there had been no discussion, let alone negotiation, about whether Thiess' rights should be defined by one rather than both insurance policies.[52]

58. Second, all negotiations and exchanges regarding legal drafting were on the basis of the preservation of Thiess' rights, in the sense that Thiess' rights under the project agreements, which allowed Thiess to benefit from both the primary insurance policy and the excess insurance policy, should be preserved.[53]

59. Third, the evidence that FFE understood that it was entitled to call on the excess insurance policy if required.[54]

60. Fourth, FFE, in contrast to Thiess, failed to call any evidence from any of its employees or directors. The only FFE witness of fact was FFE's solicitor. The Court stated that he was plainly not a decision maker as to the terms upon which FFE should contract and that "*[o]verall his evidence supports the case for rectification upon the basis of a common mistake because of what it reveals as to the absence of discussions with or advice to his client on the specific point.*"[55]

61. No explanation was offered for FFE's failure to call any other witnesses. On this basis the Court inferred that any other FFE employee or officer would not have assisted FFE's case (see *Jones v Dunkel* (1959) 101 CLR 298). This allowed a further "*inference as to FFE's intentions to be more readily drawn.*"[56]

[50] *Thiess v FFE* at [128].
[51] *Thiess v FFE* at [132].
[52] *Thiess v FFE* at [105].
[53] *Thiess v FFE* at [10] to [18] and [132].
[54] *Thiess v FFE* at [137]. See also paragraph 50 above.
[55] *Thiess v FFE* at [138].
[56] *Thiess v FFE* at [138].

Parties agree to an instrument's words but mistake the instrument's effect – rectification is still available

62. FFE argued that the actual intention of the parties was irrelevant on the basis that if parties have agreed to the words of an instrument, a mistake as to the instrument's effect could not be the basis for rectification.[57]

63. The Court rejected that argument, noting that the weight of authority now favours the view that "*rectification will not be refused merely because the common mistake is as to the legal effect of the words used, rather than as to the actual words used*".[58]

Evidence from witnesses authorised to conduct "pre-contractual" negotiations may be of limited weight.

64. In *Seymour v Ostwald*, the New South Wales Supreme Court of Appeal considered a claim for the rectification of the progress payment provisions of a construction contract.

65. Ostwald Bros Pty Ltd (in liquidation) ("**Ostwald**") served a payment claim on Seymour Whyte Constructions Pty Ltd ("**Seymour**") under the *Building and Construction Industry Security of Payment Act 1999* (NSW) ("**Act**") seeking approximately $6 million. Seymour's payment schedule proposed to pay approximately $2.5 million. Ostwald made what it said was an adjudication application resulting in an adjudication determination requiring Seymour to pay approximately $5 million.[59]

66. Seymour claimed that the adjudication application was invalid because it was served too late. Whether or not the adjudication application was serviced late depended on the progress payment provisions of the contract.

67. Seymour said that progress payments were due within 15 business days after Seymour received a payment claim.[60]

68. According to Ostwald, Seymour had more time than that to make progress payments. Ostwald said that progress payments were due within 30 days of the end of the month in which Seymour received a payment claim.[61]

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[57] *Thiess v FFE* at [90].
[58] *Thiess v FFE* at [91] and [92] to [96].
[59] *Seymour v Ostwald* at [47] and [48].
[60] *Seymour v Ostwald* at [102].
[61] *Seymour v Ostwald* at [105].

69. The relevant time constraint on the service of Ostwald's adjudication application was section 17(3)(b) of the Act which states than an adjudication application "*must be made within 20 business days after the due date for payment*".[62] For Ostwald's adjudication application to have been made within time, it was necessary for the contract to provide that progress payments were due within 30 days of the end of the month in which Seymour received a payment claim.[63]

70. The contract included Special Conditions and Subcontract Conditions. The Special Conditions had priority over the Subcontract Conditions in the event of any inconsistency.[64]

71. The Subcontract Conditions provided that Ostwald was entitled to submit payment claims as stated in the "Particulars".

72. Item 21 of the Particulars had two boxes. The second box was ticket. It provided that the due date for payment was "*[w]ithin 30 days of the end of the month of claim*".[65]

73. Item 23 of the Particulars had a "Yes" box which was ticked.[66]

    a. It was to be ticked if the head contract (between Seymour and its upstream head contractor) was a certain contract known as "GC21".

    b. Item 23 also provided that if the head contract was the GC21, then "*[A]ll subcontracts in Annexure C will apply*".

74. Special Condition 9.1 was part of Annexure C, hence ticking the Item 23 "Yes" box incorporated Special Condition 9.1 as a term of the contract.

75. Special Condition 9.1 provided that the provision of the Subcontract Conditions relating to the payment of progress claims, was to be replaced with a provision under which Seymour would be required to pay Ostwald within 15 business days after Seymour received a payment claim.[67]

76. Hence, ticking the Item 23 "Yes" box created an inconsistency with the second box in Item 21 (stipulating different timings for the payment of progress claims).[68]

77. Ostwald sought to rectify the contract by deleting Special Condition 9.1.[69]

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[62] *Seymour v Ostwald* at [84], [106] and [113].
[63] See *Seymour v Ostwald* at [106] for the relevant dates.
[64] *Seymour v Ostwald* at [93].
[65] *Seymour v Ostwald* at [96].
[66] *Seymour v Ostwald* at [96].
[67] *Seymour v Ostwald* at [94].
[68] *Seymour v Ostwald* at [99].
[69] *Seymour v Ostwald* at [105].

78. The primary Judge ordered rectification by deleting Special Condition 9.1.[70] The New South Wales Supreme Court of Appeal overturned that decision.[71]

79. Ostwald's case before the primary judge was that Special Condition 9.1 became a term of the contract as a result of the mutual mistake of the parties. Ostwald submitted that the inclusion of Special Condition 9.1 did not reflect the parties' common intention that Seymour should have 30 days from the end of the month following receipt of a payment claim to make progress payments.[72]

80. Ostwald relied on evidence from Mr McHugh, Ostwald's General Manager for Engineering who negotiated the terms of the contract with Mr Demani, Seymour's Commercial Manager. Mr McHugh gave evidence in chief but was not cross examined. Mr Demani did not give evidence.[73]

81. To help establish a common intention, Ostwald relied on the following exchange between Mr McHugh and Mr Demani which occurred during a meeting before the contract was made:[74]

> Mr McHugh: "*If we can't have 10 days, can we have 28? Why isn't that reasonable?*"
>
> Mr Demani: "*The 30 days is non-negotiable, payments are made in line with Seymour Whyte's payment runs. This is 30 days from end of month claim*". [Emphasis added.]

82. The primary judge considered that the exchange "*provided a vivid insight into the parties' negotiations*" and that the "*inference is irresistible that Ostwald accepted that Seymour Whyte meant what it said: the matter was not negotiable.*"[75]

83. However, Sackville AJA of the New South Wales Supreme Court of Appeal (with whom Leeming JA, Payne JA, White JA and Emmett AJA agreed) noted that the primary judge's finding did not depend on any credit based assessment of the evidence as to the parties' common intention at the time the contract was executed.[76]

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[70] *Seymour v Ostwald* at [119].
[71] *Seymour v Ostwald* at [1], [44], [45] and [138].
[72] *Seymour v Ostwald* at [114].
[73] *Seymour v Ostwald* at [116] and [127].
[74] *Seymour v Ostwald* at [118]. (Note: the reference to "*Mr Demasi*" in [118] and to "*Mr Demani*" at [116] and [117] refer to the same person.)
[75] *Seymour v Ostwald* at [119].
[76] *Seymour v Ostwald* at [1], [44], [45] and [126].

84. Sackville AJA pointed out that in his affidavit, Mr McHugh said that he was "*responsible for projects and pre-contractual negotiations*".[77] [Emphasis added.]

85. His Honour said that there was no evidence: [78]

a. that at the time of contract execution, Ostwald's officers intended that Seymour should have 30 days from the end of the month in which Ostwald served a payment claim to make payment; or

b. regarding how Special Condition 9.1 came to be included in the contract.

86. His Honour noted that Mr McHugh did not say that he was authorised to conclude a final binding agreement with Seymour, only that he would have expected to have been made aware of any further discussions that may have taken place regarding the payment period.[79]

87. Seymour's Group Commercial Manager, Mr Millar, gave evidence that he had instructed lawyers to prepare a proforma subcontract that would comply with CG21. He also explained that CG21 required payment to subcontractors with 15 business days. Sackville AJA stated that Mr Millar's evidence, which went unchallenged, and to which the primary Judge did not refer, was not direct evidence regarding why Special Condition 9.1 was incorporated into the contract, but nonetheless provided a rationale for its inclusion.[80]

88. Before the contract was executed, Mr Demani prepared a final version of a "Departures Table" setting out each parties' negotiating position regarding proposed contract terms, including what became Item 21 of the Particulars. The table recorded that Ostwald had requested that the due date for payment be within 10 business days of the end of the month in which a claim was made. Seymour's first response was "*Departure Not Accepted*", and its final response was "*Payments are made in line with [Seymour's] payment sums. This is 30 days from end of month of claim. Non-negotiable.*"[81]

89. Ostwald placed considerable emphasis on the Departures Table, relying on it to help establish a common intention. However, Sackville AJA noted that there were at least two significant issues, in which the Departures Table recorded Seymour's position as "*Non-negotiable*" or "*No further discussion are entertained*", and which were nonetheless dealt with differently in the

[77] *Seymour v Ostwald* at [128].
[78] *Seymour v Ostwald* at [129].
[79] *Seymour v Ostwald* at [130].
[80] *Seymour v Ostwald* at [131].
[81] *Seymour v Ostwald* at [117].

executed contract (these were which party would bear the costs of certain tests and a delay liquidated damages provision).[82]

90. Ostwald pointed to the fact that Seymour had often paid Ostwald 30 days from the end of the month a payment claim was received. Sackville AJA said that this did not demonstrate an invariable practice by Seymour and in any event, it could not stablish that Ostwald's representatives executed the contract under a mistake as to its terms.[83]

91. Overall, Sackville AJA's view (with which Leeming JA, Payne JA, White JA and Emmett AJA agreed) was that the evidence was consistent with the Item 21 box having been ticked in error, which favoured the view that Special Condition 9.1 was intended by both parties.[84]

It's the intention of the parties when a contact is made that matters, even in the face of contrary earlier intentions

92. In *JM Kelly (Project Builders) Pty Ltd v Toga Development No 31 Pty Ltd (No 5)* [2010] QSC 389 (***JM Kelly v Toga***), the Queensland Supreme Court considered a claim for rectification of a construction contract where one counterparty had engaged in "commercial brinksmanship" to try to better its commercial position shortly before entering into a contract.

93. The defendant developer and the plaintiff builder were involved in significant negotiations for a project to redevelop the Burleigh Heads Hotel site and construct some 230 residential and hotel apartments. Preliminary estimates for the project from various builders were in the order of $50 million.[85]

94. Communications between the developer and the builder included:

    a. communications during a tender process;

    b. at least four post tender meetings in February and March of 2004;

    c. a letter of intent executed by the developer and builder in April 2004; and

    d. a further meeting on 14 May 2004.[86]

[82] *Seymour v Ostwald* at [132].
[83] *Seymour v Ostwald* at [134].
[84] *Seymour v Ostwald* at [135].
[85] *JM Kelly v Toga* at [1].
[86] *JM Kelly v Toga* at [26] to [31], [34] to [49], [56] to [66],

95. The builder claimed that at the 14 May 2004 meeting, the builder and developer agreed that: [87]

a. the builder would carry out a value management process which would determine the builder's scope of works; and

b. the builder would be paid its costs plus a margin for the work it carried out pursuant to the scope of work so determined.

96. On 10 June 2004, the builder's managing director (and its ultimate decision maker) and its Queensland manager compiled a set of documents which the builder proposed be the final version of the contract between the parties.[88] The builder's managing director initialled each page of the bundle of documents and provided them to the developer's project manager.[89]

97. After reviewing the bundle of documents, on 15 June 2004, the developer's executive development manager faxed the builder stating:

> "*I refer to the documents you left for Jeffrey last Friday. However the following documents given to you have not been returned/executed, which are also key documents forming part of the building contract.*
>
> *1. Tender Form*
>
> *2. Form of Formal Instrument of Agreement*
>
> *3. Trade Cost Allocation*
>
> *4. Scope Clarifications*
>
> *5. Tripartite Agreement*
>
> *It is critical that these executed documents be given to me tomorrow at our site meeting. Should this not occur it is likely that the necessary financial arrangements will not be in place in readiness for first progress claim.*" [Emphasis added.]

[87] *JM Kelly v Toga* at [56].
[88] *JM Kelly v Toga* at [76].
[89] *JM Kelly v Toga* at [77].

98. The builder's managing director executed the documents provided on 15 June 2004 ("**the Contract**").[90] The builder asked the Court to rectify the Contract so that it reflected the agreement allegedly reached at the 14 May 2004 meeting.[91]

99. The documents provided by the developer on 15 June 2004 included various documents, relevant to the builder's scope of work, which:[92]

    a. had been previously supplied to the builder; and

    b. the builder's managing director had said that he did not wish to form part of the contract with the developer

    ("**the Developer's Preferred Documents**").

100. The builder's managing director acknowledged that: [93]

    a. the developer's 15 June 2004 documents constituted a counter-offer to the offer constituted by the builder's 10 June 2004 documents; and

    b. by the developer's 15 June 2004 facsimile, the developer was making it clear that it required those documents in that form (which included the Developer's Preferred Documents) for a contract to be made.

101. The builder's managing director claimed that he believed that the developer's 15 June 2004 documents were simply typed versions of the builder's 10 June 2004 documents, and that he signed them quickly on that basis.[94]

102. The Court did not accept that claim for at least two reasons.

103. First, the 15 June 2004 facsimile did not portray the documents attached to it as nothing more than typed versions of earlier documents. Indeed, the facsimile specifically identifies the documents attached to it as being documents which had not previously "*been returned/executed*". [95]

[90] *JM Kelly v Toga* at [78] and [80]. These documents are referred to in the decision at [80] as "*(Ex. 181)*".
[91] *JM Kelly v Toga* at [6], [56] and [65].
[92] *JM Kelly v Toga* at [79] and [83].
[93] *JM Kelly v Toga* at [83].
[94] *JM Kelly v Toga* at [82] and [85].
[95] *JM Kelly v Toga* at [82].

104. Second, the builder's managing director's evidence regarding what happened after receiving the developer's 15 June 2004 facsimile did not align with that of the builder's Queensland manager.

a. The builder's managing director said that after he initialled the builder's 10 June 2004 documents, he was of the view that "*It was done, done deal, finished, that was it.*"[96]

b. The builder's Queensland manager said that after receiving the developer's 15 June 2004 facsimile, he and the builder's managing director had a general discussion about how to keep the matter moving forward and whether they should continue further negotiations.[97]

c. The builder's managing director said that he could not recall such a discussion. Nonetheless he said that once the developer's 15 June 2004 facsimile was received a conclusion was drawn that there was a difference of opinion between the two proposed contracts.[98]

105. The Court did not accept that the builder's managing director believed the developer's 15 June 2004 documents were simply a typed version of the builder's 10 June 2004 documents. Instead, the Court concluded that:

a. the builder's managing director was engaged in "*commercial brinkmanship*" and that he did not believe that a contract had been concluded on 10 June 2004;[99] and

b. the builder's managing director had attempted to obtain a better outcome for the builder, but as this was not acceptable to the developer, the builder accepted the developer's 15 June 2004 proposal.[100]

106. The Court refused to rectify the Contract because the builder had failed to demonstrate by clear and convincing proof that the parties each intended something different to that which the developer asserted was the contract.[101]

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[96] *JM Kelly v Toga* at [82].
[97] *JM Kelly v Toga* at [83].
[98] *JM Kelly v Toga* at [84].
[99] *JM Kelly v Toga* at [82] and [90].
[100] *JM Kelly v Toga* at [90].
[101] *JM Kelly v Toga* at [92].