IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S 136 of 2016

Daniel Matthew Simic
First Appellant

Hazel Mary Delaney
Second Appellant

Richard Paul Sapsford
Third Appellant

Simic Management International Pty Limited
Fourth Appellant

Track & Machine Operations Pty Limited
Fifth Appellant

and

NSW Land and Housing Corporation
First Respondent

Australia and New Zealand Banking Group Limited
Second Respondent

Nebax Constructions Australia Pty Limited (in liquidation)
Third Respondent

SECOND RESPONDENT'S SUBMISSIONS

Part I: PUBLICATION

1. The second respondent (**"ANZ"**) certifies this submission is in a form suitable for publication on the internet.

PART II: ISSUES ON THE APPEAL AND CROSS-APPEALS

2. ANZ agrees that the issues set out in the appellants' submissions ("AS") arise on the appeal. In particular:

Filed on behalf of the Second Respondent by:
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(a) Is the *"principle of strict compliance"* in respect to letters of credit and bank guarantees, as it applies to the bank guarantees the subject of this appeal (**"Undertakings"**), irrelevant to the proper construction of the Undertakings? Alternatively, are the features of the Undertakings that arise from the text, context and purpose of the Undertakings, and fit the description of requiring strict compliance, relevant to their construction?

(b) Was the underlying construction contract between the third respondent customer (**"Nebax"**) and the first respondent (**"Corporation"**) available to construe the Undertakings to determine who is the *"Principal"* in the Undertakings in circumstances where the contract had not been provided to ANZ?

(c) In circumstances where the description of the *"Principal"* on the Undertakings differs from the name and description of the Corporation and the documents required to be submitted for an effective demand on the Undertakings would not identify the Corporation as the *"Principal"*, was ANZ required to accept that the Corporation was the *"Principal"* because it was a party to a contract with Nebax and the Undertakings referred to a contract between the Principal and Nebax?

3. In addition, the cross-appeals raise the following issues, subject to grants of special leave:

(a) if the Corporation is not entitled to call on the Undertakings but ANZ is not entitled to retain them unconditionally, is ANZ entitled to relief against Nebax and the appellants for its potential liability under the Undertakings?

(b) if the Undertakings are to be rectified pursuant to the Corporation's cross-appeal such that the *"Principal"* is the Corporation, should the contract between Nebax to ANZ for the issue of the Undertakings be similarly rectified?

PART III: *JUDICIARY ACT 1903* s. 78B

4. ANZ is of the view that notice in accordance with s. 78B of the *Judiciary Act 1903* is not required.

PART IV: FACTS

5. ANZ does not understand that any material facts are contentious. From ANZ's perspective, the salient facts are those identified below.

6. On 4 March 2010[1], an agreement was signed on behalf of the Corporation and under the common seal of Nebax (**"the Construction Contract"**). The Construction Contract was described as Contract No.: S1384. It recited that by tender dated 13 October 2009, Nebax had offered to carry out works described as Job No. BG2J8 C-71561.

7. On 12 April 2010, Nebax and ANZ entered into a written agreement in the form of a letter of offer whereby ANZ agreed to make available various financial facilities, including an Indemnity/Guarantee Facility (**"IG Facility"**), which had the purpose of enabling Nebax to satisfy bank guarantee requirements of various contracts[2].

8. On 16 April 2010[3], Daniel Simic, the first appellant and a director of Nebax, met with Adele Hanna, a senior relationship manager at the Caringbah Business Centre branch of ANZ. During the meeting, Mr Simic instructed Ms Hanna that Nebax required two bank guarantees in the amount of $73,482.53 to be made out in favour of *"New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940"*.

9. Mr Simic completed two forms of indemnity and application for guarantee (**"Indemnity"**)[4] on behalf of Nebax. Each asked ANZ to execute a bank guarantee in favour of *"New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940"* (**"Favouree"**), pay the Favouree any sum not exceeding $73,482.53 which the Favouree may claim from ANZ under the bank guarantee, and debit such amounts to Nebax's account. By each Indemnity Nebax indemnified ANZ against any loss, costs or expenses (including legal costs) that may occur in making any payments to the Favouree or may arise from any claim on ANZ under the bank guarantee as well as an acknowledgment that, if the bank guarantee was provided by Nebax to the named Favouree, the details on the bank guarantee were entirely to Nebax's satisfaction.

10. During the same meeting[5], Ms Hanna on behalf of ANZ, after checking the Undertakings and giving Mr Simic the opportunity to do so, issued and signed the Undertakings. She

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[1] *Simic v New South Wales Land and Housing Corporation* [2015] NSWCA 413 at [11] (**"CA[11]"**) Appeal Book volume 3 page 990 (**"AB 3/990"**)
[2] CA[13] AB 3/991 and AB 1/111
[3] CA[14]-[19] AB 3/991-994
[4] AB 1/127-128 (Indemnity)
[5] CA[18]-[22] AB 3/993-995 and *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [25] (**"PJ[25]"**) AB 1/901; and see AB 1/124-125 (Undertakings)

gave them to Mr Simic, who provided them to the Corporation. Carelessness or lack of diligence by the Corporation led it to accept the Undertakings in a form that did not satisfy its requirements as to form and as to the description of it as the *"Principal"*[6]. The description of the Principal in the Undertakings differed from the Corporation in two respects, the name and ABN. In each Undertaking, ANZ undertook unconditionally to pay *"New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940"*, referred to as *"The Principal"*, the amount of $73,482.53 upon presentation of the original instrument (accompanied by a written demand).

11. Each Undertaking recorded that ANZ asked the Principal to accept it *"in connection with a contract or agreement between the Principal and Customer for Job Number: P0409021, Bombaderry – Design & Construct 3-7 Karowa Street Contract Number BG2J8"*, which did not accurately describe the Construction Contract[7]. The Customer was identified as Nebax. ANZ was not given a copy of the Construction Contract[8].

12. On 16 April 2010, the IG Facility was contingently debited for $146,965.06[9].

13. On 18 October 2012, ANZ and Nebax entered into another written agreement whereby ANZ agreed to make available various financial facilities, including the IG Facility with a limit of $200,930, until an Event of Default occurs[10]. That is, the IG Facility came to be governed by the 18 October 2012 Agreement. Upon an Event of Default, ANZ was entitled to terminate the 18 October 2012 Agreement and the IG Facility, and Nebax agreed to pay the amount actually or contingently owing to ANZ under the IG Facility or the Undertakings[11].

14. Each appellant gave guarantees to ANZ for the obligations of Nebax to ANZ under the 18 October 2012 Agreement, including the IG Facility and the Undertakings/Indemnity, although the guarantee given by the first and second appellants, is a single guarantee under which each is jointly and severally liable[12]. A first registered mortgage over land

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[6] CA[108] AB 1/1031 and CA[27] AB 1/997
[7] see CA[24] and [109] AB 3/996 and AB 3/1031 and 2/526 (Construction Contract)
[8] CA[23]-[26] AB 3/994-996
[9] [31] ANZ's Commercial List Cross Claim Statement (**"Cross Statement"**) AB 1/34, admitted in [8] appellants' Amended Commercial List Response (**"Amended Cross Response"**) AB 1/48
[10] [32] & [33(a)] Cross Statement AB 1/34-35, admitted in [8] Amended Cross Response AB 1/48; and see p2 of 18 October 2012 Agreement AB 1/140-154 at 141
[11] [33(c)&(d)] Cross Statement AB 1/35, admitted in [8] Amended Cross Response AB 1/48
[12] Appellants' submissions at [13]; the guarantees are pleaded in [33](e), (h), (i) & (l), [34](a), (d), (e) & (h) and [35](a) & (c) of the Cross Statement AB 1/35-39 and admitted in [8] of the Amended Cross Response AB 1/48. See also AB 1/156 (Simic/Delaney guarantee), AB 1/272 (Sapsford), AB 1/299 (SMI) and AB 1/405 (TMO).

at Gymea Bay was given by Ms Delaney and Mr Simic and at Rose Bay by Mr Simic to ANZ as security for their guarantees[13].

15. Nebax committed Events of Default on 6 June 2013 and 12 July 2013 under the 18 October 2012 Agreement by having an administrator appointed, ceasing to trade its business and its creditors passing a resolution to wind it up[14].

16. On or about 12 July 2013, by Notice of Termination and Demand, ANZ terminated immediately its obligations under the 18 October 2012 Agreement and the Undertakings[15] and demanded from Nebax immediate payment of all amounts that may become owing under the IG Facility, being $146,965.06[16].

17. On or about 23 July 2013, ANZ gave demands to the each of the guarantor appellants, seeking immediate payment of the amount of $146,966[17]. By reason of the demands and cll. 1.2 and 1.3 of each guarantee, each appellant became indebted to ANZ in the amount of the Undertakings[18]. ANZ received no payment pursuant to the demands[19].

18. On 2 October 2013[20], the Corporation (which is identified by ABN 24960729253) demanded payment from ANZ to it of $146,965.06 pursuant to the Undertakings. ANZ did not accept that a call had been made on the Undertakings.

19. On 5 February 2015[21], the day before the trial, a solicitor for the Corporation attended the Ashfield branch of the ANZ and presented the original Undertakings together with a written demand for payment of $146,965.06. ANZ did not pay out on the demand and the solicitor took the Undertakings away.

PART V: LEGISLATION AND ORDERS ISSUED UNDER THEM

20. See annexed document.

PART VI: ARGUMENT

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[13] The mortgages are pleaded in [33](f) & (g) and [34](b) & (c) of the Cross Statement AB 1/36&39, admitted in [8] Amended Cross Response AB 1/48. See also AB 1/181 (Gymea mortgage) and AB 1/222 (Rose Bay mortgage).
[14] [33(b)] and [36]-[38] Cross Statement AB 1/35 and 1/39, admitted in [8] Amended Cross Response Red AB 1/48
[15] [39(a)] Cross Statement AB 1/39, admitted in [8] Amended Cross Response AB 1/48; AB 2/509
[16] In the alternative, the service of the cross summons and Cross Statement on the appellants and Nebax was a demand. This was conceded by the appellants in court on 6 February 2015 during the first instance hearing and was made a condition of leave being granted to file their Amended Cross Response (T15.30-16.11).
[17] [41] Cross Statement AB 1/40, admitted in [10] Cross Response AB 1/49. See also AB 2/511-520 (demands).
[18] See also clauses 7.1(b)(i)(A), 7.2(b) & 7.3(a) of the memorandum to the Gymea Mortgage AB 1/200 & 203 and clauses 7.1(a), 7.3(b) & 7.4 of the memorandum to the Rose Bay mortgage AB 1/241-242
[19] [43] Cross Statement AB 1/40, admitted in [12] Cross Response AB 1/49
[20] CA[29]-[31] AB 3/998 and see AB 1/83-93 (demand and subsequent correspondence)
[21] PJ [31] AB 3/902; A Calcopietro 5/2/15 at [6]-[17] AB 3/867-896 and AB 3/880 (demand)

21. AS [33] asserts that the underlying contract between Nebax and the Corporation (the Construction Contract), the contract between Nebax and ANZ pursuant to which the Undertakings were issued by ANZ (the Indemnity), and the *"potential"* contract (the Undertakings) are separate and autonomous. Without entering into the debate about the basis on which letters of credit and performance bonds (that are not in the form of a deed) are binding before an effective demand is made on them[22], ANZ accepts it is bound to honour the Undertakings in accordance with their terms. No issue of their revocation by ANZ arises. ANZ agrees that the three contracts identified by the appellants are autonomous in the sense that they are separate transactions.

10 22. The contracts to be construed on the appellants' appeal are the Undertakings. Emmett AJA said at CA[96], with respect correctly, that the starting point is the ordinary principles of contractual construction[23]. The Undertakings are in writing. The starting point is the language used in the Undertakings, but the exercise of construction also involves consideration of the context and purpose of the Undertakings[24]. The language, surrounding circumstances and commercial purpose or objects of the Undertakings are different from those of the Construction Contract[25].

23. Emmett AJA observed at CA[67] that all forms of letters of credit, including performance bonds given by banks, are governed by three principles: the documentary nature of the instruments, the principle of strict compliance and the principle of autonomy, and that the
20 second and third of these principles are related. These *"principles"* are better described as ordinary features of letters of credit and performance bonds. Whether and to what extent they apply depends on the circumstances of each case, especially the terms of the letter of credit/performance bond[26]. The Undertakings have the features of being documentary in nature in that the original is to be provided to the Favouree, require strict compliance with what is required to be provided to effectively call on them and are expressed to be autonomous.

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[22] A Malek and D Quest, *Jack: Documentary Credits*, 2009 Tottel Publishing at [5.8]-[5.15] pp92-95 and [12.62]-[12.67] pp363-366

[23] *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at [35] per French CJ, Hayne, Crennan and Keifel JJ

[24] *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37, (2015) 325 ALR 188 at [46]-[52] and [59] per French CJ, Nettle and Gordon JJ

[25] *Griffin Energy Group Pty Ltd v ICICI Bank Ltd* [2015] NSWCA 29 (2015) 317 ALR 395 at [47] per the Court

[26] *Griffin Energy Group Pty Ltd v ICICI Bank Ltd* supra is an example of the terms of the letter of credit requiring resort to the underlying contract for its construction, as is *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, 1 WLR 2900. These cases are discussed by Emmett AJA in CA [88] and [105] AB 3/1023 & 3/1029.

24. Emmett AJA was in error at CA[98] in finding that the *"principle"* of strict compliance was irrelevant to the proper construction of the Undertakings. The task of construction should not have been approached using such labels. The features of the Undertakings that fit the description of requiring strict compliance are part of the text, context and purpose of the Undertakings. Although the process of construction may conceptually precede performance (see CA[97]-[98]), it does not follow that requirements of performance are irrelevant to the process of construction. The way in which the Undertakings operate cannot be isolated from what they mean (see CA[100]).

25. The language of the Undertakings reveals that a precise description of the *"Favouree"* or *"Principal"* is central to their operation and that this, in part, arises from the requirement for strict compliance with their terms. This is because:

(a) for a demand to be effective it must be made in writing by the Principal (a defined term);

(b) the demand will be processed and met or refused by a bank officer who may have no knowledge of the Customer or the Principal because the demand may be presented at any branch of ANZ in Australia;

(c) as the Undertakings state specifically, the relevant officer at the ANZ branch may rely entirely on the demand *"as presented"* and has no responsibility or obligation to investigate the capacity or entitlement of the Principal to give and execute the demand;

(d) ANZ promised to pay the Amount or any part of it *"to the Principal"*;

(e) ANZ was required to pay *"upon presentation of this original Undertaking (accompanied by a written demand)"*;

(f) the Undertakings are personal to the Principal and the Principal cannot assign, transfer, charge or otherwise deal with the Undertakings; and

(g) the Principal expressly accepts the Undertaking and its terms.

26. The requirements for making an effective claim on the Undertakings are not onerous, but they are precise. Only the original Undertakings and a demand by the Principal are required. ANZ is obliged to pay once it is satisfied an effective claim has been made,

which includes being satisfied that the *"Principal"* has made the demand. It is entitled to have regard only to the demand *"as presented to it"* and is not obliged to investigate.

27. The commercial purpose of the Undertakings reinforces the need for precision in the description of the Favouree or Principal and in compliance with their terms. The purpose is to provide a mechanism for prompt payment by ANZ up to the Amount to enable the Customer to satisfy an obligation about which ANZ has no knowledge and in which ANZ has no involvement. It was the Customer who stipulated the Principal or Favouree and the conditions on which payment is to be made. The Customer did this by acknowledging in the Indemnity that the details on the Undertakings were entirely to its satisfaction. ANZ gave the original Undertakings to Nebax to pass on and did not have any contact with the nominated Principal or Favouree. ANZ was required to follow the conditions in the Undertakings precisely and pay only the nominated Principal or Favouree because otherwise it is not able to recover from the Customer.

28. In *Commercial Banking Co of Sydney Ltd v Jalsard Pty Ltd*[27], in delivering the advice of the Privy Council, Lord Diplock observed:

> The banker is not concerned as to whether the documents for which the buyer has stipulated serve any useful commercial purpose or as to why the customer called for tender of a document of a particular description. Both the issuing banker and his correspondent bank have to make quick decisions as to whether a document which has been tendered by the seller complies with the requirements of a credit at the risk of incurring liability to one or other of the parties to the transaction if the decision is wrong. Delay in deciding may in itself result in a breach of his contractual obligations to the buyer or to the seller.

29. In articulating what is recognised as the classic statement of the principle of strict compliance, Viscount Sumner observed in *Equitable Trust Co of New York v Dawson Partners Ltd*[28]:

> It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying documents strictly

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[27] [1973] AC 279 at 286
[28] [1926] 27 Lloyd's Rep 49 at 52

observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines.

This is particularly apposite in relation to the identity of the party making the claim under the document. The possibility of fraud is obvious.

30. In this case in arriving at the ultimate finding at CA[114] that the primary judge made no error in concluding that on the proper construction of the Undertakings, the words *"New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940"* mean the Corporation, Emmett AJA relied upon the Construction Contract between Nebax and the Corporation, a copy of which had not been given to ANZ.

10 31. At CA[104]-[107], Emmett AJA drew a distinction between construing the Undertakings by reference to the terms of an underlying contract and construing the Undertakings by reference to the mere identification of the underlying contract, particularly where the contract is identified in the instrument itself. Although accepting that the Construction Contract was *"an extrinsic document"*, his Honour opined that it was permissible to have regard to it and the identity of the parties to it (but not its terms) to determine the correct construction of the Undertakings because this was a reasonable application of the *"autonomy principle"* and because the Construction Contract and *"the identity of the parties to it"* were both referred to in the Undertakings.

32. This reasoning contained two errors. First, the only reference to the identity of the
20 parties to the contract identified in the Undertakings was the reference to it being a contract *"between the Principal and the Customer"*. But in the Undertakings *"Principal"* was a defined term. It did not refer to the Corporation. His Honour's reasoning is circular. Alternatively, his Honour's approach required ANZ to have regard to the Construction Contract itself, which was never given to ANZ and was therefore not even part of the surrounding circumstances known to both parties[29].

33. Secondly, it was not an application of the *"autonomy principle"* to have regard to extrinsic documents. That *"principle"* prohibits use of extrinsic documents to construe letters of credit. Emmett AJA's approach is inconsistent with the judgment of Stephen J in *Wood Hall Ltd v The Pipeline Authority*[30], who said that if performance bonds lose

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[29] *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352 per Mason J
[30] (1979) 141 CLR 443 at 457

their character of being instantly and unconditionally convertible to cash, which gives them commercial currency, they lose their acceptability.

34. Further Emmett AJA said:

(a) That there had not been, and apparently could not be, any suggestion that the description of the Favouree in the Undertakings could be referring to any entity other than the Corporation as there was no legal entity or department of the NSW Government with the name *"New South Wales Land & Housing Department"*. On the other hand the Corporation's name was very similar and it engaged in activities in conjunction with a department of the NSW Government under the name *"Housing NSW"*, the ABN for which was the same ABN specified in the Undertakings: at CA[108]-[109].

(b) The terms of the Undertakings *"make it clear beyond dispute"* that the Undertakings were to be given in favour of the entity that was a party to the contract or agreement described in the Undertakings and, notwithstanding the errors in identifying that contract in the Undertakings, *"it is unquestionable"* that this was the Corporation. His Honour said that ANZ needed only to clarify the identity of the party with which Nebax contracted and that, once the Corporation furnished ANZ with indisputable evidence that it was that party, there was no basis on which ANZ would be entitled to refrain from meeting the demand: at CA[109]-[110] and [112].

(c) The *"Favouree"* referred to in the Undertakings as the *"Principal"* could only be the Corporation and the Undertakings should be construed to have legal effect because they were intended to have legal effect: at CA[113] and [111].

35. Emmett AJA's reasoning was inconsistent with the terms of the Undertakings, and fails to have regard to the way in which they were designed to operate. In particular, the Undertakings said specifically that ANZ may *"rely entirely on any demand or notice as presented to it"* and that ANZ *"has no responsibility or obligation to investigate"* the authenticity or correctness of the matters stated in a demand or notice, or other matters. Emmett AJA's reasoning required ANZ to either investigate or have regard to documents

beyond the demand, or both, and is inconsistent with *Wood Hall Ltd v The Pipeline Authority*[31], where the words of the performance bond were applied literally.

36. Again, there was nothing on the face of the Undertakings to indicate that the intended Favouree was not an entity that was called New South Wales Land & Housing Department, which traded as Housing NSW ABN 45754121940. There was no way of telling from the Undertakings themselves that there was any errorr. There was no obvious typographical error. There was no ambiguity on the face of the Undertakings. As far as ANZ could tell from the Undertakings themselves, New South Wales Land and Housing Corporation, which has ABN 24960729253[32], was demanding payment under Undertakings that were given in favour or New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940. ANZ was not obliged to investigate or resolve this discrepancy.

37. Further, it is not correct to say that the only possible beneficiary was the Corporation. The undertakings were issued in the name of what appeared to be a government department but were called upon by a government corporation. ANZ was not required to investigate or resolve this discrepancy.

38. In any event any such investigation would have been inconclusive, as Emmett AJA's analysis at CA[32]-[40] of the ABNs and trading names of the department referred to in the *Housing Act 2001* (NSW) and the Corporation reveals. At CA[40], his Honour commented that the considerations arising from the analysis *"underline the importance of accuracy and precision in identifying government entities in instruments such as the Undertakings"*. ANZ adopts these comments but disagrees with his Honour's statement that such considerations are not necessarily fatal to the Corporation's case. The lack of accuracy and precision in identifying the *"Principal"* in the Undertakings was not able to be resolved, even if ANZ had investigated this matter (which it was not obliged to).

39. Thus, as at 16 April 2010:

    (a) There existed the Corporation – a body corporate constituted by s. 6(1) of the *Housing Act* – and a Department referred to in the *Housing Act*. The Department

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[31] (1979) 141 CLR 443 at 451 Gibbs J (with whom Barwick CJ and Mason J agreed), 457 Stephen J, 461 Murphy J.
[32] AB 2/770 & AB 2/771 (ABN searches); AB 1/83 (2 October 2013 demand); AB 3/880 (5 February 2015 demand)

was the *"Department of Human Services"*: s. 3[33]. The Corporation could enter into contracts pursuant to s. 12 of the *Housing Act* but there was nothing to prevent the Department, being part of the Crown, from entering into and suing on contracts[34].

(b) The term *"Housing NSW"* referred to the *"Department of Human Services"*. Pursuant to cl. 3 of the *Public Sector Employment and Management (Housing NSW) Order* 2008[35], the Department of Housing had been renamed *"Housing NSW"* (even though the definition of *"Department"* in s. 3 of the *Housing Act* was not changed to reflect this). By cl. 13(1)-(3) of the *Public Sector Employment and Management (Departmental Amalgamations) Order* 2009 made under the same Act, the department known as *"Housing NSW"* was abolished and became a division of the Department of Human Services and a reference to *"Housing NSW"* in any document was to be construed as a reference to the *"Department of Human Services"*: CA[35].

(c) However, the words *"Housing NSW"* in the definition of the *"Principal"* in the Undertakings was part of the expression *"New South Wales Land & Housing Department Trading As Housing NSW ABN 45754121940"*. A search of ABN 45754121940 reveals that the entity name and a trading name for that ABN had been *"Housing NSW"* since 10 October 2008[36]. On 1 July 2010, ABN 45754121940 was cancelled: see CA[38].

(d) There is nothing on the ABN searches that expressly associates the Corporation with ABN 45754121940 or states that the Corporation traded as *"Housing NSW"*. From 25 September 2009, the Corporation was the entity for ABN 24960729253, which did not have a trading name *"Housing NSW"*[37]. Although the primary

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[33] On 18 March 2010, the name of the *"Department"* referred to in the *Housing Act* had been changed from the *"Department of Housing"* to *"Department of Human Services"* pursuant to Schedule 1[1] of the *Housing Amendment (Community Service Providors) Act* 2010 (NSW).

[34] *Sue v Hill* (1999) 199 CLR 462 at [87] per Gleeson CJ, Gummow and Hayne JJ; s. 4 *Crown Proceedings Act* 1988 (NSW)

[35] This order was made pursuant to s. 104(1)(a) of the *Public Sector Employment and Management Act* 2002 (NSW) (since repealed on 24 February 2014).

[36] Between 1 July 2001 and 10 October 2008 the entity name had been *"NSW Department of Housing"*, which remained a trading name for ABN 45754121940 until it was cancelled on 1 July 2010. Moreover, a trading name for ABN 84608917940 with entity name *"NSW Department of Human Services"* had a trading name *"Housing NSW"*. AB 2/770 (search for ABN 45754121940) and AB 2/769 (search for ABN 84608917940).

[37] AB 2/771 (search of ABN 24960729253)

judge found as a fact that the Corporation was trading as *"Housing NSW"* at least between October 2009 and April 2010 (based on documents passing between the Corporation and Nebax)[38], there is no finding ANZ knew this.

Emmett AJA's analysis also shows there were further changes before 2 October 2013, when the Corporation made its first demand on the Undertakings: CA[35]-[40].

40. In addition, the Undertakings did not reveal that the Corporation was a party to *"Job Number: P0409021, Bombaderry - Design & Construct 3-7 Karowa Street Contract Number BG2J8"* rather than an entity called *"New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940"*. ANZ was not required to investigate this matter. Even if it had, it would not be enough for ANZ to simply identify the Corporation as the contracting party to the contract referred to in the Undertakings for it to be satisfied the Principal must be the Corporation because:

(a) ANZ would have had to be certain that it had the correct contract referred to in the Undertakings. It can be seen from CA[24] and [109] that there are discrepancies between the description of the contract in the Undertakings and the Construction Contract the Corporation relied upon in evidence. These discrepancies would have required the relevant officer at whichever ANZ branch in Australia a demand was made to make further inquiries outside the demand and the Undertakings.

(b) ANZ would have had to be satisfied the relevant contract provided for bank guarantees to be given and that the Undertakings satisfied the requirements of that contract or was otherwise in accordance with an agreement between the parties. This traverses into the territory of construing the underlying contract and may require enquiry even beyond that contract.

(c) ANZ would have had to eliminate the possibility that the Corporation had not decided that the Undertakings should be made out in favour of someone other than itself (for its own private reasons)[39]. It does not necessarily follow from the fact that the Corporation is the contracting party with Nebax that the Corporation

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[38] PJ[15] AB 3/896 referred to in CA[37] AB 3/1001

[39] *Maridive & Oil Services (SAE) v CNA Insurance Company (Europe) Ltd* [2002] 1 All ER (Comm) 653, [2002] EWCA Civ 369 at [10]-[13] per Mance LJ (with whom Ward and Chadwick LLJ agreed).

is the intended Favouree under the bank guarantees required by the contract. Resolution of this issue requires enquiry beyond that contract.

41. Emmett AJA observed at CA[96] that little judicial attention had been directed to the interrelationship of the principles of contractual construction and principles peculiar to letters of credit. This Court's decision in *Wood Hall Ltd v The Pipeline Authority*[40] provides some guidance and has been discussed above. *United Bank Ltd v Banque Nationale de Paris* in the High Court of Singapore, *Hanil Bank v PT Bank Negara Indonesia* in the United States District Court at New York and *Maridive & Oil Services (SAE) v CNA Insurance Company (Europe) Ltd* in the England and Wales Court of Appeal[41] each considered arguments that someone other than the named beneficiary was, by a process of construction, a beneficiary. Each case was decided against the party claiming to be a beneficiary, who was not a named beneficiary. The documents were construed literally because of their text, context and purpose and, in the US case, because the purported beneficiary had the opportunity to correct any error in the name.

42. By contrast, the case of *Bank of Montreal v Federal National Bank & Trust Co of Shawnee*[42] in the United States District Court at Oklahoma found that a mistake in a name in a letter of credit could be corrected to resolve an ambiguity because the correct name had also been used in the document. There is no such ambiguity on the face of the Undertakings. Emmett AJA at CA[83] also referred to *Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd*[43], where the Hong Kong High Court corrected what it considered was an obvious typographical error in the name of the drawee or customer (not the beneficiary) in a letter of credit as nobody was misled and English was not the first language of 98% of the population.

43. The present case was, in reality, a simple case:

(a) The Undertakings were issued in the name of what appeared to be a government department. The demand on them, however, was made by a government corporation.

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[40] (1979) 141 CLR 443 at 457

[41] respectively [1991] 2 SLR(R) 60 and see CA[81] AB 3/1020; 41 UCC Rep Serv 2d 618 (SDNY 2000); [2002] 1 All ER (Comm) 653 at [10]-[11], [51] and [63]; and see Appellants' submissions at [43]iii), v) and vii).

[42] 622 F Supp 6 (D Okla, 1984) cited in *United Bank Ltd v Banque Nationale de Paris* supra at 72 and see CA[82]

[43] [1991] 2 HKLR 35 at 45.

(b) The party in whose favour the Undertakings were given was described as having an ABN 45754121940. The call on them was made by a body having a quite different ABN, namely 24960729253.

(c) The demand or notice as presented to ANZ, was by an entity which was not a party to the Undertakings. And ANZ was not obliged to clear the matter up.

PART VII: NOTICE OF CROSS APPEAL

44. Pursuant to orders made by the Court of Appeal on 2 September 2015[44], as a condition of the stay of the orders made at first instance in favour of the Corporation and ANZ, Mr Simic (as a guarantor of Nebax to ANZ) paid $146,965.06 to ANZ and ANZ paid the same sum to the Corporation. The orders require ANZ to hold the original Undertakings in safe keeping until further order of the Court of Appeal. The Court of Appeal made no further order in respect of the Undertakings. ANZ continues to hold the Undertakings pursuant to the orders of the Court of Appeal made on 2 September 2015.

45. In the Court of Appeal, ANZ filed a notice of cross-appeal against the possibility that, in the event the appeal was allowed, a demand could be made on the Undertakings by an entity other than the Corporation[45]. In its cross-appeal ANZ sought relief against Nebax and the appellant guarantors to give effect to its rights under the Indemnity, the 18 October 2012 Agreement, the guarantees and the mortgages, as well as pursuant to an agreement struck with the guarantors at the first instance hearing. During the hearing in the Court of Appeal[46], the Corporation filed a second notice of cross-appeal seeking rectification of the Undertakings in the alternative. Orders were also made for ANZ to serve its amended notice of cross-appeal on the liquidator of Nebax. The Court of Appeal dismissed both cross-appeals because they did not arise: CA[119].

46. ANZ has filed a notice of cross-appeal in this Court[47] in similar terms to its cross appeal below. Also, as the Corporation has filed a notice of cross-appeal seeking rectification of the Undertakings, ANZ will seek to amend its notice of cross appeal to seek rectification of the Indemnity after it reinstates Nebax to the register and obtains leave to proceed against it in liquidation under ss. 601AH(2) and 500(2) of the *Corporations Act* 2001.

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[44] AB 3/962-963 (stay orders of Court of Appeal); AB 3/929-931 (orders at first instance)
[45] AB 3/947-955 (ANZ's amended notice of cross-appeal); see CA[56]-[57] AB 3/1009-1010
[46] CA[58] AB 3/1010; AB 3/957-960 (second notice of cross-appeal);
[47] AB 3/1048-1053 (ANZ's notice of cross-appeal); AB 3/1055-1057 (the Corporation's notice of cross-appeal)

ANZ will seek special leave at the hearing to proceed with its cross-appeal[48] on the ground that it would do injustice to determine the appeal alone[49].

47. Until ANZ holds the original Undertakings permanently and unconditionally, the potential exists for a demand to be made on them. If someone else has possession of the Undertakings, ANZ is potentially exposed to paying out on them. The importance of possession of the original Undertakings emerges from the terms of the Undertakings. Return of the original Undertakings is one way that they cease to be in force. When the each Undertaking expires or is no longer required, the original must be returned to ANZ.

48. The reasons for ANZ's concern in this regard were reinforced by the events that unfolded during and following the hearing in the Court of Appeal[50]. On 12 October 2015, during the hearing, and by a direction made on 29 October 2015, Senior Counsel for the Corporation was asked whether the Corporation could give an assurance it will not call on the Undertakings unless it is determined the Corporation is entitled to relief in the appeal and whether he could give such an assurance that no other emanation of the Crown would do so. On 30 October 2015, Senior Counsel for the Corporation notified the Court of Appeal that the Corporation does not offer the assurance and his solicitors were retained solely by the Corporation, not by any or any other emanation of the Crown.

49. Pursuant to leave granted by the Court of Appeal, on 10 November 2015, ANZ, the appellants and the Corporation made short written submissions[51]. ANZ argued that if orders are made for the return of the Undertakings in the event the appellants' appeal succeeded, the orders sought in ANZ's cross-appeal should be made. The appellants argued that no order should be made for the return of the Undertakings because if their appeal succeeded it would mean the Corporation had no entitlement to call on the Undertakings. The Corporation argued that the Undertakings should be returned to it if the appellants' appeal succeeded because it appeared likely the Crown or one of its emanations could call on the Undertakings and the Corporation is better placed to bring the Undertakings to the attention of an entity that may have a valid claim on them.

Facts relevant to the claims in ANZ's cross-appeal and proceedings at first instance

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[48] Rules 42.08.1 & 42.08.4 *High Court Rules* 2004

[49] *Director of Public Prosecutions v United Telecasters Sydney Pty Ltd* (1990) 168 CLR 594 at 602 per Brennan, Dawson and Gaudron JJ

[50] AB 3/966 (direction given on 29 October 2015); AB 3/970 (Senior Counsel for the Corporation's letter).

[51] AB 3/974-975 (ANZ); AB 3/977 (appellants); AB 3/979-980 (Corporation).

50. The facts set out in [7]-[17] above are relevant to ANZ's cross-appeal.

51. In the proceedings at first instance, ANZ's claims against Nebax and the guarantor appellants were not limited to the event ANZ was liable to the Corporation on the Undertakings. An issue identified by ANZ in its pre-hearing submissions was *"even if ANZ is not liable to the Corporation are the Cross-defendants liable?"*. During the hearing, an agreement was reached between ANZ and the appellants (**"ANZ/Appellants' Agreement"**)[52]. The ANZ/Appellants' Agreement was as follows:

    (a) If ANZ is liable to the Corporation on the Undertakings, then the appellants are liable to ANZ on the cross summons.

    (b) If the Undertakings are ineffective to create an obligation on the part of ANZ to anyone, there can be no contingent liability of ANZ under them and therefore the appellants have no liability under the cross summons. In such a situation, the Undertakings should be returned to ANZ so that it does not have continued exposure to the Undertakings being called on.

    (c) If the Court finds the Corporation could not call on the Undertakings but, for some reason, the Undertakings could be called upon by someone else or they are not returned to ANZ, then ANZ has a contingent liability on the Undertakings, the guarantees and securities given by the appellants are enforceable and ANZ is entitled to the relief it seeks on the cross summons. It was also agreed that, in this scenario, the amount of the Undertakings would be put in a term deposit until the Undertakings were returned, with the interest to depend on what happens.

52. The Corporation succeeded on its claims against ANZ and the primary judge made declarations and orders against Nebax and the guarantors on the cross summons pursuant to the scenario in [51](a) above in the ANZ/Appellants' Agreement[53].

Cross-appeal to the Court of Appeal and to this Court

53. In its notice of cross-appeal in the Court of Appeal, ANZ sought to enforce the ANZ/Appellants' Agreement or, alternatively, its rights under the Indemnity, the 18 October 2012 Agreement, the guarantees and the securities. It seeks to do the same by its notice of cross-appeal to this Court. In the further alternative, it seeks an order that it

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[52] The transcript that records this agreement and the Speaking Notes referred to therein are not reproduced in the Appeal Book because the ANZ/Appellants' Agreement is not in dispute.

[53] PJ[4] & [96] AB 3/892 & 926-927; AB 3/929-931 (first instance judgment)

may keep the Undertakings permanently and unconditionally. It also seeks rectification of the Indemnity if the Corporation is granted rectification of the Undertakings.

54. The appellants and ANZ are bound in contract by the ANZ/Appellants' Agreement in the scenario described in [51](c) above[54]. Such an agreement is enforceable pursuant to s73 of the *Civil Procedure Act* 2005 (NSW) or as an accord and satisfaction pursuant to which ANZ accepted the appellants' promises to accept liability in scenarios in [51](a) and (c) above for its claims in the proceedings[55].

55. Alternatively, by the ANZ/Appellants' Agreement, the appellants made an admission of liability in the event that the scenarios described in [51](a) or (c) above apply. The admission was made by the appellants' counsel and is admissible against them because it is reasonably open to find the appellants' counsel had authority to make the admission on the appellants' behalf[56]. It was made in circumstances where the legal representative of each party was prohibited from causing his clients to breach the duty to assist the Court to facilitate the just, quick and cheap resolution of the real issues in dispute in the proceedings[57]. The Court may give judgment for ANZ on the admission or make any order to which ANZ is entitled on the admission[58]. The admission of liability in the ANZ/Appellants' Agreement is an admission of fact. Alternatively, to the extent it was of mixed law and fact and requires the application of a legal standard, the Court of Appeal should have give the admission full weight because it was made by the appellants' counsel, who one would expect understood the relevant legal standard[59].

56. In any event, the court at first instance and the Court of Appeal should have found for ANZ on its cross summons and cross-appeal if the scenario described in [51](c) above applies, based on the facts referred to in [7]-[17] above. On termination of the I/G Facility, Nebax became liable for the face value of the Undertakings under the 18 October 2012 Agreement and, following the demands made by ANZ on the guarantors, they became liable on their guarantees to ANZ. ANZ became entitled to possession of the properties at Gymea and Rose Bay under the mortgages and s.60 *Real Property Act* 1900.

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[54] Counsel had actual and ostensible authority to settle: *Harvey v Phillips* (1956) 95 CLR 235 at 241-243
[55] *McDermott v Black* (1940) 63 CLR 161 at 183 per Dixon J; *Ashton v Pratt* (2008) 88 NSWLR 281, [2015] NSWCA 12 at [172] per Bathurst CJ
[56] s87(1)(a) & 88 *Evidence Act* 1995 (NSW), *Hoy Mobile Pty Ltd v Allphones Retail Pty Ltd* (2008) 167 FCR 314 at [18] per Rares J re admissions by lawyers and see s191 *Evidence Act* insofar as the admission is to facts.
[57] s56(3)&(4) *Civil Procedure Act* 2005 (NSW)
[58] rule 17.7(1) *Uniform Civil Procedure Rules* 2005 (NSW)
[59] *Lym International Pty Ltd v Marcolongo* (2011) 15 BPR 29,465, [2011] NSWCA 303 at [132] per Campbell JA

57. In the alternative, a possible consequence of an appeal to this Court being allowed is that the Undertakings will be returned to the Corporation in return for repayment of the money by the Corporation to ANZ[60]. In that event, a further order that the Undertakings remain permanently and unconditionally with ANZ should be made. Such an order will make other relief in favour of ANZ against the guarantors unnecessary (excepting costs).

58. If this Court finds that the Undertakings should be rectified, the Indemnity should also be rectified in the same manner. The Corporation alleges it and ANZ had a common intention the Corporation would be the Favouree and there was a mutual mistake[61]. If so, ANZ and Nebax made the same mistake. However, ANZ and the Corporation had no such common intention[62]. ANZ's intention was to act on the express instructions (rather than the intentions) of Nebax. ANZ's intention was to issue the Undertakings in the name it was instructed to issue them in[63]. Nebax reinforced those instructions in the Indemnity by stating that when the Undertakings are given to it to give to the Favouree, it acknowledges the details on the Undertakings are entirely to its satisfaction. The Undertakings also provide that the Principal accepts them and their terms.

PART VIII: ORAL ARGUMENT

59. ANZ estimates that its oral argument will require approximately 1¼ hours.

DATED: 24 June 2016

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[60] The appellants seek orders for repayment in [11] and [12] of the notice of appeal AB 3/1046
[61] The Corporation's commercial list statement at [16] & [18] AB 1/10
[62] See *Mander Pty Ltd v Clements* [2005] WASCA 67 (2005) 30 WAR 46 at [93]
[63] see CA[118] AB 3/1034; *Tradax Petroleum Inc. v Coral Petroleum Inc.* 878 F 2d 830 (5th Cir 1989) at p834

IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S20 of 2016

Daniel Matthew Simic
First Appellant

Hazel Mary Delaney
Second Appellant

10

Richard Paul Sapsford
Third Appellant

Simic Management International Pty Limited
Fourth Appellant

Track & Machine Operations Pty Limited
Fifth Appellant

20 and

NSW Land and Housing Corporation
First Respondent

Australia and New Zealand Banking Group Limited
Second Respondent

Nebax Constructions Australia Pty Limited (in liquidation)
Third Respondent

30

ANNEXURE TO SECOND RESPONDENT'S SUBMISSIONS

1. The definitions of *"Department"* and *"Director-General"* in s. 3 of the *Housing Act* 2001 (NSW)

(a) Between 1 July 2001 (the date of commencement of the *Housing Act*) and 18 March 2010, the definition of *"Department"* in s. 3 of the *Housing Act* was as follows:

40 ***"Department"*** *means the Department of Housing.*

(b) The definitions of *"Department"* and *"Director-General"* in section 3 of the *Housing Act* 2001 (NSW) were in the following form on 16 April 2010 by reason of the commencement on 18 March 2010 of the *Housing Amendment (Community Housing Providers) Act* 2010 (NSW):

"Department" *means the Department of Human Services.*

"Director-General" *means the Director-General of the Department.*

(c) On 15 January 2016, the definitions of *"Department"* and *"Director-General"* in s. 3 of the *Housing Act* 2001 (NSW) were omitted and replaced by definitions in the following form pursuant to Schedule 3.44[2] *Statute Law (Miscellaneous Provisions) Act (No 2)* 2015, which remain in place:

"Department" *means the Department of Family and Community Services.*

"Secretary" *means the Secretary of the Department.*

2. Section 6 of the *Housing Act* 2001 (NSW)

(a) This provision was in the following form on 16 April 2010:

6 Establishment of New South Wales Land and Housing Corporation

(1) There is constituted by this Act a body corporate with the corporate name of the New South Wales Land and Housing Corporation.

(2) The affairs of the Corporation are to be managed by the Director-General.

(3) Any act, matter or thing done in the name of, or on behalf of, the Corporation by the Director-General, or with the authority of the Director-General, is taken to have been done by the Corporation.

(4) The Corporation is, for the purposes of any Act, a statutory body representing the Crown.

(5) The Corporation is subject to the direction and control of the Minister.

(6) (Repealed)

(7) The Corporation may exercise any of its functions, and may otherwise act, in the name of the Department.

(8) The Corporation and the Department are, to the maximum extent possible, to act in a complementary manner, so as to achieve a unified administration of this Act.

(b) On 15 January 2016, s. 6 of the *Housing Act* was amended to the following form pursuant to Schedule 3.44[2] *Statute Law (Miscellaneous Provisions) Act (No 2)* 2015 (NSW) and remains in that form:

6 Establishment of New South Wales Land and Housing Corporation

(1) There is constituted by this Act a body corporate with the corporate name of the New South Wales Land and Housing Corporation.

(2) The affairs of the Corporation are to be managed by the Secretary.

(3) Any act, matter or thing done in the name of, or on behalf of, the Corporation by the Secretary, or with the authority of the Secretary, is taken to have been done by the Corporation.

(4) The Corporation is, for the purposes of any Act, a statutory body representing the Crown.

(5) The Corporation is subject to the direction and control of the Minister.

(6) (Repealed)

(7) The Corporation may exercise any of its functions, and may otherwise act, in the name of the Department.

(8) The Corporation and the Department are, to the maximum extent possible, to act in a complementary manner, so as to achieve a unified administration of this Act.

3. Section 12 of the *Housing Act* 2001 (NSW)

This provision was in the following form on 1 July 2001, the date of commencement of the *Housing Act*, and remains in the same form:

12 Corporation may enter into contracts
(cf Act No 62, 1976, s 16)

(1) The Corporation may make and enter into contracts with any person for the carrying out of works or the performance of services or the supply of goods or materials in connection with the exercise by the Corporation of its functions.

(2) A contract under subsection (1) may provide for:

(a) the whole or any part of any works to be undertaken by the Corporation, or

(b) the whole or any part of the cost of any works to be paid by the Corporation, or

(c) a loan to be made by the Corporation to meet the whole or any part of the cost of any works, or

(d) the Corporation to pay the cost of providing any services during a specified period.

(3) Without affecting the generality of subsection (1), the Corporation may make and enter into a contract under this section with any person for the construction on land vested in the Corporation or that person, or in the Corporation and that person, of buildings or of other works, and for the sale, lease or exchange of any such land together with the buildings or other works on the land.

4. Section 4 of the *Crown Proceedings Act* 1988 (NSW)

The current version and the version since 3 December 1999 of this provision is:

4 Crown may sue

The Crown may bring civil proceedings under the title "State of New South Wales" against any person in any competent court.

5. Section 104(1)(a) of the *Public Sector Employment and Management Act* 2002 (NSW)

(a) This provision was in the following form between 17 March 2006 and 30 November 2009, the relevant dates being 11 June 2008 and 27 July 2009:

104 Creation and change in relation to Divisions

(1) The Governor may by order:

(a) establish, abolish or change the name of any Division of the Government Service (or any branch of any Division of the Government Service), or

(b) This provision remained in the same form until it was repealed by Schedule 5 to the *Government Sector Employment Act* 2013 (NSW) with effect from 24 February 2014.

6. Section 56 of the *Civil Procedure Act* 2005 (NSW)

This provision has been in the following form since 28 February 2013 (the relevant date being 6 February 2015):

56 Overriding purpose
(cf SCR Part 1, rule 3)

(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.

(3) A party to civil proceedings is under a duty to assist the court to further the overriding purpose and, to that effect, to participate in the processes of the court and to comply with directions and orders of the court.

(3A) (Repealed)

(4) Each of the following persons must not, by their conduct, cause a party to civil proceedings to be put in breach of a duty identified in subsection (3):

(a) any solicitor or barrister representing the party in the proceedings,

(b) any person with a relevant interest in the proceedings commenced by the party.

(5) The court may take into account any failure to comply with subsection (3) or (4) in exercising a discretion with respect to costs.

(6) For the purposes of this section, a person has a ***relevant interest*** *in civil proceedings if the person:*

(a) provides financial assistance or other assistance to any party to the proceedings, and

(b) exercises any direct or indirect control, or any influence, over the conduct of the proceedings or the conduct of a party in respect of the proceedings.

Note. *Examples of persons who may have a relevant interest are insurers and persons who fund litigation.*

(7) (Repealed)

7. Section 73 of the *Civil Procedure Act* 2005 (NSW)

This provision has been in the following form since its commencement on 15 August 2005 (the relevant dates being since 6 February 2015):

73 Power of court to determine questions about compromises and settlements

(1) In any proceedings, the court:

(a) has and may exercise jurisdiction to determine any question in dispute between the parties to the proceedings as to whether, and on what terms, the proceedings have been compromised or settled between them, and

(b) may make such orders as it considers appropriate to give effect to any such determination.

(2) This section does not limit the jurisdiction that the court may otherwise have in relation to the determination of any such question.

8. Rule 17.7(1) of the *Uniform Civil Procedure Rules* 2005 (NSW)

This provision has been in the following form since its commencement on 15 August 2005 (the relevant dates being since 6 February 2015):

17.7 Judgment on admissions
(cf SCR Part 18, rule 3; DCR Part 15, rule 3; LCR Part 14, rule 5)

(1) If admissions are made by a party, whether by his or her pleadings or otherwise, the

court may, on the application of any other party, give any judgment or make any order to which the other party is entitled on the admissions.

(2) The court may exercise its powers under this rule even if the other questions in the proceedings have not been determined.

9. Section 60 of the *Real Property Act* 1900 (NSW)

This provision has been in the following form since 5 December 1986 (the relevant date being 23 July 2013):

60 In case of default, entry and possession, ejectment

The mortgagee, chargee or covenant chargee upon default in payment of the principal sum or any part thereof, or of any interest, annuity, or rent-charge secured by any mortgage, charge or covenant charge may:

(a) enter into possession of the mortgaged or charged land by receiving the rents and profits therefor, or

(b) (Repealed)

(c) bring proceedings in the Supreme Court or the District Court for possession of the said land, either before or after entering into the receipt of the rents and profits thereof, and either before or after any sale of such land effected under the power of sale given or implied in the mortgage, charge or covenant charge,

in the same manner in which the mortgagee, chargee or covenant chargee might have made such entry or brought such proceedings if the principal sum, interest, annuity, or rent-charge were secured to the mortgagee, chargee or covenant chargee by a conveyance of the legal estate in the land so mortgaged or charged.

10. Sections 87(1)(a), 88 and 191 of the *Evidence Act* 1995 (NSW)

Sections 87(1)(a) and 88 of the *Evidence Act* 1995 (NSW) have been in the following form since the commencement of that Act on 1 September 1995 and section 191 has been in the following form since 1 January 2009:

87 Admissions made with authority

(1) For the purpose of determining whether a previous representation made by a person is also taken to be an admission by a party, the court is to admit the representation if it is reasonably open to find that:

(a) when the representation was made, the person had authority to make statements on behalf of the party in relation to the matter with respect to which the representation was made, or

88 Proof of admissions

For the purpose of determining whether evidence of an admission is admissible, the court is to find that a particular person made the admission if it is reasonably open to find that he or she made the admission.

191 Agreements as to facts

(1) In this section:

***agreed fact** means a fact that the parties to a proceeding have agreed is not, for the purposes of the proceeding, to be disputed.*

(2) In a proceeding:

(a) evidence is not required to prove the existence of an agreed fact, and

(b) evidence may not be adduced to contradict or qualify an agreed fact, unless the court gives leave.

(3) Subsection (2) does not apply unless the agreed fact:

(a) is stated in an agreement in writing signed by the parties or by Australian legal practitioners, legal counsel or prosecutors representing the parties and adduced in evidence in the proceeding, or

(b) with the leave of the court, is stated by a party before the court with the agreement of all other parties.

24 June 2016.