HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, GAGELER, NETTLE AND GORDON JJ

DANIEL MATTHEW SIMIC & ORS APPELLANTS

AND

NEW SOUTH WALES LAND AND HOUSING CORPORATION & ORS RESPONDENTS

Simic v New South Wales Land and Housing Corporation
[2016] HCA 47
7 December 2016
S136/2016

ORDER

1. *Appeal allowed.*

2. *Special leave be granted to the first respondent to cross-appeal.*

3. *The cross-appeal by the first respondent be treated as instituted and heard instanter and allowed.*

4. *Special leave be granted to the second respondent to cross-appeal.*

5. *The cross-appeal by the second respondent be treated as instituted and heard instanter and allowed.*

6. *Set aside the order of the Court of Appeal of the Supreme Court of New South Wales made on 18 December 2015, and in its place order that:*

   (a) the appeal be allowed in part;

   (b) the cross-appeal by the first respondent be allowed;

(c) *the second respondent be granted leave pursuant to s 500(2) of the* Corporations Act *2001 (Cth) to commence and proceed with its cross-appeal against the third respondent;*

(d) *the second respondent be granted leave to file its amended notice of cross-appeal;*

(e) *the cross-appeal by the second respondent be treated as instituted and heard instanter and allowed;*

(f) *orders 1 and 4 of the Supreme Court of New South Wales made on 24 March 2015 be set aside, and in their place it be ordered that:*

(i) *the bank guarantees issued by the defendant/cross-claimant dated 16 April 2010 and numbered 108781 and 108783 be rectified by substituting the words "New South Wales Land and Housing Corporation ABN 24 960 729 253" for the words "New South Wales Land & Housing Department Trading As Housing NSW ABN 45754121940"; and*

(ii) *the forms of indemnity and application for guarantee from the first cross-defendant to the defendant/cross-claimant dated 16 April 2010 with serial numbers 108781 and 108783 be rectified by substituting the words "New South Wales Land and Housing Corporation ABN 24 960 729 253" for the words "New South Wales Land & Housing Department Trading As Housing NSW ABN 45754121940"; and*

(g) *the appellants pay the first and second respondents' costs in the Court of Appeal.*

7. *The appellants pay the first and second respondents' costs in this Court.*

On appeal from the Supreme Court of New South Wales

Representation

M A Ashhurst SC with A F Fernon for the appellants (instructed by O'Neill McDonald Lawyers)

G Curtin SC with D I Talintyre for the first respondent (instructed by Sparke Helmore Lawyers)

D F Jackson QC with S B Docker for the second respondent (instructed by Kemp Strang Lawyers)

No appearance for the third respondent

CATCHWORDS

Simic v New South Wales Land and Housing Corporation

Contract – Construction of terms – Performance bonds – Where unconditional undertakings by financial institution to pay on demand ("Undertakings") required as security under construction contract – Where Undertakings and underlying finance applications erroneously referred to non-existent entity as payee because incorrect information provided by applicant for security – Principle of autonomy – Principle of strict compliance – Whether possible to construe references to non-existent entity in Undertakings and applications as references to counterparty to construction contract.

Contract – Rectification – Actual or true common intention of parties – Where references to non-existent entity in Undertakings and applications result of common mistake – Whether rectification available to correct references to non-existent entity.

Words and phrases – "actual or true common intention", "bank guarantee", "common mistake", "letter of credit", "performance bond", "principle of autonomy", "principle of strict compliance", "rectification", "subjective intention of the parties".

FRENCH CJ.

Introduction

1 This appeal concerns a claim for payment on performance bonds issued in relation to a construction contract. It raises a general question about the proper approach to their interpretation where the erroneously named beneficiary is a non-existent entity. It also raises a particular question in the circumstances of this case about the availability of rectification to substitute the intended beneficiary. For the reasons given in the joint judgment, I agree that the bonds cannot be construed to overcome the erroneous designation of the beneficiary. However, I also agree, for the reasons given by Kiefel J, that they should be rectified to reflect the common intention of the issuing bank and the contracting party requesting the issue of the bonds that the beneficiary be the principal in the construction contract in relation to which the bonds were issued. I wish to add some observations to my concurrence.

The construction question

2 Performance bonds, sometimes misleadingly called "bank guarantees"[1], are typically issued by a financial institution at the request of one party to a contract in favour of another party pursuant to a requirement of the contract. They are frequently used in relation to construction contracts[2]. They take the form of a promise by the issuing institution that it will pay, to the beneficiary named in the bond, an amount up to the limit set out in the bond unconditionally or on specified conditions and without reference to the terms of the contract between the parties[3]. The present case concerns the contested refusal by Australia and New Zealand Banking Group Ltd ("ANZ") to make payments demanded by the New South Wales Land and Housing Corporation (ABN 24 960 729 253) ("the Corporation") under performance bonds issued at the request of a construction company, Nebax Constructions Australia Pty Ltd ("Nebax"), which, because of a mistake made by the first appellant, Daniel Simic, acting on behalf of Nebax, named their beneficiary as the non-existent "New South Wales Land & Housing Department trading as Housing NSW

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1 See *Wood Hall Ltd v Pipeline Authority* (1979) 141 CLR 443 at 445 per Barwick CJ; [1979] HCA 21.

2 Penn, Shea and Arora, *The Law and Practice of International Banking*, (1987) at 261 [12.01].

3 *Hortico (Australia) Pty Ltd v Energy Equipment Co (Australia) Pty Ltd* (1985) 1 NSWLR 545 at 551 per Young J.

ABN 45754121940". The bonds were sought by Nebax in accordance with a requirement contained in a special condition of a construction contract between it and the Corporation. Nebax had provided an indemnity to ANZ in respect of each of the bonds and the appellants were guarantors whose liabilities under their guarantees depended upon Nebax's liability, which in turn depended upon the efficacy of the bonds.

3 Following ANZ's refusal to pay the Corporation the amount of $146,965.06 pursuant to the bonds, which were referred to as "Undertakings", the Corporation instituted proceedings in the Supreme Court of New South Wales. The primary judge, Kunc J, made a declaration that the term "New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940" in the description of the principal in the Undertakings meant the Corporation. That conclusion was reached as a matter of the construction of that term. It was therefore not necessary for his Honour to deal with a claim for the rectification of the Undertakings although he expressed views on that issue which would have favoured the grant of such relief had it not been for the constructional resolution[4].

4 The Court of Appeal held that the primary judge had not erred in his construction of the Undertakings[5]. It followed as a matter of common ground that the indemnity in favour of ANZ provided by Nebax was to be construed in the same way and that the present appellants, as guarantors of Nebax's obligations under that indemnity, were liable to ANZ[6].

5 The principles governing the legal effect and operation of performance bonds are similar to those applicable to letters of credit. A letter of credit represents payment for the performance of an obligation. A performance bond represents payment on default or in lieu of performance[7]. The commercial purpose of performance bonds, as described in *Wood Hall Ltd v Pipeline Authority*, is to provide an equivalent to cash[8].

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4 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [88]-[91].

5 *Simic v New South Wales Land and Housing Corporation* [2015] NSWCA 413 at [116].

6 [2015] NSWCA 413 at [117].

7 McCracken et al, *Everett and McCracken's Banking and Financial Institutions Law*, 8th ed (2013) at 392 [11.001].

8 (1979) 141 CLR 443 at 445 per Barwick CJ, 453-454 per Gibbs J, 457-458 per Stephen J.

6 Two complementary principles apply to letters of credit and performance bonds alike — the principle of strict compliance and the principle of autonomy or independence. According to the principle of strict compliance, a bank paying on a letter of credit or performance bond only has an obligation to do so and only has an entitlement to claim indemnity for the performance of that obligation if the conditions on which it is authorised and required to make payment are strictly observed. A demand for payment cannot be accepted on the basis that near enough is good enough[9]. The principle of autonomy requires that the letter of credit or performance bond be treated as independent of the underlying commercial contract[10]. The principles of strict compliance and autonomy serve the immediate commercial purpose of such instruments of providing an equivalent to cash and the further purpose of performance bonds of allocating risk between the parties to the underlying contract until their dispute, if there be one, is resolved[11].

7 The strict compliance principle requires that the party making demand on a performance bond be the party named in the bond as the beneficiary and that any conditions on payment set out in the bond are satisfied[12]. It does not describe an obligation imposed on the issuing or accepting institution. Rather, it delimits the issuing institution's obligation to make payment and, correspondingly, its right to claim on an indemnity promise by the party requesting the issue of the bond[13]. Where a performance bond is expressed, as in the present case, to be unconditional, strict compliance at least requires that the beneficiary making demand for payment be the beneficiary named in the bond. Unlike the autonomy principle, it is not a rule of construction of the bond.

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9 Or on the strength of documents which are "almost the same, or which will do just as well": *Equitable Trust Co of New York v Dawson Partners Ltd* (1927) 27 Ll L Rep 49 at 52 per Viscount Sumner.

10 Ellinger, "The Doctrine of Strict Compliance: Its Development and Current Construction", in Rose (ed), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds*, (2000) 187 at 187.

11 McCracken et al, *Everett and McCracken's Banking and Financial Institutions Law*, 8th ed (2013) at 421 [11.330].

12 *English, Scottish and Australian Bank Ltd v The Bank of South Africa* (1922) 13 Ll L Rep 21 at 24 per Bailhache J; *J H Rayner & Co v Hambro's Bank Ltd* [1943] KB 37 at 42 per Goddard LJ; Ellinger and Neo, *The Law and Practice of Documentary Letters of Credit*, (2010) at 81, 86.

13 (1927) 27 Ll L Rep 49 at 52 per Viscount Sumner.

8 The autonomy principle requires that the obligations of the issuing or accepting bank under the bond not be read as qualified by reference to the terms of the underlying contract[14]. That said, it does not prevent a party to a contract who procures the issue of a performance bond claiming as against the beneficiary that the beneficiary's action in calling upon the bond is fraudulent or unconscionable or in breach of a contractual promise not to do so unless certain conditions are satisfied[15]. However, this is not such a case. The primary question in this case concerns the obligation of the issuing bank to pay on demand of a party claiming to be the beneficiary which, due to error on the part of the requesting party, is not the beneficiary named in the bond.

9 In approaching the constructional question, Emmett AJA, who wrote the leading judgment in the Court of Appeal, held that ordinary principles of construction were applicable[16]. He observed that the relationship between those principles and the principles of "strict compliance" and "autonomy" was not resolved by the authorities referred to by the parties. He approached the question of construction on the basis that it was anterior to the principle of strict compliance, which he held pertained to performance[17]. The principle of autonomy went to construction because it was directed to the question as to which documents could be employed for the purpose of determining what the performance bonds meant[18]. He found that the construction contract was not actually incorporated in the Undertakings[19] but that the contract and the identity of the parties to it were referred to. It was therefore permissible to have regard to the construction contract to that extent in order to determine the correct construction of the Undertakings[20]. Once the Corporation had furnished ANZ with indisputable evidence that it was the entity that was a party as "Principal" to the contract with Nebax described in the Undertakings, there was no basis upon

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14 *Urquhart Lindsay and Co Ltd v Eastern Bank Ltd* [1922] 1 KB 318 at 322-323 per Rowlatt J; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 169 per Lord Denning MR; *Wood Hall Ltd v Pipeline Authority* (1979) 141 CLR 443 at 451 per Gibbs J.

15 *Clough Engineering Ltd v Oil and Natural Gas Corporation Ltd* (2008) 249 ALR 458 at 478 [77]-[78] and authorities there cited.

16 [2015] NSWCA 413 at [98].

17 [2015] NSWCA 413 at [100].

18 [2015] NSWCA 413 at [101].

19 [2015] NSWCA 413 at [105].

20 [2015] NSWCA 413 at [109].

which ANZ would be entitled to refrain from meeting the demand[21]. Having regard to those findings, it was not necessary for his Honour to proceed to determine the availability of rectification[22].

10 Emmett AJA was, with respect, correct to hold that the identity of the beneficiary named in the Undertakings was a matter of construction. His Honour was also correct in characterising the strict compliance principle as a matter relating to performance by the issuing institution rather than as a rule of construction. However, the principle is an incident of the purposes of a performance bond, which are inconsistent with an approach to construction that would require the issuing institution to undertake an investigative function where the beneficiary named on the face of the bond is not the same entity as that demanding payment under the bond[23]. In the ordinary case, saving minor slips and misdescriptions, the designation of a person or entity as a beneficiary cannot simply, as a matter of construction, be transmuted into the designation of a different person or entity. Nor can a reference to a non-existent entity be construed as a reference to an existing entity with quite a different name.

11 The name of the non-existent government department specified in the Undertakings could not be construed by reference to underlying facts, requiring inquiry by the issuing institution, as a reference to the Corporation. Such a loose approach to construction would be inconsistent with the commercial purposes of the Undertakings as performance bonds.

The rectification question

12 The particular circumstances under which the Undertakings were brought into existence in this case made it clear that the actual common intention of the requesting party and the issuing bank was that the beneficiary be the principal in the underlying construction contract. It is therefore appropriate that the Court order rectification of the instruments.

13 There is a preliminary point, namely whose intention was relevant to rectification. It was Mr Simic representing Nebax who asked ANZ to issue the Undertakings. They were issued in favour of the Principal to the construction contract, misidentified as the "New South Wales Land & Housing Department". The true Principal was the Corporation.

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21 [2015] NSWCA 413 at [114].

22 [2015] NSWCA 413 at [118].

23 (1927) 27 Ll L Rep 49 at 52 per Viscount Sumner. See also *Gian Singh & Co Ltd v Banque de l'Indochine* [1974] 1 WLR 1234 at 1238-1239 per Lord Diplock; [1974] 2 All ER 754 at 757-758.

14 In its commercial list statement filed in the proceedings in the Equity Division of the Supreme Court, the Corporation sought rectification on the basis that it was the common intention of itself and ANZ that the Undertakings should be issued in its favour. The primary judge in his observations on rectification identified the relevant common intention as that of Nebax (in the person of Mr Simic) and ANZ (in the person of Ms Hanna)[24]. Both Mr Simic and Ms Hanna subjectively intended, owing to Mr Simic's mistake, to write the words "New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940" on the Undertakings. His Honour went on to find, however, that[25]:

> "ANZ and Nebax's common intention ... was for the guarantees to support Nebax's building contract referred to in the Description. ANZ and Nebax intended the Principal to be Nebax's counterparty to that contract."

15 In the Court of Appeal in obiter remarks relating to the Corporation's cross-appeal seeking rectification, Emmett AJA expressed no concluded view on whose common intention was relevant. He doubted the existence of any relevant subjective intention by Ms Hanna. There was nothing to suggest she was aware of the existence of the Corporation. On the other hand, he suggested that it might be that the common intention of Nebax and the Corporation was all that was relevant[26].

16 The characterisation of the Undertakings has varied during the life of the litigation. The primary judge referred to them as "unilateral contracts"[27]. In the Court of Appeal they were referred to as "bilateral contracts" or "synallagmatic agreements"[28]. The term "synallagmatic" defines in civil law a category of bilateral contract where the parties' obligations are exchanged for each other and are contingent upon each other[29]. The appellants argued in their written

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24 [2015] NSWSC 176 at [70], [91].

25 [2015] NSWSC 176 at [92].

26 [2015] NSWCA 413 at [120].

27 [2015] NSWSC 176 at [69].

28 [2015] NSWCA 413 at [22], [46].

29 Treitel, *Remedies for Breach of Contract: A Comparative Account*, (1988) at 248-249 [191]. Under bilateral non-synallagmatic contracts the performance of each party is not by way of exchange; for example, a non-synallagmatic bilateral contract exists when a gratuitous agent has a duty to act while the principal has a duty to reimburse his or her expenses. The two performances are not in exchange for each other.

submissions that the Undertakings were unilateral but were equivocal about the primary judge's characterisation of them as "unilateral contracts". They described them as "potential contracts". However, counsel for the appellants in oral argument adopted the primary judge's conclusion that the Undertakings were unilateral contracts. Counsel focussed for the purposes of rectification on the intentions of the Corporation and ANZ and submitted that those parties did not have a common intention in relation to the Undertakings. When asked whether the Undertakings were capable of rectification as between Nebax and ANZ, counsel said that they were not because ANZ also did not have the same intention as Nebax.

17 In my opinion, the relevant intention is correctly characterised as that of Nebax and ANZ. It was their common intention to bring the Undertakings into existence conditioned upon Nebax entering into indemnity arrangements with ANZ. So far as equity is concerned, it must have been their common intention that the amounts specified in the Undertakings be payable on demand to the Principal of the underlying construction contract, such as to render it unconscionable for ANZ to contend otherwise.

18 At a conceptual level, construction and rectification of a contract are different processes. The first involves determination of the meaning of the words of the contract defined by reference to its text, context and purpose[30]. Resort to extrinsic circumstances and things external to the contract may be necessary to identify its purpose and in determining the proper construction where there is a constructional choice. The question for constructional purposes is not about the real intentions of the parties, not what the parties meant to say, but what they actually said[31].

19 There has been debate in the United Kingdom about reliance upon the "real" as distinct from objectively attributed intentions of the parties in relation to the rectification of contracts[32]. One line of reasoning in the debate is that reliance upon an objectively ascertained common intention for the purpose of rectification serves to bring about coherence with the common law of contract[33]. In

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30 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116 [46] per French CJ, Nettle and Gordon JJ and authorities there cited; [2015] HCA 37.

31 *Byrnes v Kendle* (2011) 243 CLR 253 at 263 [17] per French CJ, 275 [59] per Gummow and Hayne JJ, 284 [98] per Heydon and Crennan JJ; [2011] HCA 26.

32 Etherton, "Contract Formation and the Fog of Rectification", (2015) 68 *Current Legal Problems* 367.

33 Smith, "Rectification of Contracts for Common Mistake, *Joscelyne v Nissen*, and Subjective States of Mind", (2007) 123 *Law Quarterly Review* 116.

Chartbrook Ltd v Persimmon Homes Ltd[34], Lord Hoffmann's obiter remarks supporting a requirement for an objectively attributed common intention for the purposes of rectification commanded the assent of his colleagues. However, that objective test was not argued in this case and does not represent the common law of Australia as it presently stands. A change in the law would require full argument in a case in which the question was relevant to the outcome.

20 There is a conceptual distinction between construction and rectification but that does not mean that there is not a close connection in their practical operation. Professor Carter has pointed to the close relationship between construction and rectification and the pragmatic view that the fundamental difference between them lies in the ability to use the prior negotiations of the parties[35]. However, he has properly acknowledged the difference of principle between mistakes which can be corrected by construction and those for which a formal order is required, commenting that[36]:

> "The fact that rectification is a remedy informed by matters such as the prevention of unconscionable conduct must still have some relevance." (footnote omitted)

As to that, it may be added that the relevance is considerable given the historical and doctrinal bases upon which rectification is granted.

Conclusion

21 For the preceding reasons, I agree with the orders proposed in the joint judgment.

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34 [2009] AC 1101.

35 Carter, *The Construction of Commercial Contracts*, (2013) at 306 [9-44].

36 Carter, *The Construction of Commercial Contracts*, (2013) at 306 [9-44].

22 KIEFEL J. The facts and circumstances relevant to this appeal are set out in the joint reasons. For my purposes it is necessary to refer only to the more salient of them.

23 Two instruments ("the Undertakings") were issued by the second respondent, Australia and New Zealand Banking Group Limited ("ANZ"), to the "New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940 (The Principal)" at the request of Nebax Constructions Australia Pty Ltd ("Nebax"), a company of which the first appellant, Mr Simic, was a director. The Undertakings were each expressed to take effect as an unconditional promise to pay the named Principal a sum of money upon acceptance by the Principal of the Undertaking and upon its written demand.

24 The circumstances giving rise to the issue of the Undertakings were the acceptance by the first respondent, the New South Wales Land and Housing Corporation ("the Corporation"), of Nebax's tender for building construction works to be carried out at 3-7 Karowa Street, Bomaderry, and the subsequent execution by Nebax and the Corporation of an agreement ("the Construction Contract"). It was a term of the Construction Contract that Nebax, if required, provide "security ... 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". The Corporation duly stated that it required security to the value of a particular sum and specified that the security was to be in the form of an enclosed draft "Unconditional Bankers Certificate". The draft identified the Corporation as the Principal to which the undertaking was to be addressed; however, as explained above, the actual Undertakings named the "Department" as the Principal.

25 The discussions concerning the provision by ANZ of the Undertakings were conducted by Mr Simic, on behalf of Nebax, and Ms Adele Hanna, on behalf of ANZ. The Corporation took no part in these discussions. Mr Simic and Ms Hanna had previously had a number of dealings concerning Nebax's business. The primary judge, Kunc J, found[37] that Ms Hanna knew that Nebax operated a construction business and regularly obtained contracts from various entities, including government departments, and that it was not unusual for ANZ to provide documents such as bank guarantees with respect to Nebax's construction contracts. That is not to say that the Undertakings were bank guarantees, despite the fact that they were referred to as such by Mr Simic and Ms Hanna and in some of the documentation provided by ANZ. They were not, as they did not involve any form of suretyship.

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37 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [16].

26 The Undertakings came to identify the Principal as they did because of the instructions given by Mr Simic to Ms Hanna. Mr Simic told Ms Hanna that Nebax had obtained a contract from "Housing NSW" and that he required two "bank guarantees" made out to "New South Wales Land & Housing Department trading as Housing NSW". He provided her with an ABN for that entity. However, the primary judge found[38] that he did not provide Ms Hanna with a copy of the Construction Contract or the draft form of undertaking originally provided by the Corporation.

27 The two forms of "Indemnity and Application for Guarantee" ("the Indemnities") and the Undertakings produced by Ms Hanna all contained the name provided by Mr Simic. The so-called "Department" was identified in the Undertakings in two ways: as the Principal and the "Favouree" for the purposes of the Undertaking; and as the party to the contract between it and ANZ's customer, Nebax. As to the latter, one of the Undertakings contained the following request:

> "[ANZ] asks the Principal to accept this bank guarantee ('Undertaking') in connection with a contract or agreement between the Principal and Customer for Job Number: P0409021, Bomaderry – Design & Construct 3-7 Karowa Street. Contract No: BG2J8"

The request in the other Undertaking was materially identical, except for a misspelling of the suburb as "Bombaderry".

28 The primary judge found that Ms Hanna understood that the Undertakings were being entered into in relation to a construction contract to which Nebax was a party and that the job number, address and contract number in the Undertakings were references to that contract. Ms Hanna would have issued the Undertakings to the Corporation had she been given the correct name of "the Principal"[39].

29 Not only was the entity to which the Undertakings were addressed not the Corporation, it was a non-existent entity. There was no such Department. The inclusion of the wrong name was not the only error appearing in those instruments. The ABN was not that of the Corporation. Neither the job number nor the contract number there referred to matched those in the Construction Contract. The Undertakings did, however, identify the location of the works, albeit the name of the suburb was misspelt in one of the Undertakings. Despite

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38 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [23].

39 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [24].

these errors, the primary judge found[40] that it was Nebax's and ANZ's common intention that the Undertakings were to support the Construction Contract described in the Undertakings. The Principal for the purpose of the Undertakings, so far as concerned Ms Hanna, was to be Nebax's counterparty to that contract.

30 It would seem that the Corporation accepted the Undertakings from Nebax for the purposes of the Construction Contract. The Corporation then made demand for the monies the subject of the Undertakings but was met with a refusal by ANZ, on the ground that the Corporation was not the entity named as the Principal in those instruments. In proceedings brought in the Supreme Court of New South Wales, the Corporation made two claims as to ANZ's liability to pay the monies based upon the fact that the Corporation was the entity to which the Undertakings were intended to be addressed. It claimed that this fact could be determined as a matter of construction of the Undertakings, an argument which found favour with both the primary judge[41] and the Court of Appeal (Bathurst CJ, Ward JA and Emmett AJA)[42]. The Corporation's alternative claim was for rectification of the mistake as to its name in the Undertakings. This claim was based upon an alleged intention, held by both it and ANZ, that the Undertakings were to be issued in the Corporation's favour.

The construction of the Undertakings

31 The terms of the Undertakings and the entity to which they were addressed did not oblige ANZ to pay the Corporation on its demands. To the contrary, as the joint reasons explain (at [90]), to have paid the Corporation would have put ANZ at risk of breaching its agreements with Nebax. ANZ was obliged only to pay the amount specified to the entity named in the Undertakings, upon production of the original Undertakings and a demand for payment. No process of construction could effect the inclusion of the Corporation's name in lieu of the name appearing in the Undertakings. ANZ was not obliged to enquire into the background giving rise to the error of identification, which was not evident from the Undertakings themselves.

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40 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [92].

41 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [92], [96].

42 *Simic v New South Wales Land and Housing Corporation* [2015] NSWCA 413 at [116].

Rectification

32 The resolution of this matter lies in the equitable remedy of rectification, which will be provided to overcome common mistake by making an instrument conform either to a concluded antecedent agreement or to the continuing concurrent intention of the parties to the instrument[43].

33 This case was not decided by the courts below on the basis of rectification, but the reasons for judgment contain observations as to that claim. Neither the primary judge nor the Court of Appeal accepted the Corporation's submission that it was the concurrent intention of the Corporation and ANZ which was relevant to the question of rectification. The primary judge considered[44] the relevant intention to be that of Nebax and ANZ, which is to say Mr Simic and Ms Hanna. In the Court of Appeal, Emmett AJA (with whom Bathurst CJ and Ward JA agreed) observed[45] that the Undertakings were issued by ANZ at the behest of Nebax, not the Corporation. On the other hand, his Honour observed, they were expressed as an agreement between ANZ and the Principal. In this regard, the Undertakings provided that:

> "In consideration of the Principal accepting this Undertaking and its terms, ANZ undertakes unconditionally to pay the Principal on written demand …"

34 The Corporation submits that it was a party to the Undertakings and that they took effect as contracts between it and ANZ. It submits that despite "difficulties reconciling performance bonds and letters of credit with some traditional contractual principles, particularly regarding consideration, commercial entities and the courts have long accepted that performance bonds and letters of credit are enforceable contracts between the beneficiary and the issuing bank". In this regard it may be observed that in *United City Merchants (Investments) Ltd v Royal Bank of Canada*, Lord Diplock considered[46] that a letter of credit gave rise to a contract between the bank and seller (ie, the

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43 *Fowler v Fowler* (1859) 4 De G & J 250 at 265 [45 ER 97 at 103]; *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 346, 349-350; [1973] HCA 23; *Pukallus v Cameron* (1982) 180 CLR 447 at 452, 456; [1982] HCA 63.

44 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [91].

45 *Simic v New South Wales Land and Housing Corporation* [2015] NSWCA 413 at [119].

46 *United City Merchants (Investments) Ltd v Royal Bank of Canada* [1983] 1 AC 168 at 183.

beneficiary of the letter of credit), under which the bank undertook to pay the seller against provision of the stipulated documents. As his Lordship explained, the law gave to the seller an assured right to be paid before parting with control of the goods – a right that did not admit of a dispute with the buyer even where the buyer alleges non-performance of the underlying contract of sale.

35 The appellants' argument as to the status of the Corporation as a relevant "party" for the purposes of rectification also had regard to the nature of the Undertakings. It relies upon the primary judge's view[47] that they were unilateral contracts. According to Lord Diplock's definition in *United Dominions Trust (Commercial) Ltd v Eagle Aircraft Services Ltd*[48], a contract is unilateral in circumstances where, although the promisor undertook to do something if the promisee did something (or did not), the promisee did not itself undertake to do or to refrain from doing that thing. The cases relied upon by the Corporation, the appellants submit, do not involve unilateral contracts but, rather, synallagmatic contracts.

36 Although the term "synallagmatic contract" has sometimes been used in common law cases to refer to bilateral contracts, such as contracts of sale, it is perhaps best understood in a civil law context, where it more clearly refers to a contract in which the parties obligate themselves reciprocally[49], without the complication of the doctrine of consideration.

37 There is an alternative view to the unilateral vs bilateral characterisation of letters of credit and performance bonds. It is that the common law has generally regarded them as sui generis[50]. However, none of these considerations are relevant to the question of rectification.

38 The characterisation of the Undertakings may have relevance to the enforcement of them as between the Corporation and ANZ, but that is not the issue presently under consideration. The present issue involves the question whether there was a mistake made in the identification of the Principal in the

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47 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [69].

48 [1968] 1 WLR 74 at 83; [1968] 1 All ER 104 at 109.

49 See eg Farnsworth, "Comparative Contract Law", in Reimann and Zimmermann (eds), *The Oxford Handbook of Comparative Law*, (2008) 899 at 910, 925; Zimmermann, *The Law of Obligations*, (1996) at 811.

50 See eg Ellinger and Neo, *The Law and Practice of Documentary Letters of Credit*, (2010) at 111; Mugasha, *The Law of Letters of Credit and Bank Guarantees*, (2003) at 30-31.

Undertakings, brought about by Ms Hanna's preparation of those instruments on the erroneous instructions of Mr Simic. It is those persons' intentions, and therefore those of ANZ and Nebax, which are relevant to the question whether there was a common mistake and whether the instruments should be rectified. Their intentions can be determined without resort to questions of characterisation.

39 The primary judge did not accept[51] ANZ's contention that rectification was not possible because Ms Hanna's subjective intention was simply to issue a guarantee in whatever name she was given by Mr Simic. His Honour said[52] that although Ms Hanna was indifferent to the precise identity of the beneficiary of the Undertakings, her intention was the same as Mr Simic's – to provide support for Nebax's compliance with the Construction Contract. In this appeal the appellants repeated ANZ's argument and submitted that ANZ had no intention other than to issue the Undertakings in accordance with its instructions. It followed that ANZ could not be said to have made a mistake in describing the Principal in the Undertakings.

40 The primary judge adopted as correct what was said in *Elders Lensworth Finance Ltd v Australian Central Pacific Ltd*[53] concerning the principles to be applied with respect to the remedy of rectification. In that case the Full Court of the Supreme Court of Queensland drew largely on what had been said by Street J in *Australasian Performing Right Association Ltd v Austarama Television Pty Ltd*[54] and by Wilson J in *Pukallus v Cameron*[55]. In Street J's view[56], what is necessary for rectification is to find an "identical corresponding contractual intention on each side" which was "manifested by some act or conduct". From such facts may be inferred "objectively a consensual relationship between the parties".

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51 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [91].

52 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [91]-[92].

53 [1986] 2 Qd R 364 at 367-368.

54 [1972] 2 NSWLR 467.

55 (1982) 180 CLR 447 at 452.

56 *Australasian Performing Right Association Ltd v Austarama Television Pty Ltd* [1972] 2 NSWLR 467 at 473.

41 It has for some time been settled law that the existence of an antecedent agreement is not essential to the grant of relief by way of rectification and that rectification may be granted in cases where the instrument sought to be rectified is the only agreement between the parties[57]. The focus of the courts turned to the common intention of the parties up to the time the relevant instrument was made. That intention must be proved by admissible evidence and proved to a high standard. In a passage from *Fowler v Fowler*[58], which has been cited with approval by this Court[59], Lord Chelmsford said 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".

42 What is necessary to be shown is the actual intention of each of the parties. This has often been referred to by intermediate appellate courts as the subjective intention of the parties[60]. A court, in determining whether the burden of proof is discharged, may be said to view the evidence of intention objectively, in the sense that it does not merely accept what a party says was in his or her mind, but instead considers and weighs admissible evidence probative of intention. It is in this sense that statements such as that of Hodgson J in *Bush v National Australia Bank Ltd*[61], that common continuing intention "must be objectively apparent from the words or actions" of each party, may be understood.

43 It is not to be expected that parties to contractual negotiations will express themselves in terms of their intentions. It is therefore to be expected that proof to the necessary standard will usually require some manifestation of the intention of

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57 *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 350.

58 (1859) 4 De G & J 250 at 265 [45 ER 97 at 103].

59 *Australian Gypsum Ltd and Australian Plaster Co Ltd v Hume Steel Ltd* (1930) 45 CLR 54 at 64; [1930] HCA 38; *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 349; *Pukallus v Cameron* (1982) 180 CLR 447 at 457.

60 See eg *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at 657 [267]; *Masterton Homes Pty Ltd v Palm Assets Pty Ltd* (2009) 261 ALR 382 at 405 [107]; *Newey v Westpac Banking Corporation* [2014] NSWCA 319 at [175]; *Technomin Australia Pty Ltd v Xstrata Nickel Australasia Operations Pty Ltd* (2014) 48 WAR 261 at 283 [134]; *Mayo v W & K Holdings (NSW) Pty Ltd (in liq) (No 2)* [2015] NSWCA 119 at [58]; *RCR Tomlinson Ltd v Russell* [2015] WASCA 154 at [53].

61 (1992) 35 NSWLR 390 at 406.

each party by their words or conduct and that the requisite common intention will be a matter of inference for the court from that evidence. As Yeldham J pointed out in *Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd*[62], it would not be sufficient for proof of intention to refer to a party's state of mind which remained undisclosed in the course of negotiations.

44 Yeldham J also observed[63] that there was some divergence of judicial and academic opinion as to whether more was required for proof of intention and, in particular, whether intention must be evidenced by "some outward expression of accord", as was suggested in *Joscelyne v Nissen*[64]. Further, in *Maralinga Pty Ltd v Major Enterprises Pty Ltd*, Mason J referred to[65] what had been said by Buckley LJ in *Lovell and Christmas Ltd v Wall*[66], namely that it was necessary for rectification to find that intention "was communicated by one side to the other".

45 In *Pukallus v Cameron*[67] it was not necessary to resolve the question as to what was required to prove intention, but Wilson J was moved to suggest[68] that, notwithstanding the views expressed in *Joscelyne v Nissen* and *Maralinga*, it may not be necessary to prove an outward expression of accord. His Honour appears to have preferred the view expressed in an article[69], that the requirement of an outward expression of accord was not justified by principle or authority. On this view, the absence of an outward expression of accord may go to whether the burden of proof can be discharged, but an outward expression of accord is not itself a requirement of rectification[70].

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62 [1981] 1 NSWLR 429 at 431.

63 *Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd* [1981] 1 NSWLR 429 at 431.

64 [1970] 2 QB 86 at 98.

65 *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 349-350.

66 (1911) 104 LT 85 at 93.

67 (1982) 180 CLR 447.

68 *Pukallus v Cameron* (1982) 180 CLR 447 at 452.

69 Bromley, "Rectification in Equity", (1971) 87 *Law Quarterly Review* 532 at 537.

70 Bromley, "Rectification in Equity", (1971) 87 *Law Quarterly Review* 532 at 538.

46 Regardless of these issues it may be said that the traditional approach of the courts, following cases such as *Fowler v Fowler*, is to grant rectification only if the instrument in question did not reflect the actual common intention of the parties. That intention is proved in the usual way, by admissible evidence to the requisite standard. The assessment undertaken by the court may, in the sense referred to above, be described as an objective one. But the term "objective" is apt to be misunderstood because it can be applied with respect to a quite different process, as the decision in *Chartbrook Ltd v Persimmon Homes Ltd*[71] shows.

47 In *Chartbrook*, Lord Hoffmann suggested[72] that, in cases of rectification, "the terms of the contract to which the subsequent instrument must conform must be objectively determined in the same way as any other contract". The approach to which his Lordship referred was that applied under the common law to the interpretation of contracts, namely, "what an objective observer would have thought the intentions of the parties to be". His Lordship clearly considered a consistency of approach – to rectification and to interpretation – to be both warranted and necessary.

48 Lord Hoffmann's view involves a departure from the traditional approach of the courts to rectification. Its utility has been questioned. It has been observed[73] that it is difficult to see why a prior agreement, objectively determined, should override the later instrument, unless it reflects the parties' actual intentions. The need for consistency which his Lordship thought desirable may also be questioned. Rectification is an equitable remedy which is concerned with a mistake as to an aspect of what an instrument records and with the conscience of the parties. The common law, on the other hand, deals with the interpretation of the words chosen by the parties to reflect their agreement and it does so pragmatically, by reference to considerations such as business efficacy.

49 It is not necessary to express a concluded opinion on these and other matters to which Lord Hoffmann's view gives rise. Although that aspect of Lord Hoffmann's reasons commanded the assent of other members of the House of Lords, it was not necessary to the decision in *Chartbrook*. Moreover, whilst other aspects of the reasons in that case have been referred to in some recent decisions of this Court[74], his Lordship's view in this regard has not been the

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71 [2009] AC 1101.

72 *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101 at 1126 [59]-[60].

73 McGhee, *Snell's Equity*, 33rd ed (2015) at 426.

74 *Byrnes v Kendle* (2011) 243 CLR 253 at 284-285 [98]-[99]; [2011] HCA 26; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 135 [121]; [2015] HCA 37; *Paciocco v Australia & New Zealand Banking Group Ltd* (2016) 90 ALJR 835 at 876 [242]; 333 ALR 569 at 621; [2016] HCA 28.

subject of any consideration. It was not the subject of argument in this appeal, which should be approached by reference to settled principle.

50 It is not correct to say that Ms Hanna had no intention with respect to the identity of the Principal the subject of the Undertakings. True it is that she did not know who that entity was and relied upon Mr Simic for that information, but she understood that it was to be the counterparty to the Construction Contract. The inference to be drawn as to her intention may be tested by an enquiry: if Ms Hanna had been asked at the time she executed the Undertakings on behalf of ANZ who the Principal was, other than by reference to the name given, she would have identified it as Nebax's counterparty to the Construction Contract, which of course was the Corporation.

51 The Undertakings, and the Indemnities, should be rectified so that the Corporation is named as the Principal in the Undertakings and as the Favouree in the Indemnities.

52 I agree with the orders proposed in the joint judgment.

53 GAGELER, NETTLE AND GORDON JJ. The second respondent ("ANZ"), on the instructions of the third respondent ("Nebax"), issued two instruments, each in the form of an unconditional promise to pay ("Undertakings"), in favour of a named "Principal" that did not exist. The first respondent, the New South Wales Land and Housing Corporation ("the Corporation"), made a demand for payment under each Undertaking. ANZ did not pay on the demands because the Corporation was not the named "Principal".

54 Is it possible, as a matter of construction, to regard the Undertakings as being in favour of the Corporation, instead of a named "Principal" that did not exist? If the answer is "no", should the Undertakings be rectified so that each is in favour of the Corporation?

55 For the reasons that follow, it is not possible to construe the Undertakings as being in favour of the Corporation. However, the Undertakings (as well as the underlying finance applications) should be rectified so that each refers to the Corporation.

56 It follows that ANZ was bound to pay on the demands and that the appellants, as guarantors of the obligations of Nebax (the customer that sought the issue of the Undertakings), were bound to pay ANZ the amount it was bound to pay. The appellants' appeal to this Court should be allowed, special leave to cross-appeal should be granted to the Corporation and to ANZ and each of those cross-appeals should be allowed.

Facts

57 By a letter dated 4 March 2010, the Corporation awarded Nebax the tender to demolish existing buildings and construct unit blocks at 3-7 Karowa Street, Bomaderry, identified in that letter as "JOB NO BG2J8 C-71561".

58 The letter went on to state:

> "In accordance with clause 5 of the General Conditions of Contract and Special Condition 39, the Principal requires security in the sum of $146,965.06. Please provide original Bankers Certificate(s) totalling this amount at the time of the execution of the Contract documents. I enclose the Principal's form of Bankers Certificate of Undertaking to be used. The option of providing security by retention from progress payment is not available. **The Certificate is to be executed under the Bank's Power of Attorney**."

59 A draft of the "Unconditional Bankers Certificate" was enclosed and was addressed as follows:

"TO: **NEW SOUTH WALES LAND AND HOUSING CORPORATION (ABN 24 960 729 253) trading as Housing NSW (ABN 45 754 121 940)** 223-239 Liverpool Road, Ashfield (hereinafter called 'the Principal')"

60 The draft also stated that it was a security deposit by Nebax and referred to "**JOB NO: BG2J8 C-71561 - BOMADERRY (3-7 Karowa Street) - MATTER NO: 20092540**".

61 On 4 March 2010, the Formal Instrument of Agreement Contract No: 51384 ("the Construction Contract") was executed. The Corporation was defined as the "Principal" and described as "**NEW SOUTH WALES LAND AND HOUSING CORPORATION** (ABN 24 960 729 253) a statutory authority constituted pursuant to section 6(1) of the Housing Act 2001 and having its principal office at 223-239 Liverpool Road, Ashfield in the State of New South Wales". Recital A recorded that Nebax had tendered for "Job No BG2J8 C-71561".

62 The Construction Contract incorporated General Conditions of Contract for Design and Construct (AS 4902-2000) and Standard Special Conditions of Contract. Standard Special Condition 39 deleted cl 5 from the General Conditions of the Construction Contract and relevantly substituted it with the following:

> "If required, security must be provided by the Contractor for the purpose of ensuring the due and proper performance of the Contract and of satisfying the obligations of the Contractor under the Contract. If required, 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*. Insurance bonds, cheques or cash are not acceptable. For the purpose of giving unconditional undertakings, the Principal has approved banks, building societies and credit unions listed by the Australian Prudential Regulation Authority ('APRA') as being regulated by APRA." (emphasis added)

63 Mr Simic, a director of Nebax, went to the Caringbah branch of ANZ and told an employee (Ms Hanna) 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". Mr Simic gave Ms Hanna the details to enable her to generate the Undertakings using a computer template. Mr Simic did not give Ms Hanna a copy of the Construction Contract or a copy of the draft Unconditional Bankers Certificate.

64 Two forms of indemnity and application for guarantee ("the applications") were completed by Ms Hanna and signed by Mr Simic, on behalf of Nebax, and provided to and retained by ANZ. Each application requested ANZ to execute the security to facilitate Nebax's business transactions with "New South Wales Land & Housing Department Trading As Housing NSW ABN 45754121940". Each application stated that:

> "If I/we provide the guarantee to the named Favouree or Principal then by this act I/we acknowledge that the details on the guarantee are entirely to my/our satisfaction."

65 The Undertakings, signed by Ms Hanna on behalf of ANZ, were handed to Mr Simic, who subsequently provided them to the Corporation.

66 The Undertakings relevantly included the following[75]:

Favouree	To: **New South Wales Land & Housing Department Trading As Housing NSW ABN 45754121940** (The Principal)
Business name or trading name	For: **Nebax Constructions Australia Pty Ltd ACN 101054068** (The Customer)
Description of contract/agreement	[ANZ] asks the Principal to accept this bank guarantee ("Undertaking") in connection with a contract or agreement between the Principal and Customer for **Job Number: P0409021, Bomaderry - Design & Construct 3-7 Karowa Street. Contract No: BG2J8**
Amount	In consideration of the Principal accepting this Undertaking and its terms, ANZ undertakes unconditionally to pay the Principal on written demand from time to time any sum or sums up to an aggregate amount not exceeding **73,482.53 AUD ("Amount")** ANZ will pay the Amount or any part of it to the Principal upon presentation of this original Undertaking (accompanied by a written demand) at any ANZ branch located within Australia without reference to the Customer and even if the Customer has given ANZ notice not to pay the money, and without regard to the performance or non-performance of the Customer or Principal under the terms of the

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75 The description of the location of the works under the Construction Contract was incorrectly described as "Bombaderry" in only one of the Undertakings. Similarly, the words "Trading As" were capitalised in only one of the Undertakings. It was not suggested, however, that any significance should be attributed to these discrepancies.

> contract or agreement.
>
> By accepting this Undertaking, the Principal acknowledges and agrees that ANZ may rely entirely on any demand or notice as presented to it and has no responsibility or obligation to investigate the authenticity or correctness of the matters stated in a demand or notice, the signatures on the same, the positions of such signatories or the capacity or entitlement of the Principal to give and execute the demand or notice.
>
> …
>
> This Undertaking remains in force until the first to occur of:-:
>
> * The Principal notifies ANZ in writing that the Undertaking is no longer required.
>
> * This original Undertaking is returned to ANZ.
>
> * ANZ has paid to the Principal the Amount or the balance outstanding of the Amount.
>
> …
>
> This Undertaking is personal to the Principal. The Principal cannot assign, transfer, charge or otherwise deal with its rights under this Undertaking and ANZ will not recognise any purported assignment, transfer, charge or other dealing.
>
> This Undertaking will be governed by the laws of **New South Wales** ("Governing Jurisdiction") (emphasis in original)

67 There were problems with the Undertakings.

68 The "Favouree" of each Undertaking, also defined as the "Principal", was expressed to be "New South Wales Land & Housing Department Trading As Housing NSW ABN 45754121940". That was an error. There was no, and never has been any, government department called the "New South Wales Land & Housing Department". As the document enclosed with the letter of 4 March 2010 showed, the party to be named as Favouree was "New South Wales Land and Housing Corporation". It was that corporation that was intended to be a party to and have the benefit of each Undertaking.

69 As a result of those errors, the applications that Nebax made to ANZ were not for an instrument in favour of the Corporation, and the instruments that ANZ issued were not in favour of the Corporation. The Undertakings were issued to a (non-existent) "Department" and the only ABN quoted was not the ABN of the Corporation. The Corporation's ABN was, at all relevant times,

"24 960 729 253". The ABN referred to in the Undertakings was never the ABN of the Corporation itself. It was the ABN for the trading name "Housing NSW", although it is significant that the Corporation had traded as "Housing NSW" at least between October 2009 and April 2010[76]. That ABN was cancelled on 1 July 2010.

70 The references to the Construction Contract were also wrong. The Undertakings stated that they related to "Job Number: P0409021". That reference does not appear in the Construction Contract. The "Job Number" in the Construction Contract was "BG2J8 C-71561". Equally, the "Contract Number" in the Undertakings (BG2J8) does not match the "Contract Number" in the Construction Contract (51384), although BG2J8 is part of the "Job Number". The location (Bomaderry) is misspelt in one of the Undertakings.

71 On 2 October 2013, the Corporation sought to make a demand on ANZ for payment under each Undertaking. ANZ disputed that the Corporation was entitled to claim the benefit of Undertakings issued in favour of another named entity and refused to accept that a call had been made.

72 On 5 February 2015, a solicitor for the Corporation presented the original Undertakings and a written demand at a branch of ANZ. ANZ did not pay out on the demand and the solicitor took the Undertakings away.

Decisions below

73 The Corporation issued proceedings in the Supreme Court of New South Wales seeking a declaration that the description of the "Principal" should be construed as referring to the Corporation or an order that each Undertaking be rectified by substituting the name of the Corporation for the named "Principal".

74 The primary judge made the declaration sought by the Corporation[77]. His Honour added that, although it was unnecessary to deal with the rectification claim, he considered that the pre-requisites for the making of an order for rectification were satisfied and that, if necessary, he would have ordered that the Undertakings be rectified. The primary judge directed the entry of judgment for the Corporation against ANZ in the sum of $146,965.06. His Honour declared that ANZ was entitled to be indemnified by Nebax for that amount and made

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76 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [15].

77 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [96].

further declarations that the appellants were liable to ANZ under various arrangements between the appellants and ANZ.

75 The appellants appealed to the Court of Appeal of the Supreme Court of New South Wales. The two questions raised by the appeal were whether the primary judge erred in construing the Undertakings as referring to the Corporation and, if so, whether the Undertakings should be rectified by correcting the name of the "Principal" to refer to the Corporation.

76 Emmett AJA (with whom Bathurst CJ and Ward JA agreed) concluded that, although carelessness or lack of diligence on the part of the Corporation led the Corporation to accept the Undertakings, there had not been and could not be any suggestion that the description of the "Principal" in the Undertakings was capable of referring to any entity other than the Corporation[78]. On the proper construction of the Undertakings, the defined "Principal" meant the Corporation[79] and, it followed, "once the Corporation had furnished to ANZ indisputable evidence that it was the entity that was a party, as 'Principal', to the contract or agreement with Nebax described in the Undertakings, there was no basis upon which ANZ would be entitled to refrain from meeting the demand"[80]. Emmett AJA did not deal with the question of rectification but expressed some reservations about the primary judge's conclusion[81].

Applicable construction principles

77 The Undertakings are in writing. ANZ accepts that it is bound to honour the Undertakings according to their terms. The Undertakings contain a contractual promise to pay, not under seal. They are contracts, although of a specific kind. When and how a contractual promise to pay, not under seal, in favour of a named principal establishes a binding contract has been the subject of

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78 *Simic v New South Wales Land and Housing Corporation* [2015] NSWCA 413 at [110].

79 *Simic v New South Wales Land and Housing Corporation* [2015] NSWCA 413 at [116].

80 *Simic v New South Wales Land and Housing Corporation* [2015] NSWCA 413 at [114].

81 *Simic v New South Wales Land and Housing Corporation* [2015] NSWCA 413 at [119]-[120].

debate and discussion since at least the first half of the 20th century[82]. For present purposes, however, that debate and discussion may be put to one side. Consistent with established banking practice[83], no party contended that the Undertakings were to be construed otherwise than in accordance with ordinary principles of contract construction.

78 There was also no dispute about those principles of construction. The proper construction of each Undertaking is to be determined objectively by reference to its text, context and purpose[84]. As was stated in *Electricity Generation Corporation v Woodside Energy Ltd*[85]:

> "[T]he objective approach [is] to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. … [I]t will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'. As Arden LJ observed in *Re Golden Key Ltd* [[2009] EWCA Civ 636 at [28]], unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the parties … intended to produce a commercial result'. A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'." (footnotes omitted)

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82 See, eg, Malek and Quest, *Jack: Documentary Credits*, 4th ed (2009) at 92-95 [5.8]-[5.16].

83 See, eg, *Hamzeh Malas & Sons v British Imex Industries Ltd* [1958] 2 QB 127 at 129.

84 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 at 656-657 [35]; [2014] HCA 7; *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104 at 116-117 [46]-[52]; [2015] HCA 37.

85 (2014) 251 CLR 640 at 656-657 [35].

Proper construction of the Undertakings

79 The starting point for the proper construction of the Undertakings is the language used in each Undertaking[86].

80 Each Undertaking was an unconditional obligation to pay a named beneficiary upon demand, in the nature of a performance bond[87]. No party to either Undertaking was involved in any obligations or rights of suretyship[88].

81 The beneficiary was defined in each Undertaking as the "Principal". Each Undertaking expressly provided that, in consideration of the "Principal" accepting the Undertaking and its terms, ANZ unconditionally promised to pay that "Principal", on written demand, an amount not exceeding $73,482.53.

82 Each Undertaking recorded that ANZ asked the "Principal" to accept the Undertaking "in connection with" an identified "contract or agreement". But ANZ assumed a primary obligation, not a secondary obligation. ANZ was obliged to pay a stipulated amount without regard to the performance or non-performance of any party to that "contract or agreement". Further, each Undertaking expressly stated that "[a]ny alterations to the terms of the contract or agreement or any extensions of time or any other forbearance by [either party to the contract or agreement] will not impair or discharge ANZ's liability under the Undertaking".

83 As has been explained, the "Principal", as defined in the opening paragraph of each Undertaking, did not exist; and for the reasons that follow, it is not open to construe "New South Wales Land & Housing Department" where it appears as the "Principal" in each Undertaking as referring to the Corporation.

84 First, the Corporation and a "department" of the New South Wales Government are legally distinct. The Corporation is a statutory corporation that can sue and be sued in its own name[89]. By contrast, a department of the New South Wales Government is an emanation of the Crown in the right of the State of New South Wales, and thus an action to enforce a contract made in the name of a department of the New South Wales Government is governed by s 5 of the

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86 *Mount Bruce Mining* (2015) 256 CLR 104 at 118 [59].

87 Hapgood, *Paget's Law of Banking*, 10th ed (1989) at 652-653.

88 *Wood Hall Ltd v Pipeline Authority* (1979) 141 CLR 443 at 445; [1979] HCA 21.

89 See s 6 of the *Housing Act* 2001 (NSW).

Crown Proceedings Act 1988 (NSW) and brought in the name of "State of New South Wales".

85 Second, although the "contract or agreement" referred to in the third paragraph of each Undertaking provides a link to the Corporation which, as will be seen, is significant for the purposes of rectification, it is either irrelevant or of no assistance for the purposes of construction. That is because, subject to fraud perpetrated by a beneficiary, an instrument of this nature (unconditional promise to pay on demand) is independent of any underlying transaction and any other contract[90]. That principle – the principle of autonomy – reflects that those instruments, by their nature, stand alone. Not only are they equivalent to cash[91], but, by their terms, they also require that the obligations of the issuer are not determined by reference to the underlying contract. The principle of autonomy dictates that the surrounding circumstances and commercial purpose of the Construction Contract are different from those of the Undertakings[92].

86 Here, that conclusion is fortified by the fact that there was no contract or agreement "between the Principal and [Nebax] for Job Number: P0409021, Bomaderry - Design & Construct 3-7 Karowa Street. Contract No: BG2J8". That was another error. The Construction Contract had a different job number and a different contract number and, in one of the Undertakings, the location was misspelt.

87 Third, the inability to construe the "Principal" named in each Undertaking as the Corporation is impelled by the commercial purpose or objects of such an instrument. Although banking instruments are often not consistently described, for present purposes two categories are relevant – letters of credit or documentary credits, and performance bonds or guarantees. Both involve an undertaking, usually by a bank, to make payment on satisfaction of certain conditions[93]. The difference lies in their commercial uses. The former category represents the method of payment of the price of goods. The latter category, of which each Undertaking is one, is generally given "for the purpose of providing

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90 See *Wood Hall* (1979) 141 CLR 443 at 445.

91 See McCracken et al, *Everett and McCracken's Banking and Financial Institutions Law*, 8th ed (2013) at 399 [11.060].

92 *Griffin Energy Group Pty Ltd v ICICI Bank Ltd* (2015) 317 ALR 395 at 410 [47] citing *Electricity Generation Corporation* (2014) 251 CLR 640 at 656-657 [35].

93 See McCracken et al, *Everett and McCracken's Banking and Financial Institutions Law*, 8th ed (2013) at 392 [11.001].

compensation if work is not done, rather than as payment for the work actually done"[94].

88 Under the latter form of security, the issuer (here, ANZ) is not required or intended to be concerned with the terms of the underlying contract (here, the Construction Contract) or, subsequently, with whether the construction contractor (here, Nebax) has sufficiently performed its obligations under that contract. The issuer's sole concern is to provide security in accordance with its contract with its customer (here, Nebax) and, when the security is issued, to see whether there has occurred the event stipulated in the instrument on which the issuer's obligation to pay arises[95]. In effect, such securities "create a type of currency"[96] and are treated as being "as good as cash"[97]. Instruments of this nature are essential to international commerce and, in the absence of fraud, should be allowed to be honoured free from interference by the courts[98].

89 Fourth, the inability to construe the named "Principal" as referring to the Corporation is necessitated by commercial reality. In issuing a banking instrument of this nature, the issuer relies upon, and acts in accordance with, the instructions of the applicant, and is contractually bound to do so.

90 Here, Mr Simic provided the information for Ms Hanna to complete the applications and he instructed ANZ to issue the Undertakings in the form in which they were issued. The fact that the applications were completed based on incorrect instructions did not alter ANZ's contractual relationship with Nebax. ANZ was asked to provide security in the form of the Undertakings that it in fact issued consistent with its contractual arrangements with Nebax. ANZ followed the incorrect instructions provided by Nebax and the Undertakings recorded those incorrect instructions. Unless and until it is rectified, ANZ would be at risk of acting in breach of contract if, contrary to Nebax's express instructions, it were to treat the instrument as referring to the Corporation.

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94 McCracken et al, *Everett and McCracken's Banking and Financial Institutions Law*, 8th ed (2013) at 392 [11.001]; see also at 419-421 [11.320]-[11.330].

95 *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 at 171-172; Hapgood, *Paget's Law of Banking*, 10th ed (1989) at 652-653.

96 *Westpac Banking Corporation v Commonwealth Steel Co Ltd* [1983] 1 NSWLR 735 at 741.

97 *Wood Hall* (1979) 141 CLR 443 at 457-458.

98 See *Edward Owen Engineering* [1978] QB 159 at 171-172.

91 Each Undertaking was personal to the "Principal". The "Principal" could not assign, transfer, charge or otherwise deal with *its* rights under the Undertaking. Nor was it possible for the "Principal" to do what was required under each instrument – accept the Undertaking. As the Undertaking expressly stated, by accepting the Undertaking, the "Principal" acknowledged and agreed that ANZ could rely entirely on any demand or notice as presented to it and had no responsibility or obligation to investigate the matters stated in the demand or notice. As the facts of this case illustrate, the "Principal" could not accept the Undertaking and make it personal to it as the "Principal" did not exist.

92 Under the terms of the Undertaking, ANZ was only required to pay the amount to the "Principal" upon presentation of two documents – the original Undertaking and a written demand – at any branch of ANZ within Australia. The "Principal" could not provide a written demand to ANZ because it did not exist.

93 Fifth, after the Undertakings were issued, Mr Simic took them to the Corporation. Upon receipt of the Undertakings, the Corporation should have been able to determine whether each Undertaking satisfied the requirement that Nebax provide security under the Construction Contract and, if it did not, to take appropriate steps under the Construction Contract at that point.

94 If the Corporation had properly reviewed the Undertakings and identified that the named "Principal" was wrong, as well as the other errors or discrepancies, the Corporation could at that point have refused to accept the Undertakings as satisfying the security requirement under Standard Special Condition 39 of the Construction Contract and requested Nebax to provide security that complied or conformed with the Construction Contract[99].

95 That was not the only available step either. The Construction Contract provided that if Nebax did not provide security in accordance with Standard Special Condition 39 of the Construction Contract, the Corporation could have given Nebax notice to show cause for a breach of the Construction Contract (Standard Special Condition 51). Nebax would have then been required to show cause why the Corporation should not remove Nebax as contractor or terminate the Construction Contract (General Condition 39.3) and, if Nebax failed to show "reasonable cause", the Corporation could have removed Nebax as contractor or terminated the Construction Contract (General Condition 39.4).

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99 See Adodo, *Letters of Credit: The Law and Practice of Compliance*, (2014) at 66-74 [3.01]-[3.19], especially at 68 [3.05].

96 The evidence in this matter did not disclose what occurred when the Corporation received the Undertakings. It is therefore not possible to address the legal consequences of the apparent failure of Nebax to provide security in accordance with its obligations under the Construction Contract or the "carelessness or lack of diligence on the part of the Corporation"[100] in reviewing the Undertakings. But nor is it necessary to do so. What is important for present purposes is, as Dolan states[101], to recognise that, from a commercial and banking perspective, it is more efficient to require the Principal to conduct the review of the security before performance than after it and if the Principal acts without seeing or examining the security, the Principal should bear the costs.

97 Finally on this aspect of the matter, it is necessary to say something about the principle of strict compliance – that an issuer (like a bank) should only accept documents that comply strictly with the requirements stipulated in an instrument of this nature. The principle is fundamental to the efficacy and dependability of banking instruments such as the Undertakings. As Viscount Sumner said in *Equitable Trust Company of New York v Dawson Partners Ltd*[102]:

> "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 … strictly 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."

98 The commercial realities of the principle are apparent. In this matter, each Undertaking was able to be presented at any ANZ branch. In *Equitable Trust Company*, where the instrument was able to be presented abroad, Viscount Sumner explained the commercial realities (and practicalities) in these terms[103]:

> "The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk."

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100 *Simic v New South Wales Land and Housing Corporation* [2015] NSWCA 413 at [110].

101 Dolan, *The Law of Letters of Credit*, 2nd ed (1991) at 6-9 [6.03].

102 (1927) 27 Ll L Rep 49 at 52.

103 (1927) 27 Ll L Rep 49 at 52.

99 As the primary judge and Emmett AJA correctly concluded, the principle of strict compliance applies after the instrument has been construed[104], and it is not a rigid rule. It must be applied intelligently, not mechanically[105]; the issuer must exercise its own judgment about whether the requirements stipulated in the instrument have been satisfied.

100 Nevertheless, as each Undertaking expressly stated, ANZ was not required to make inquiries or investigate further. And it did not. An officer of ANZ inspected the documents tendered, looked at the named "Principal" in each Undertaking, looked at the demand and refused to meet the call for payment under each Undertaking. The demand did not comply with the Undertaking. The discrepancies and errors were not minor or merely typographical. At the time of compliance, consistent with the principle of strict compliance, it was not possible for ANZ to accept a demand from the Corporation.

101 For those reasons, the definition of "Principal" in each Undertaking should not be construed as referring to the Corporation.

Rectification

102 Although it is not possible to construe the definition of "Principal" as referring to the Corporation, in the unusual circumstances of this case it is appropriate to rectify the applications completed by Nebax and the Undertakings that were then issued by ANZ.

103 Rectification is an equitable remedy, the purpose of which is to make a written instrument "conform to the true agreement of the parties where the writing by common mistake fails to express that agreement accurately"[106]. For relief by rectification, it must be demonstrated that, at the time of the execution of the written instrument sought to be rectified, there was an "agreement" between the parties in the sense that the parties had a "common

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104 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [84]; *Simic v New South Wales Land and Housing Corporation* [2015] NSWCA 413 at [100].

105 *Fortis Bank SA/NV v Indian Overseas Bank* [2010] 1 Lloyd's Rep 227 at 231 [33].

106 *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336 at 350; [1973] HCA 23. See also *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 at 346; [1982] HCA 24.

intention", and that the written instrument was to conform to that agreement[107]. Critically, it must also be demonstrated that the written instrument does not reflect the "agreement" because of a common mistake[108]. Unless those elements are established, the "hypothesis arising from execution of the written instrument, namely, that it is the true agreement of the parties" cannot be displaced[109].

104 The issue may be approached by asking – what was the actual or true common intention of the parties[110]? There is no requirement for communication of that common intention by express statement[111], but it must at least be the parties' actual intentions, viewed objectively from their words or actions, and must be correspondingly held by each party[112].

105 However, here there was such communication, and as is apparent from the primary judge's findings, all parties to the transaction intended that the Undertakings should enure to the benefit of the party with which Nebax entered into the Construction Contract. It was Mr Simic's intention, and, therefore, Nebax's intention, that the Undertakings should operate in favour of Nebax's counterparty to the Construction Contract. Similarly, it was Ms Hanna's understanding, and, therefore, ANZ's understanding, that the Undertakings were to be entered into in relation to the Construction Contract.

106 Granted, Mr Simic misdescribed the Construction Contract to Ms Hanna as "Job Number: P0409021, Bomaderry - Design & Construct 3-7 Karowa Street. Contract No: BG2J8". But, despite Mr Simic's misdescription of the Construction Contract, it is not suggested that there was ever more than one contract for the Design and Construct of 3-7 Karowa Street or that the contract

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107 *Slee v Warke* (1949) 86 CLR 271 at 281; [1949] HCA 57; *Maralinga* (1973) 128 CLR 336 at 350-351.

108 *Maralinga* (1973) 128 CLR 336 at 350-351.

109 *Maralinga* (1973) 128 CLR 336 at 350-351.

110 *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at 642 [182], [185].

111 *Bishopsgate Insurance Australia Ltd v Commonwealth Engineering (NSW) Pty Ltd* [1981] 1 NSWLR 429 at 431; *Bush v National Australia Bank Ltd* (1992) 35 NSWLR 390 at 405-406.

112 *Bush v National Australia Bank Ltd* (1992) 35 NSWLR 390 at 405-406.

for the Design and Construct of 3-7 Karowa Street was ever anything other than the Construction Contract[113].

107 As the primary judge found, Mr Simic, and, therefore, Nebax, made a further mistake in informing Ms Hanna of the name of Nebax's counterparty to the Construction Contract. Mr Simic erroneously stated that the name of the counterparty was "New South Wales Land & Housing Department Trading As Housing NSW ABN 45754121940". That error was repeated in the applications prepared by Ms Hanna and signed by Mr Simic. Ms Hanna, and therefore ANZ, then unwittingly perpetuated the mistake by including the name "New South Wales Land & Housing Department Trading As Housing NSW ABN 45754121940" as the name of the counterparty in the Undertakings produced pursuant to the applications[114]. However, Nebax told ANZ, and therefore ANZ knew, that Nebax obtained a contract with the entity trading as "Housing NSW" and that the applications and the resulting Undertakings were required under that contract. At the time the applications were completed and given to ANZ, and the Undertakings were issued by ANZ, the Corporation was trading as "Housing NSW" and the ABN referred to in both the applications and the Undertakings was, at that time, used by and associated with "Housing NSW".

108 Therefore, as the primary judge said, if someone had pointed out at the time to Mr Simic and Ms Hanna that the name of the counterparty was wrong, that would have been plain and obvious to both of them[115]. There can be no doubt that their actions were the result of a common mistake.

109 Rectification of the applications and the Undertakings to refer to the Corporation gives effect to what Nebax required, as well as the stated intention of ANZ to provide the security to the entity with which Nebax had contracted to provide the building and construction services. That intention (to provide security to the entity with which Nebax had contracted) was the actual or true common intention[116] of Nebax and ANZ. And that was the actual intention of each party, viewed objectively. The fact that the "Principal" was wrongly

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113 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [33], [74].

114 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [76].

115 *New South Wales Land and Housing Corporation v Australia and New Zealand Banking Group Ltd* [2015] NSWSC 176 at [76].

116 *Ryledar Pty Ltd v Euphoric Pty Ltd* (2007) 69 NSWLR 603 at 642 [182], [185].

identified in the applications and the Undertakings was, in the particular circumstances of this case, a matter that could be and should be rectified.

110 It was contended on behalf of ANZ that this was a case of mutual mistake or, in other words, the parties being at cross-purposes, rather than of common mistake. Counsel for ANZ submitted that, on a correct view of the facts, Mr Simic made a mistake by conveying the incorrect name of the Corporation to Ms Hanna and, as a result, Ms Hanna made a corresponding but different mistake which had the effect that the Undertakings were intended to operate in favour of an entity other than the Corporation. It must follow from that submission that the parties were bound by the objective effect of the words of the instrument[117] or, alternatively, that it was wholly ineffective[118].

111 That contention is opposed to the primary judge's findings of fact. It was not suggested below that Mr Simic believed that Nebax entered into the Construction Contract with a party other than the Corporation. As the primary judge found, Mr Simic's mistake was that he did not convey the correct name of the Corporation and the correct contract numbers to Ms Hanna. Nor is there a basis to suppose that Ms Hanna and therefore ANZ might have had a belief as to the identity (as opposed to the name) of the intended Favouree of the Undertakings, other than that the intended Favouree was to be the counterparty to the Construction Contract. To the contrary, Ms Hanna believed that the Undertakings related to a contract to which Nebax was a party and understood that the words "Job Number: P0409021, Bomaderry - Design & Construct 3-7 Karowa Street. Contract No: BG2J8" were intended to refer to that contract. One of Ms Hanna's mistakes, which was the result of Mr Simic's error and which, therefore, Ms Hanna shared with Mr Simic, was that the name of the counterparty was "New South Wales Land & Housing Department Trading As Housing NSW ABN 45754121940".

112 Counsel for ANZ further contended that this Court should adopt the reasoning of the United States Court of Appeals for the Fifth Circuit in *Tradax Petroleum American Inc v Coral Petroleum Inc*[119] that rectification is not available in a case of this kind.

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117 *Life Insurance Co of Australia Ltd v Phillips* (1925) 36 CLR 60 at 77; [1925] HCA 18.

118 *Raffles v Wichelhaus* (1864) 2 H & C 906 [159 ER 375]; *Babsari Pty Ltd v Wong* [2000] 2 Qd R 576 at 585-589 [32]-[47].

119 878 F 2d 830 (5th Cir 1989).

113 That contention should be rejected. In *Tradax*, the Court of Appeals held that a letter of credit could not be "reformed" because there was no "mutual mistake"[120]. The Court concluded that[121]:

> "We agree with the district court's determination that there was no mutual mistake here. Any mistake made was made by Tradax and Coral only – not by FABC [the financier]. FABC, without knowledge of the meanings of the technical designations included, prepared the letter of credit precisely in compliance with Coral's request. Tradax then failed to recognize that the letter of credit's terms did not reflect its agreement with Coral. In addition, there is no prior agreement between FABC and Tradax to which this letter of credit could be conformed."

114 Earlier, the Court had quoted with approval the following statement of Harfield[122]:

> "The right to enforce express terms, without reference to equities, has long been recognized in letter-of-credit law, and is essential to the proper functioning of the letter-of-credit device."

115 As is apparent from that reasoning, there are several bases on which *Tradax* stands to be distinguished.

116 First, in contradistinction to FABC's lack of mistake, in this case ANZ made a mistake. As a result of Mr Simic's error in conveying the correct name of the Corporation to Ms Hanna, ANZ mistakenly believed that the correct name of Nebax's counterparty to the Construction Contract was "New South Wales Land & Housing Department Trading As Housing NSW ABN 45754121940", and, therefore, that the Undertakings should be drawn in favour of that name rather than the name of the Corporation.

117 Second, the reasoning in *Tradax* set out above implies that the Court of Appeals considered that it was not open under United States law to order that an instrument be "reformed" for "mutual mistake" unless there were a prior agreement to which the instrument could be "conformed". By contrast,

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120 878 F 2d 830 at 834 (5th Cir 1989).

121 *Tradax* 878 F 2d 830 at 834 (5th Cir 1989).

122 *Tradax* 878 F 2d 830 at 834 (5th Cir 1989) quoting Harfield, "Code, Customs and Conscience in Letter-of-Credit Law", (1971) 4 *Uniform Commercial Code Law Journal* 7 at 14.

in Australia, it has long been recognised that an antecedent agreement is not essential to an order for rectification. Rectification may be ordered of an instrument that does not reflect the parties' true intention even though the instrument constitutes the only agreement between the parties[123].

118 Third, it is also apparent from the reasoning in *Tradax* set out above that a further reason for the Court of Appeals' refusal to reform the letter of credit was that it considered that, under United States law, "equities" are excluded in relation to letters of credit. By contrast, in this case, we are not concerned with a letter of credit or with any particular doctrine of law especially applicable to letters of credit. The Undertakings are not letters of credit and, even if they were, in Australia there is no special doctrine of law precluding rectification of a letter of credit on the basis of a common mistake. Subject to the facts and circumstances of each case, the principles that apply to the rectification of letters of credit and cognate securities such as the Undertakings are the same as for the rectification of any other form of contractual instrument.

Conclusion and orders

119 For those reasons, the appeal should be allowed, special leave to cross-appeal granted and the cross-appeal by the Corporation allowed, and special leave to cross-appeal granted and the cross-appeal by ANZ allowed. The appellants are to pay the costs of ANZ and the Corporation.

120 The orders made by the Court of Appeal on 18 December 2015 should be set aside and, in lieu thereof, it be ordered that:

(1) ANZ is granted leave *nunc pro tunc* pursuant to s 500(2) of the *Corporations Act* 2001 (Cth) to commence and proceed with its cross-appeal against Nebax.

(2) ANZ has leave to file its amended notice of cross-appeal in the first cross-appeal.

(3) Appeal allowed in part.

(4) Second cross-appeal by the Corporation allowed.

(5) First cross-appeal by ANZ allowed.

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123 *Slee* (1949) 86 CLR 271 at 280-281; *Maralinga* (1973) 128 CLR 336 at 350; *Pukallus v Cameron* (1982) 180 CLR 447 at 452, 456; [1982] HCA 63.

(6) Orders 1 and 4 made by the Supreme Court of New South Wales on 24 March 2015 are set aside and in lieu thereof:

(a) The bank guarantees issued by ANZ dated 16 April 2010 and numbered 108781 and 108783 be rectified by substituting the words "New South Wales Land and Housing Corporation ABN 24 960 729 253" for the words "New South Wales Land & Housing Department Trading As Housing NSW ABN 45754121940".

(b) The forms of indemnity and application for guarantee from Nebax to ANZ dated 16 April 2010 with serial numbers 108781 and 108783 be rectified by substituting the words "New South Wales Land and Housing Corporation ABN 24 960 729 253" for the words "New South Wales Land & Housing Department trading as Housing NSW ABN 45754121940".

(7) The appellants are to pay the costs of the Corporation and ANZ in the Court of Appeal.