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Court of Appeal
Supreme Court

New South Wales

Case Name:	Inghams Enterprises Pty Limited v Hannigan
Medium Neutral Citation:	[2020] NSWCA 82
Hearing Date(s):	11 December 2019
Date of Orders:	4 May 2020
Decision Date:	4 May 2020
Before:	Bell P at [1]; Meagher JA at [118]; Gleeson JA at [158]
Decision:	(1) Grant leave to appeal. (2) Allow the appeal. (3) Set aside orders (1) and (3) made by Slattery J on 16 September 2019. (4) Declare that the dispute the subject of the respondent's Notice of Dispute dated 29 May 2019 is not required to be submitted to arbitration pursuant to cl 23.6 of the Queensland Broiler Chicken Growing Agreement between the parties dated 22 September 2015. (5) The respondent pay the appellant's costs of the proceedings at first instance and on appeal.
Catchwords:	ARBITRATION – multi-tiered dispute resolution clause – clause included as a component an arbitration clause for certain types of disputes – proper construction of arbitration clause and its scope – principles applicable to the construction of such clauses. CONTRACT – dispute resolution clause – clause contemplating court proceedings in some

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circumstances and arbitration proceedings in other circumstances – proper construction of the clause – whether a claim for damages for breach of contract "concerned" a "monetary amount payable and/or owed" "under" the agreement.
CONTRACT – construction and interpretation – multi-tiered dispute resolution clause – principles applicable to construction of dispute resolution clauses.

CONTRACT – waiver – whether commencement of earlier court proceedings seeking declarations as to breach of contract resulted in waiver of right to submit claim for damages for breach of contract to arbitration.

Legislation Cited:

Civil Procedure Act 2005 (NSW) s 26(1)
Foreign States Immunities Act 1985 (Cth) s 11(1)
Income Tax Assessment Act 1936 (Cth) s 160U(3)
International Arbitration Act 1974 (Cth)
Jurisdiction of Courts (Cross-Vesting) Act 1987 (NSW) s 5(7)
Land Title Act 1994 (Qld) s 62
Supreme Court Act 1970 (NSW) s 101(2)(r)

Cases Cited:

AAP Industries Pty Limited v Rehaud Pte Limited [2015] NSWSC 468
Ace Insurance Ltd v Moose Enterprise Pty Ltd [2009] NSWSC 724
Akai Pty Ltd v People's Insurance Co Ltd (1996) 188 CLR 418; [1996] HCA 39
Armacel Pty Ltd v Smurfit Stone Container Corporation (2008) 248 ALR 573; [2008] FCA 592
Attorney General for New South Wales v Melco Resorts & Entertainment Limited [2020] NSWCA 40
Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99; [1973] HCA 36
Australian Health & Nutrition Association Ltd v Hive Marketing Group Pty Ltd (2019) 99 NSWLR 419; [2019] NSWCA 61
Australian Securities Commission v Lord (1991) 33 FCR 144; (1991) 105 ALR 347
BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd (2008) 168 FCR 169; [2008] FCA 551
Cape Lambert Resources Ltd v MCC Australia Sanjin

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Mining Pty Ltd [2013] WASCA 66; (2013) 298 ALR 666
Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd (1987) 10 NSWLR 468
Cell Tech Communications Pty Ltd v Nokia Mobile Phones (UK) Ltd (1995) 58 FCR 365
Chan v Cresdon Pty Ltd (1989) 168 CLR 242; [1989] HCA 63
Cherry v Steele-Park (2017) 96 NSWLR 548; [2017] NSWCA 295
Comandate Marine Corporation v Pan Australia Shipping Pty Ltd (2006) 157 FCR 45; [2006] FCAFC 192
Commissioner of Taxation (Cth) v Sara Lee Household & Body Care (Australia) Pty Ltd (2000) 201 CLR 520; [2000] HCA 35
Commonwealth v Amann Aviation Pty Ltd (1992) 174 CLR 64; [1991] HCA 54
Concut Pty Ltd v Worrell (2000) 75 ALJR 312; [2000] HCA 64
Continental Bank NA v Aeakos Compania Naviera SA [1994] 1 WLR 588
Corporate Affairs Commission (SA) v Australian Central Credit Union (1985) 157 CLR 201; [1985] HCA 64
Electra Air Conditioning BV v Seeley International Pty Ltd [2008] FCAFC 169
Electricity Generation Corporation v Woodside Energy Ltd; Woodside Energy Ltd v Electricity Generation Corporation (2014) 251 CLR 640; [2014] HCA 7
Energy Resources of Aust Ltd v Commissioner of Taxation (2003) 52 ATR 120
FAI General Insurance Co Ltd v Ocean Marine Mutual Protection & Indemnity Association (1997) 41 NSWLR 117
Faxtech Pty Ltd v ITL Optronics Ltd [2011] FCA 1320
Fiona Trust & Holding Corporation v Privalov [2007] UKHL 40; [2007] 4 All ER 951
Firebird Global Master Fund II Ltd v Republic of Nauru (2015) 258 CLR 31; [2015] HCA 43
Francis Gregory Hannigan v Inghams Enterprises Pty Limited [2019] NSWSC 321
Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd (1996) 39 NSWLR 160; (1996) 131 FLR 422

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Galafassi v Kelly (2014) 87 NSWLR 119
Gaynor v Attorney General of New South Wales [2020] NSWCA 48
Global Partners Fund Limited v Babcock & Brown Limited (in liq) [2010] NSWCA 196; (2010) 79 ACSR 383
Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd [2015] VSCA 190
Hancock Prospecting Pty Ltd v Rinehart (2017) 257 FCR 442; [2017] FCAFC 170
Harding v Wealands [2007] 2 AC 1; [2006] UKHL 32
Hi-Fert Pty Ltd v Kiukiang Maritime Carriers (No 5) (1998) 90 FCR 1; (1998) 159 ALR 142
HIH Casualty & General Insurance Ltd (in liq) v RJ Wallace (2006) 68 NSWLR 603; [2006] NSWSC 1150
IBM Australia Ltd v National Distribution Services Ltd (1991) 22 NSWLR 466; (1991) 100 ALR 361
Inghams Enterprises Pty Ltd v Francis Gregory Hannigan [2019] NSWSC 1186
Insigma Technology Co Ltd v Alstom Technology Ltd [2009] 3 SLR 936
JTA Le Roux Pty Ltd as trustee for the FLR Family Trust v Lawson [2013] WASC 293
Kraft Foods Group Brands LLC v Bega Cheese Limited (2018) 358 ALR 1; [2018] FCA 549
Lainson Holdings Pty Ltd v Duffy Kennedy Pty Ltd [2017] NSWSC 203
Mann v Paterson Constructions Pty Ltd [2019] HCA 32; (2019) 93 ALJR 1164
Mastrobuono v Shearson Lehman Hutton Inc. 514 U.S. 52 (1995)
McCann v Switzerland Insurance Australia Limited (2000) 203 CLR 579; [2000] HCA 65
Mineral Resources Ltd v Pilbara Minerals Ltd [2016] WASC 338
Mitsubishi Motors Corp v Soler-Chrysler Plymouth Inc 473 US 614 (1985)
Mobis Parts Australia Pty Ltd v XL Insurance Company SE [2016] NSWSC 1170
Morris-Garner v One Step (Support) Ltd [2019] AC 649; [2018] UKSC 20
Moschi v Lep Air Services Ltd [1973] AC 331; [1972] 4 WLUK 46

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Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37
Paharpur Cooling Towers Ltd v Paramount (WA) Ltd [2008] WASCA 110
Paper Products Pty Ltd v Tomlinsons (Rochdale) Limited (1993) 43 FCR 439; [1993] FCA 346
Parnell Manufacturing Pty Ltd v Lonza Ltd [2017] NSWSC 562
Perovich v Whitton (No 2) (2016) 250 FCR 272; [2016] FCAFC 152
Photo Production Ltd v Securicor Transport Ltd [1980] AC 827; [1980] 2 WLUK 146
Plenary Research Pty Ltd v Biosciences Research Centre Pty Ltd [2013] VSCA 217
Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR 589; [1981] HCA 45
Progressive Mailing House Pty Ltd v Tabali Pty Ltd (1985) 157 CLR 17; [1985] HCA 14
PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission [2011] FCAFC 52
Queensland Premier Mines Pty Ltd v French (2007) 235 CLR 81; [2007] HCA 53
Recyclers of Australia Pty Ltd v Hettinga Equipment Inc (2000) 100 FCR 420; [2000] FCA 547
Rinehart v Hancock Prospecting Pty Ltd [2019] HCA 13; (2019) 366 ALR 635
Rinehart v Rinehart (No 3) (2016) 257 FCR 310
Rinehart v Welker (2012) 95 NSWLR 221; [2012] NSWCA 95
Robinson v Harman (1848) 1 Exch 850; 154 ER 363
Rotheberger Australia Pty Ltd v Poulsen [2003] NSWSC 788
Royal Bank of Scotland plc v Babcock & Brown DIF III Global Co-Investment Fund LP [2017] VSCA 138
Samick Lines Co Ltd v Owners of the “Antonis P Lemos” [1985] AC 711
Tanning Research Laboratories Inc v O’Brien (1990) 169 CLR 332; [1990] HCA 8
TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia (2013) 251 CLR 533; [2013] HCA 5
Tea Trade Properties Ltd v CIN Properties Ltd (1990) 1 EGLR 155

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	The Queen v Khazal (2012) 246 CLR 601; [2012] HCA 26 Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52 Wilkie v Gordian Runoff Ltd (2005) 221 CLR 522; [2005] HCA 17 Zhu v Treasurer of the State of New South Wales (2004) 218 CLR 530; [2004] HCA 56
Texts Cited:	G B Born, International Commercial Arbitration (2nd ed, 2014, Wolters Kluwer) A Briggs, Agreements on Jurisdiction and Choice of Law (2007, Oxford University Press) M Davies (ed), Jurisdiction and Forum Selection Clauses in International Maritime Law (2005, Kluwer Law International) M Davies, A S Bell, P L G Brereton and M Douglas, Nygh's Conflict of Laws in Australia (10th ed, 2019, LexisNexis Butterworths) D W Greig and J L R Davis, The Law of Contract (1987, The Law Book Company Limited) J D Heydon, Heydon on Contract (2019, Lawbook Co) D Joseph, Jurisdiction and Arbitration Agreements and their Enforcement (3rd ed, 2015, Sweet & Maxwell) K Lewison, The Interpretation of Contracts (5th ed, 2011, Sweet & Maxwell) K Lewison, The Interpretation of Contracts (6th ed, 2015, Sweet & Maxwell)
Category:	Principal judgment
Parties:	Inghams Enterprises Pty Limited (Applicant) Francis Gregory Hannigan (Respondent)
Representation:	Counsel: P S Braham SC, D Neggo (Applicant) M S Henry SC (Respondent) Solicitors: Paradise Charnock O'Brien (Applicant) Hannigans Solicitors (Respondent)
File Number(s):	2019/307488
Publication Restriction:	N/A

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Decision under appeal:

Court or Tribunal:	Supreme Court of New South Wales
Jurisdiction:	Equity – Duty List
Citation:	[2019] NSWSC 1186
Date of Decision:	16 September 2019
Before:	Slattery J
File Number(s):	2019/269478

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

Inghams Enterprises Pty Limited (**Inghams**) entered into a chicken growing contract (**the Agreement**) with Mr Francis Gregory Hannigan (**Mr Hannigan**), under which Mr Hannigan received batches of one day old chicks from Inghams, grew them in sheds into chickens and returned them to Inghams. For this service, Inghams paid Mr Hannigan a "Fee", as defined in the Agreement. The Agreement closely regulated the process of the supply of chicks and return of chickens, and the standard of care expected of Mr Hannigan whilst the chicks were in his custody.

On 8 August 2017, Inghams purported to terminate the Agreement and refused to supply chicks for growing to Mr Hannigan. On 30 August 2017, Mr Hannigan commenced proceedings in the Supreme Court seeking a declaration that Inghams' purported termination of the Agreement was wrongful (**the 2017 proceedings**). He did not seek damages in those proceedings, but he reserved his rights in correspondence and before the Court. The 2017 proceedings were heard by Robb J, who entered judgment for Mr Hannigan on

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29 March 2019, declaring in effect that Inghams had wrongfully terminated the Agreement. Inghams resumed supplying chicks to Mr Hannigan on or about 17 June 2019.

Mr Hannigan issued a Notice of Dispute to Inghams dated 29 May 2019, seeking damages from Inghams for loss of profits, based on Inghams' failure to supply chicks to Mr Hannigan from 8 August 2017 (the purported termination date by Inghams) to 17 June 2019 (the resumed dated of supply). A mediation was unsuccessfully undertaken by the parties on 28-29 August 2019, and thus Mr Hannigan contended that cl 23.6 of the Agreement entitled him to refer the dispute to arbitration. Clause 23.1 of the Agreement provided:

> "A party must not commence court proceedings in respect of a dispute arising out of this Agreement ("**Dispute**") (including without limitation any Dispute regarding any breach or purported breach of this Agreement, the interpretation of any of its provisions, any matters concerning a party's performance or observance of its obligations under this Agreement, or the termination or the right of a party to terminate this Agreement) until it has complied with this clause 23."

Clause 23 made provision, in sub-clauses 3 and 4, for the initial informal and then formal mediation of disputes. Clause 23.6 provided as follows:

> "If:
>
> 23.6.1 the Dispute concerns any monetary amount payable and/or owed by either party to the other under this Agreement, including without limitation matters relating to determination, adjustment or renegotiation of the Fee under Annexure 1 or under clauses 9.4, 10, 11, 12, 13 and 15.3.3; and
>
> 23.6.2 the parties fail to resolve the Dispute in accordance with Clause 23.4 within twenty eight (28) days of the appointment of the mediator
>
> then the parties must (unless otherwise agreed) submit the Dispute to arbitration using an external arbitrator (who must not be the same person as the mediator) agreed by the parties or, in the absence of agreement, appointed by the Institute Chairman."

Inghams commenced proceedings in the Supreme Court to restrain the referral to arbitration, and sought declarations that (a) Mr Hannigan's damages claim did not fall within cl 23 of the Agreement and that (b) even if it did, Mr Hannigan had waived any entitlement to arbitrate the dispute under cl 23 because of his commencement of the 2017 proceedings.

The primary judge held that Mr Hannigan was entitled to refer his damages claim to arbitration under cl 23.6 of the Agreement.

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The principal issues before the Court of Appeal were:

(1) Whether the primary judge erred in his construction of cl 23.6 of the Agreement, in finding that the claim for damages fell within cl 23.6.1 and could be referred to arbitration (**the construction issue**);

(2) Whether the primary judge erred in not finding that Mr Hannigan had waived his right to refer the dispute to arbitration, pursuant to cl 23.6 of the Agreement (**the waiver issue**).

The Court held (Meagher JA, Gleeson JA agreeing, Bell P dissenting),

granting leave to appeal and allowing the appeal:

As to the construction issue:

(1) By Meagher and Gleeson JJA: the primary judge erred in his construction of cl 23.6 of the Agreement. The subject matter of the notified dispute, being a claim for unliquidated damages, was not a claim to or about an amount "payable" or "owed" by Inghams to Mr Hannigan under the Agreement, nor was it a dispute which affected or related to the negotiation, adjustment or determination of any such amount. As the claim did not concern a monetary amount payable under the Agreement, and as the obligation to pay damages for breach of contract was not created by or did not arise under the Agreement, the Court held that the dispute was not a dispute which fell within cl 23.6.1. Accordingly, the dispute was not one which must have, in the absence of any ad hoc agreement, been submitted to arbitration: [127]-[156]; [158].

(2) By Bell P (dissenting): the primary judge did not err in his construction of cl 23.6 of the Agreement. A liberal approach should be applied to the construction of the dispute resolution clause, based both on the legal principles applicable to dispute resolution clauses and a number of textual indications in cl 23.6.1, suggesting that the parties intended the clause to be construed broadly. Accordingly, the Dispute in question did fall within the ambit of cl 23.6, with Mr Hannigan entitled to pursue his claim for damages by way of arbitration: [68]-[107].

(3) Discussion by Bell P of dispute resolution clauses and the principles applicable to their interpretation: [48]-[67] (Bell P).

As to the waiver issue:

(4) By Meagher and Gleeson JJA: as the dispute was not required to be referred to arbitration, the waiver issue did not arise. However, agreeing with Bell P's reasoning in this respect, if the dispute was required to be referred to arbitration, Mr Hannigan had not waived his right to insist that occur: [118]; [158].

(5) By Bell P: the primary judge did not err in finding that Mr Hannigan had not waived his right to refer the dispute to arbitration. There had been no unequivocal abandonment in or by reason of the 2017 proceedings

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of any right to arbitrate the question of damages for breach of contract at some time in the future. Further, cl 23.11 of the Agreement authorised court proceedings to be pursued for urgent declaratory relief, and the relief sought in the 2017 proceedings could be so characterised: [109]-[112].

JUDGMENT

1 **BELL P**: This is an application for leave to appeal from the decision of Slattery J (**the primary judge**) of 16 September 2019, concerning the proper forum for the determination of a claim for damages for breach of contract, the relevant contract being a standard form chicken growing contract (**the Agreement**) between Mr Francis Gregory Hannigan (**Mr Hannigan**) and Inghams Enterprises Pty Limited (**Inghams**).

2 Mr Hannigan sought to have his claim referred to arbitration, pursuant to cl 23.6 of the Agreement but Inghams resisted, initiating proceedings in this Court to restrain the commencement or continuation of any arbitration and seeking declarations as to the proper construction of the Agreement.

3 As shall be seen, the dispute resolution clause in the Agreement contemplates the litigation of some disputes in court proceedings and the arbitration of other disputes, following a preliminary mediation requirement. At first instance, the primary judge held that the claim for damages fell within the scope of the arbitration sub-clause and, accordingly, declined to restrain the commencement or continuation of the arbitration and dismissed Inghams' proceedings: [2019] NSWSC 1186.

4 Inghams seeks leave to appeal because of the fact that it was considered that the value of the outcome of the real issue in dispute, namely the question of forum, did not exceed $100,000 with the consequence that s 101(2)(r) of the *Supreme Court Act 1970* (NSW) applied: see, generally, *Gaynor v Attorney General of New South Wales* [2020] NSWCA 48 at [13]-[20].

5 Inghams raised two main issues on the prospective appeal:

(1) whether the primary judge erred in finding that the notified dispute between the parties must be referred to arbitration, pursuant to cl 23.6 of the Agreement; and

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(2) whether the primary judge erred in not finding that Mr Hannigan had waived his right to refer the dispute to arbitration pursuant to cl 23.6 of the Agreement.

6 In my opinion, leave to appeal should be granted in circumstances where final and injunctive declaratory relief was sought, the arguments were not free of complexity and called for a consideration of the principles applicable to the interpretation of a complex dispute resolution clause, and the ultimate commercial ramifications for the parties were significant.

The Agreement

7 Under the Agreement entered into on 22 December 2015, Mr Hannigan receives batches of one day old chicks (referred to in the Agreement as "Birds") from Inghams, grows them in sheds into chickens and returns them to Inghams. For this service, Inghams pays Mr Hannigan a "Fee", as defined in the Agreement. The Agreement closely regulates the process of the supply of chicks and return of chickens, and the standard of care expected of Mr Hannigan whilst the chicks are in his custody.

8 Inghams' general obligations under the Agreement are defined in cl 3.1 and 3.2 of the Agreement, as follows:

> "3.1 Subject to this Agreement, the availability of Chickens and the Grower's capacity to raise those Chickens (in accordance with the terms and conditions of the Agreement), Inghams will supply Batches to the Grower and the Grower will accept and grow those Birds for Inghams in the Sheds.
>
> 3.2 Inghams will so far as is reasonably practicable supply the Grower with Batches at placement densities commensurate with the Commercial Growers or such other placement densities which may be agreed by Inghams with the Grower Representative from time to time but subject to variation:
>
> 3.2.1 in accordance with Annexure 3;
>
> 3.2.2 if the Grower requests that it receive a quantity of Birds for a particular Batch that is less than would be required pursuant to clause 3.2;
>
> 3.2.3 taking into consideration any relevant Animal Welfare Standards;
>
> 3.2.4 taking into consideration any broiler growing standards;
>
> 3.2.5 taking into consideration any other provision of this Agreement; and/or
>
> 3.2.6 if Inghams' farming standards change or if the breed or genetics of the Chickens change."

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9 One oddity of the Agreement which may present issues in the assessment of any claim for damages, irrespective of the forum in which that claim is determined, is that it does not appear to specify the number of Batches that Inghams will supply per year or during the life of the Agreement. The reference to "placement densities commensurate with the Commercial Growers" in cl 3.2 appears to reflect the fact that a grower such as Mr Hannigan is a member of a pool or collective and, by a complex series of formulae in Annexures 2 and 3 of the Agreement, the fee paid to and efficiency rating of any one grower in the pool is affected by his or her performance relative to other growers. It is not necessary to go into the complexity of such formulae, other than to note that they have implications for the calculation of the damages claimed in the present case and the potential complexity of that exercise.

10 Mr Hannigan's general obligations as Grower are provided for in cl 4, with cl 4.1 to 4.7 of the Agreement providing as follows:

> "The Grower must:
>
> 4.1 accept each Batch delivered by Inghams to the Grower pursuant to this Agreement and raise the Birds in each Batch to the stage of maturity determined by Inghams;
>
> 4.2 raise the Birds in accordance with the Manual;
>
> 4.3 prepare the Sheds in readiness for each Batch;
>
> 4.4 be available or present on the Premises when each Batch is delivered;
>
> 4.5 place the Birds in the Sheds upon their delivery;
>
> 4.6 furnish all labour, utilities, water, electricity, litter, bedding and all other supplies (other than those Inghams agrees to supply under this Agreement) required to raise the Birds and comply with its obligations under this Agreement and the Manual;
>
> 4.7 provide adequate well-maintained Sheds for the Birds as required by the Manual ..."

11 Clause 9.1 of the Agreement provides that:

> "For each Batch raised by the Grower and collected by Inghams from the Grower, Inghams will pay the Grower the Payment calculated on the basis of the Fee but varied as may be required by clauses 9, 10 and 11 and Annexure 1".

12 Clause 9.4 of the Agreement provides that:

> "Inghams may deduct from the Payment:

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9.4.1 any amount referable to the weight and/or number of Birds rejected as unfit for processing by Inghams; or

9.4.2 any amount referable to the weight of Birds that are unsuitable based on Animal Welfare Standards including but not limited to Paw Burns, Breast Blisters and Feed-in-Crop received from a Batch of Birds from the Growers premises (including the reasonable costs incurred to return the production process at Inghams' processing plant to meet the relevant food safety standards). The Bird standards and relevant food safety standards are outlined in the Manual; and

9.4.3 any amount referable to Birds which are rejected by reason of the Grower failing to meet appropriate accreditation standards, meaning those Birds can only be processed as a non-accredited commercially grown Bird. In such cases the Fee paid to the Grower in respect of those Birds will be reduced to the current Collective Grower commercially grown Bird fee at that time;

if the number of Birds so rejected exceeds Inghams normal and reasonable expectations at such time".

13 Clause 10.1 of the Agreement provides that:

> "From the commencement of this agreement Inghams will make Payments to the Grower calculated in accordance with Annexure 1 and Annexure 2".

14 Clause 7 of Annexure 1 highlights the complexity of the calculation of the Fee payable for chickens collected by Inghams from the growers, making provision for detailed adjustment by the application of productivity criteria. Again, it is not necessary to descend to further detail in relation to this calculation, other than to note that the calculation of a Fee payable (and thus the calculation of any damages for breach of contract) would not appear to be a straightforward exercise free from complexity.

15 Clause 11 of the Agreement provides:

> "11.1 Where the Payment to be paid to the Grower in respect of any Batch is less than 85% of the Fee in respect of that Batch as a consequence of a single event determined in writing by Inghams to be a disaster, then:
>
> 11.1.1 if the disaster is caused by any negligent or deliberate action by or on behalf of Inghams:
>
> (a) the Batch will not be assessed by reference to the Pool Payment System;
>
> (b) the Batch will not be considered during the determination of the Grower's Efficiency Rating; and
>
> (c) the Grower shall be paid 100% of the Fee for the number of birds placed, reduced by the average mortality of the relevant period;

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11.1.2 if the parties agree that Clause 11.1.1 does not apply and neither party is deemed to have caused the poor performance of the batch, the Grower shall be paid 100% of the group growing fee for all birds collected; or

11.1.3 if the parties agree that the Grower and Inghams have each partially contributed to the cause of the disaster, the Grower shall be paid a percentage between 65% and 100% of the group growing fee, as agreed between Inghams and the Grower Representative (or failing agreement, as determined in accordance with clause 23).

11.2 Where the Grower is not responsible for causing the disaster (as determined under Clause 11.1.1 or 11.1.2) the Batch shall be excluded from any determination of the Grower's Efficiency Rating".

16 Clause 12 of the Agreement provides:

"12.1 The Grower will bear financial losses suffered by Inghams (limited to the cost of all goods supplied to the Grower in accordance with clause 3.2 and excluding all consequential and indirect losses) caused by the negligence of the Grower in raising the Birds, and Inghams may deduct such losses from any Payments due to the Grower subject to the Payment for the Batch in respect of which the losses were suffered being calculated on the basis of 100% of the Fee for all Birds collected.

12.2 Inghams will notify the Grower in writing if the Grower is to be held liable under Clause 12.1.

12.3 Inghams may collect from the Grower and/or raise (or arrange to be collected and/or raised) any Birds to which any losses under Clause 12.1 are referable, in which case:

12.3.1 Inghams will notify the Grower in writing of its intention to do so; and

12.3.2 Inghams may charge to and recover from the Grower the losses and all reasonable expenses incurred by Inghams in taking action under this Clause 12.3

12.4 Any dispute relating to the amount of any loss pursuant to this Clause 12 will be resolved in accordance with clauses 23.4 to 23.10 (inclusive), provided that Inghams will pay to the Grower within fourteen (14) days of the Friday of the week in which the last Birds in the Batch the subject of a notice under Clause 12.2 are collected by Inghams one half of the Payment determined by it to be due to the Grower in respect of the relevant Batch, with an adjustment to be made after the resolution of the Dispute".

17 Clause 15.3.3 of the Agreement provides:

"if any amendments to the Manual are likely to cause a material increase in the cost to the Grower of performing its obligations under this Agreement, the parties will re-negotiate the Fee having regard to the effect of the relevant amendments and in the absence of agreement the matter will be resolved in accordance with clauses 23.4 to 23.10 inclusive".

18 The Agreement contains a dispute resolution clause which is the central clause at issue in the present proceedings. Clause 23 relevantly provides:

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"23.1 A party must not commence court proceedings in respect of a dispute arising out of this Agreement ("**Dispute**") (including without limitation any Dispute regarding any breach or purported breach of this Agreement, the interpretation of any of its provisions, any matters concerning a party's performance or observance of its obligations under this Agreement, or the termination or the right of a party to terminate this Agreement) until it has complied with this clause 23.

23.2 A party claiming that a Dispute has arisen must notify the other party to the Dispute in writing and set out details of the Dispute.

23.3 Each party must use its best efforts to resolve the dispute during the period of thirty (30) days (or such longer period not exceeding ninety (90) days as the parties may mutually agree) after a notice is given under clause 23.2 ("**Initial Period**").

23.4 If the parties are unable to resolve the Dispute within the Initial Period (or any extension of that period which may be agreed in writing) then:

23.4.1 they must within a further seven (7) days appoint a mediator to mediate the Dispute; or

23.4.2 if the parties fail to agree on a mediator within that time, either of them may refer the Dispute for mediation to a mediator nominated by the then Chairman for the time being of the State Branch of the Institute of Arbitrators and Mediators Australia,

and the parties must thereafter mediate the Dispute.

23.5 The terms on which the mediation is conducted and the procedure for the mediation will unless otherwise agreed in writing between the parties and the mediator be in accordance with and subject to the Institute of Arbitrators and Mediators Australian (**IAMA**) Rules for the conduct of Commercial Mediation (or any rules substituted for those Rules by the Institute) applicable at that date.

23.6 If:

23.6.1 the Dispute concerns any monetary amount payable and/or owed by either party to the other under this Agreement, including without limitation matters relating to determination, adjustment or renegotiation of the Fee under Annexure 1 or under clauses 9.4, 10, 11, 12, 13 and 15.3.3; and

23.6.2 the parties fail to resolve the Dispute in accordance with Clause 23.4 within twenty eight (28) days of the appointment of the mediator

then the parties must (unless otherwise agreed) submit the Dispute to arbitration using an external arbitrator (who must not be the same person as the mediator) agreed by the parties or, in the absence of agreement, appointed by the Institute Chairman.

23.7 The parties agree that the arbitration of any matter referred for arbitration will be undertaken by the arbitrator in accordance with and will be governed by the IAMA Arbitration Rules.

23.8 The parties must use their reasonable endeavours to enable the arbitrator to make a determination as quickly as possible and the arbitrator must (unless otherwise agreed in writing) make that determination within 2

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(two) months of accepting the appointment. For that purpose the parties agree to co-operate with the arbitrator and each other in fixing a timetable and taking such steps as are required under that timetable or as may otherwise be reasonably directed by the arbitrator in order to enable the arbitrator to complete the arbitration with[in] that period.

23.9 The written determination of the arbitrator of any matter referred is final and binding on the parties (except for manifest error or fraud).

23.10 Each party must (as applicable):

23.10.1 unless otherwise agreed bear its own costs of resolving a Dispute in accordance with this Clause 23 (other than the costs of an arbitration) and bear equally the fees and proper out of pocket expenses of the mediator and any other third party expenses (including venue hire) related to the mediation; and/or

23.10.2 bear in the proportions and to the extent determined by the arbitrator the costs of the arbitration and any related costs.

23.11 Nothing in this Clause 23 shall prevent the making of an application to the court by any party to the dispute for urgent injunctive or declaratory relief".

The 2017 proceedings and the proceedings at first instance

19 Before considering the proceedings at first instance, an earlier set of proceedings between the parties should be noted.

20 On 8 August 2017, Inghams purported to terminate the Agreement and refused to supply chicks for growing to Mr Hannigan, who maintained in response that the Agreement was still on foot. Inghams contended that there was a chicken growing relationship between the two parties which was not governed by the Agreement because of Mr Hannigan's failure to sign and return the Agreement document. Alternatively, Inghams contended that even if it were bound by the terms of the Agreement, it was entitled to terminate it on account of Mr Hannigan's breach, due to his alleged failure to feed thousands of chickens in contravention of animal welfare standards, and because of his alleged failure to provide Inghams, from time to time, with certain documents relating to the weight of the chickens.

21 Mr Hannigan commenced proceedings in the Supreme Court on 30 August 2017 (**the 2017 proceedings**), seeking a declaration that Inghams' purported termination of the Agreement was wrongful. He did not, however, seek damages in those proceedings and did not (and has never) terminated the Agreement. The speed with which proceedings were commenced reflected their urgency from Mr Hannigan's perspective. His business and livelihood

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were under threat and he wanted the Agreement to continue, seeking a declaration in effect that it remained on foot. At [29]-[30] of his judgment, the primary judge observed that:

> "Mr Hannigan's decision not to include a claim for consequential loss was a deliberate one, constrained as it was, he says, by the commercial circumstances he faced. Mr Henry SC, who also appeared for Mr Hannigan in the 2017 proceedings, explained this to Robb J at a directions hearing on 10 May 2018, in the following terms:
>
> > 'HENRY: There's no claim for damages presently, and I'm not suggesting it would arise in these proceedings. The position on that front is that the plaintiff has reserved its position. Whether it at a later point in time brings a claim for damages is obviously yet to be seen. Frankly, the reason for that approach was to try to have this resolved as soon as possible, because the position is that there's a farm with substantial chicken sheds on it which are empty and have been empty since - I can't recall the date in particular, but it would be late August last year.
> >
> > So the proceedings were brought in the hope to have the question of termination resolved as expeditiously as possible without being delayed by complicating things with further claims for damages and the associated time and cost associated with it. So the plaintiff won't be claiming damages in these proceedings, but that shouldn't be taken as - that's why it's confined in the way it is.'
>
> The commercial reasoning behind this approach is understandable. Mr Henry SC's then statement to the Court is consistent with Mr Hannigan's evidence adduced in these proceedings about his state of mind at the time. He was not cross-examined in these proceedings and his affidavit evidence is accepted. Mr Hannigan explained, 'I wanted to have that dispute determined as quickly as possible'. He has six chicken sheds on his property, which collectively housed approximately 210,000 chickens. The logistics and costs of running those sheds are substantial. For that reason he said, 'I wanted certainty as to whether the Contract remained on foot as soon as possible'. His belief was that 'the quickest way in which I was likely to obtain that certainty, by a judgment of the Court, was to confine the matters in dispute in the [2017] proceedings'. He not unreasonably believed that bringing a claim for damages in the 2017 proceedings would delay, complicate and increase the costs of the 2017 proceedings. Consistently with the position, his counsel stated to the Court, he certainly thought, as he said, that, 'throughout the course of the [2017] proceedings I believed that I had reserved my position to claim damages at a later point if I had such a claim'."

22 The 2017 proceedings were heard by Robb J who entered judgment for Mr Hannigan on 29 March 2019, declaring in effect that Inghams had wrongfully terminated the Agreement: *Francis Gregory Hannigan v Inghams Enterprises Pty Limited* [2019] NSWSC 321. Inghams resumed supplying chicks to Mr Hannigan on or about 17 June 2019.

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Subsequent claim for damages and jurisdictional dispute

23 Mr Hannigan issued a Notice of Dispute to Inghams dated 29 May 2019, seeking damages from Inghams for loss of profits, based on Inghams' failure to supply chicks to Mr Hannigan from 8 August 2017 (the purported termination date by Inghams) to 17 June 2019 (the resumed date of supply).

24 The "Details of Dispute" were relevantly outlined as follows:

> "1. Inghams Enterprises Pty Ltd have failed to supply chickens to Francis Hannigan (Avoca Vale Farm) from 8th August 2017 to 17th June 2019 (date estimated)[.] Inghams Enterprises Pty Ltd are in breach of the Contract for not supplying chickens.
>
> 2. Francis Hannigan has suffered financial loss as a result of Inghams Enterprises Pty Ltd not supplying chickens being 661 days x $3,031.70 per day being $1,992,055.70.
>
> 3. Francis Hannigan claims:-
>
> (i) $1,992,055.70
>
> (ii) Damage to sheds – from lack of use (estimated $150,000.00);
>
> (iii) Electricity – locked into Contract with supplier (details to be supplied);
>
> (iv) Interest (Estimated $100,000.00);
>
> (v) Legal fees (estimated $50,000.00 plus legal fees on Supreme Court proceedings).
>
> (vi) Miscellaneous $20,000.00
>
> 4. The Initial Period (Clause 23.3) commences on Thursday 30 May 2019 and ceases 30 days thereafter – 29 June 2019.
>
> 5. For your ease of reference Clause 23 is attached."

25 A mediation was unsuccessfully undertaken by the parties on 28-29 August 2019 and thus Mr Hannigan contended that cl 23 of the Agreement entitled him to refer the dispute to arbitration (see at [18] above).

26 Inghams commenced proceedings in the Supreme Court to restrain the referral to arbitration, and for declarations that (a) Mr Hannigan's damages claim did not fall within cl 23 of the Agreement and that (b) even if it did, Mr Hannigan had waived any entitlement to arbitrate the dispute under cl 23 because his commencement of the 2017 proceedings meant that he had abandoned reliance upon cl 23 at that time.

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The primary judgment

27 The primary judge held that Mr Hannigan was entitled to refer his damages claim to arbitration under cl 23 of the Agreement, and that he had not waived that entitlement by commencing the 2017 proceedings.

28 After referring to the familiar principles concerning the interpretation of commercial contracts articulated by the High Court in cases such as *Electricity Generation Corporation v Woodside Energy Ltd; Woodside Energy Ltd v Electricity Generation Corporation* (2014) 251 CLR 640; [2014] HCA 7 (**Woodside**) and *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37 (**Mount Bruce**), the primary judge observed (at [56]) that "[w]ithin the broad canons of construction laid down by cases such as *Woodside* and *Wright Prospecting*, arbitration clauses draw specific considerations into focus." In this respect, his Honour referred to the well-known decision of Gleeson CJ in *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165 (**Francis Travel**), where the Chief Justice observed that:

> "An extensive examination of the many cases dealing with the meaning and effect of various common arbitration clauses in contracts was undertaken by Hirst J in *Ethiopian Oilseeds v Rio del Mar* [1990] 1 Lloyd's Rep 86. As his Lordship demonstrated, the expression 'arising out of' has usually been given a wide meaning. Some older cases, such as *Crane v Hegeman-Harris Co Inc* [1939] 4 All ER 68 and *Printing Machinery Co Ltd v Linotype & Machinery Ltd* [1912] 1 Ch 566, which held that arbitration agreements expressed in a certain manner or entered into in certain circumstances did not permit an arbitrator to deal with a claim for rectification, have been confined by later authorities to their special facts, and should not now be regarded as indicating the correct general approach to problems of this kind.
>
> When the parties to a commercial contract agree, at the time of making the contract, and before any disputes have yet arisen, to refer to arbitration any dispute or difference arising out of the agreement, their agreement should not be construed narrowly. They are unlikely to have intended that different disputes should be resolved before different tribunals, or that the appropriate tribunal should be determined by fine shades of difference in the legal character of individual issues, or by the ingenuity of lawyers in developing points of argument."

The primary judge noted that these principles were further discussed by Bathurst CJ in *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95 (**Welker**), and by the Full Court of the Federal Court of Australia in *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442; [2017] FCAFC 170

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(**Hancock Prospecting**). He referred in particular to Bathurst CJ's observation in *Welker* at [121] that, irrespective of the language of the clause, the Court should not apply a presumption that parties are likely to have intended all of their disputes to be decided by the one tribunal.

29 The essence of the primary judge's reasoning is contained in [59]-[66] of the primary judgment. His Honour began by noting the breadth of the word "concerns" in cl 23.6 of the Agreement, stressing that it was not confined to claims in debt or amounts payable or that may be calculated as payable arising under express terms of the Agreement: at [59]. His Honour then observed (at [60]) that:

> "Giving appropriate emphasis to the word 'concerns' in clause 23.6 readily accommodates within the words of the Contract the considerations that Gleeson CJ emphasised in *Francis Travel* about the approach to be considered in construing arbitration clauses."

30 His Honour then accepted the submission by senior counsel for Mr Hannigan that the reference to cl 12 in cl 23.6 provided a telling answer to Inghams' submission that the Agreement contemplated that arbitration was to be used solely for monetary disputes, such as in relation to the calculation of a Fee under the various formulae contained in the Agreement.

31 The submission accepted by the primary judge was that "clause 12.1 defies that proposition." As the primary judge held (at [62]), "[n]o monetary amount is able to be directly calculated from clause 12, as being payable under the Contract. Rather, clause 12 in substance describes no more than a claim for damages that Inghams may have, as its words bear out: 'the Grower *will bear financial losses* suffered by Inghams'." (emphasis in original).

32 The significance of this submission lay in the fact that no genus of dispute could be derived from the specific clauses referred to in cl 23.6.1 to suggest what did and did not fall within the scope of the arbitration agreement constituted by that sub-clause. This was only emphasised, in the primary judge's opinion, by the fact that that clause used the words "including without limitation": at [63].

33 The primary judge then observed (at [64]) that:

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> "…Inghams' construction of clause 23 introduces a degree of arbitrariness to the operation of the clause that does not seem consonant with the predictable operation of a clause designed to provide rapid certainty in a commercial contract. As Mr Henry SC points out, if Mr Hannigan received chicks and performed his part of the bargain by growing them and they were in turn collected by Inghams, ordinarily the Fee calculated in accordance with clause 9 would become due to Mr Hannigan. Mr Hannigan could attempt to recover the fee by suing on clause 9 as an action in debt. In that case, clause 23.6.1 would operate to allow the dispute to be referred to arbitration. Alternatively, Mr Hannigan could sue to recover the money as damages for breach of contract, that is, a breach of the obligation to pay the Fee. In these circumstances, clause 23.6.1 would, on Inghams' construction, not operate to allow referral of the dispute to arbitration. Such inconsistency in outcome between two modes of suing for non-payment of the same fee could hardly have been intended by the contracting parties."

His Honour continued (at [65]):

> "… it does no violence to the words of clause 23.6.1 to see that in an action for breach of contract the calculation of the quantum of the 'monetary amount payable and/or owed by either party to the other under this agreement' is the measure of the ultimate damages that may be awarded for breach of this Contract. What is actually payable as a Fee under the Contract would be a critical integer in any damages calculation at the suit of Mr Hannigan. At least in that sense, it can be said without difficulty that the dispute 'concerns' such 'money amounts'.

34 On the question of waiver, the primary judge held that the bringing of the 2017 proceedings was not an abandonment of a right to seek damages in a subsequent arbitration, that Mr Hannigan had reserved his right to do so and that this was apparent from the terms of [24] of the earlier decision in the 2017 proceedings, in which Robb J had said:

> "Thirdly, it is notable that, by his prayers for relief, Mr Hannigan only seeks declarations that the parties are bound by a particular agreement, and that Inghams' 8 August 2017 letter did not terminate the agreement. Mr Hannigan has not sought any consequential relief, either in the nature of orders obliging Inghams to implement the agreement, or ordering Inghams to pay damages to Mr Hannigan for breach of the agreement. As Inghams ceased to deliver chickens to Mr Hannigan after it purported to terminate the agreement, it may be imagined that Mr Hannigan may have suffered some damage. The Court does not know what Mr Hannigan's aspirations are concerning the possible continuity of the performance of the agreement, if it is found by the Court to be valid and to continue in effect. The Court does not know what course Inghams proposes to take in that event. If Mr Hannigan succeeds in these proceedings, the only result will be that he will establish that he has an agreement in terms of the Inghams Agreement, and that the agreement has not been terminated. Mr Hannigan will apparently be satisfied with that outcome, and Inghams has not suggested that Mr Hannigan's claims are incomplete as he has not sought in these proceedings all of the relief to which he may be entitled. As the parties have been content to proceed on that basis, so will the Court."

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35 Further, the primary judge characterised the 2017 proceedings as falling within cl 23.11 of the Agreement, concluding that Mr Hannigan's "election to take the course of commencing proceedings in the Court comes within an exception to clause 23 in the Contract and is not incompatible with his present attempts to use of [sic] clause 23": at [82].

Submissions on appeal

36 As noted at [5] above, Inghams raised two issues which may conveniently be labelled "the construction issue" and "the waiver issue".

The construction issue

37 In relation to the construction issue, Inghams contended that the primary judge erred in his construction of cl 23.6 of the Agreement, submitting that the correct construction of cl 23.6 is as follows:

> "a. it applies only where the dispute *concerns* the monetary amount – the monetary amount must itself be the subject matter of the dispute;
>
> b. the phrase *payable and/or owed* means that the monetary amount must be a liquidated amount due for payment (which the amount claimed in the dispute notice is not, because it is not a payment actually earned by Mr Hannigan for raising chickens); and
>
> c. it must arise "*under the agreement*" such that the obligation to pay is found in a clause of the agreement (rather than as a secondary obligation to pay damages)." (emphasis in original).

38 In written submissions, Inghams raised the following textual considerations as to why its construction of the clause should be preferred:

(1) As a matter of ordinary language, a dispute "concerns" a monetary amount payable under an agreement if it is a dispute *about* the monetary amount. It is not sufficient that one integer in the calculation of a disputed claim is a monetary amount that would have been payable under the Agreement had different circumstances come to pass.

(2) The scope of cl 23.6 is to be construed by reference to the differently and more broadly drafted cl 23.1, with such difference in drafting weighing heavily against a broad reading of cl 23.6. In this respect, it was submitted that the primary judge's construction of cl 23.6 tended to remove that distinction.

(3) The "list" of matters referred to in cl 23.6.1 includes matters relating to "determination, adjustment or renegotiation of the Fee" or a number of other specified clauses, all of which concern the manner of calculation or adjustment of various monetary amounts payable under the Agreement. It was submitted that, although the list was obviously not

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intended to be exhaustive, using as it did the phrase "including without limitation", it was nonetheless relatively narrow in its scope.

(4) The use of the phrase "payable and/or owed" suggests that damages claims were not intended to be covered, as the word "payable" connotes a legally enforceable obligation to pay. In this respect, reference was made to *Grocon Constructors (Victoria) Pty Ltd v APN DF2 Project 2 Pty Ltd* [2015] VSCA 190 at [118ff]. It was submitted that there was no legally enforceable obligation to pay damages for breach of the Agreement pending the judicial determination of Mr Hannigan's claim and that no money could be "owed" until determination of the claim. Thus, it was submitted that the dispute in the present case did not concern any amount "payable and/or owed" by Inghams.

(5) The need for amounts payable to be payable "under the agreement" maintained a distinction between primary obligations to pay money (which might be owed or payable under the Agreement) and secondary obligations arising upon breach (which might become payable upon judgment being given by reason of the judgment, but which are not ever payable "under the agreement").

39 In oral submissions, Mr Braham SC who appeared on behalf of Inghams attacked the primary judge's reliance on *Francis Travel* to justify a broad interpretation of the language used in cl 23.6. He submitted that Gleeson CJ's observations in that case proceeded on the basis, to use the Chief Justice's language at 165, that the parties were "unlikely to have intended that different disputes should be resolved before different tribunals". In the present case, however, Mr Braham suggested that the parties had contemplated this very outcome, drawing a distinction in this regard between the language of cl 23.1 and 23.6.1. As such, it was submitted, there was no justification for construing cl 23.6 broadly.

40 Mr Braham also submitted in oral argument that "[t]he Agreement clearly needed a rapid dispute resolution procedure for fee calculation and it was provided by [cl] 23.6.1".

41 Mr Hannigan submitted that Inghams' submissions should be rejected for the following reasons:

(1) Inghams' submissions involved form prevailing over substance. For example, if Mr Hannigan fulfilled his contractual obligations by growing chicks and, in breach of its obligations, Inghams refused to pay him, he could recover the outstanding money by an action in debt or an action for damages for breach of contract. Although both actions would seek recovery of the same unpaid amount, on Inghams' construction of c

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23.6.1 of the Agreement, the former action would have to be determined by arbitration, whereas the latter action would have to be determined by a court.

(2) The dispute the subject of Mr Hannigan's damages claim need not be *confined* to an amount payable and/or owed under the Agreement. As specified under cl 23.6.1 of the Agreement, provided it "concerns" such an amount, the dispute will fall within the relevant clause. In view of the primary judge's finding at [65] that the Fee payable to Mr Hannigan under the Agreement would be a "critical integer in any damages calculation at the suit of [the respondent]", the dispute the subject of that claim relates to or is connected with the amount payable and/or owed under the Agreement.

(3) Inghams' submission that the monetary amount must be a liquidated amount due for payment was at odds with the terms of cl 23.6.1, and its submission that cl 23.6.1 applies only to primary obligations, but not secondary obligations, is misplaced.

(4) Inghams' submission that no monetary amount was payable within the meaning of cl 23.6.1 of the Agreement because there "is no legally enforceable obligation to pay damages for breach of the agreement pending the judicial determination of Mr Hannigan's claim" was incorrect. Referring to *Cell Tech Communications Pty Ltd v Nokia Mobile Phones (UK) Ltd* (1995) 58 FCR 365 at 375, it was submitted that an entitlement to damages accrues upon breach of contract. Further, it was submitted that it did not follow from the fact that the quantum of damages may not be ascertained at the date of breach that there is no legally enforceable obligation to pay damages.

The waiver issue

42 On the waiver issue, which arises only if its submissions in relation to the construction issue are not accepted, Inghams submitted that the primary judge erred in finding that Mr Hannigan had not waived his right to refer the dispute to arbitration.

43 Inghams submitted that Mr Hannigan did not follow cl 23 of the Agreement in commencing the 2017 proceedings in court. Consequently, it was submitted that Mr Hannigan was now prevented from asserting any right to have the current dispute referred to arbitration for two reasons:

> "First, by commencing and conducting the Earlier Proceedings in this Court, Mr Hannigan acted in a manner inconsistent with his right to have the questions in those proceedings determined in an arbitration, thereby waiving that right: *Expense Reduction Analysts Group Pty Ltd v Boulder Proprietary Gold Mines Limited* (1937) 59 CLR 641… the waiver now extends to the damages claim.

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> Secondly, if Mr Hannigan's construction of clause 23.6 is accepted, then it was open to Inghams to resist the Earlier Proceedings on the basis that the subject matter of the case was required to be submitted to arbitration. Inghams did not do so. The conduct of the parties in conducting the Earlier Proceedings to final judgment indicates an agreement between them not to submit the dispute to arbitration. The present dispute is just a continuation of the dispute the subject of the Earlier Proceedings. It is not open to Mr Hannigan to now act inconsistently with the agreement that the dispute would be resolved in Court."

44 Mr Hannigan responded on the basis that the question whether Inghams lawfully terminated the Agreement on 8 August 2017 (being the subject of the 2017 proceedings) and whether he was entitled to damages for breach of the Agreement post 8 August 2017 were disparate matters. As the primary judge held at [81], the 2017 proceedings primarily concerned events leading up to and including Inghams' invalid letter of termination dated 8 August 2017. The current proceedings, on the other hand, concerned Inghams' failure to supply chicks after 8 August 2017.

45 It was submitted that, as held by the primary judge at [79], "there was a sound reason" for Mr Hannigan not claiming damages for breach of the Agreement in the 2017 proceedings. The issue in the 2017 proceedings was whether Inghams' purported termination of the Agreement was valid. Mr Hannigan's position was that it was invalid, that he did not accept the repudiation constituted by the invalid notice of termination, and that the Agreement remained on foot. Accordingly, unlike the position that would have occurred had the repudiation been accepted and the Agreement terminated with the accrual of a right to loss of bargain damages, Mr Hannigan could not have claimed the damages the subject of his current claim at the time of the 2017 proceedings.

46 Further, Mr Hannigan submitted that cl 23.11 of the Agreement provided that nothing in cl 23 shall prevent the making of an application to the court by any party for urgent injunctive or declaratory relief. As the primary judge held at [82], this "is exactly what Mr Hannigan sought in the 2017 proceedings". Mr Hannigan thus submitted that there was no inconsistency between, or waiver consequent upon, his approaching the Court for declaratory relief in 2017 and subsequently seeking to have a damages claim referred to arbitration.

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47 Additionally, Mr Hannigan submitted that the 2017 proceedings did not fall within cl 23.6.1, and therefore could not have been submitted to arbitration, as they did not concern any monetary amount payable or owed under the Agreement.

Consideration – the construction issue

48 Dispute resolution clauses may be crafted and drafted in an almost infinite variety of ways and styles. The range and diversity of such clauses may be seen in the non-exhaustive digest of dispute resolution clauses considered by Australian courts over the last thirty years, which is appended to these reasons.

49 Dispute resolution clauses may be short form or far more elaborate, as illustrated by the cases referred to in the Appendix. They may be expressed as service of suit clauses: see, for example, *HIH Casualty & General Insurance Ltd (in liq) v RJ Wallace* (2006) 68 NSWLR 603; [2006] NSWSC 1150 (**HIH Casualty**). They may provide for arbitration: see, for example, *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533; [2013] HCA 5 (**TCL Air Conditioner**). They may be standard form: see, for example, *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45; [2006] FCAFC 192 (**Comandate**). They may be bespoke: see, for example, *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13; (2019) 366 ALR 635 (**Rinehart**). They may be exclusive or non-exclusive: see, for example, *FAI General Insurance Co Ltd v Ocean Marine Mutual Protection & Indemnity Association* (1997) 41 NSWLR 117 at 120-124 (**FAI**). They may be asymmetric: see, for example, *Continental Bank NA v Aeakos Compania Naviera SA* [1994] 1 WLR 588. They may be optional: see, for example, *Paharpur Cooling Towers Ltd v Paramount (WA) Ltd* [2008] WASCA 110 (**Paharpur**); *HIH Casualty*. They may and often will be coupled with choice of law clauses: see, for example, *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418; [1996] HCA 39. They may be multi-tiered, providing first for a process of mediation, whether informal or formal, or informal and then formal, before providing for arbitral or judicial dispute resolution: see, for example, *Electra Air Conditioning BV v Seeley International*

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Pty Ltd [2008] FCAFC 169; *Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd* [2013] WASCA 66; (2013) 298 ALR 666.

50 Dispute resolution clauses are just as capable of generating litigation as any other contractual clause, and the law reports are replete with cases concerned with the construction of such clauses. The cases referred to in the Appendix supply a sample.

51 Such clauses have also spawned specialist texts and monographs (eg. D Joseph, *Jurisdiction and Arbitration Agreements and their Enforcement* (3rd ed, 2015, Sweet & Maxwell); A Briggs, *Agreements on Jurisdiction and Choice of Law* (2007, Oxford University Press) (**Briggs**); M Davies (ed), *Jurisdiction and Forum Selection Clauses in International Maritime Law* (2005, Kluwer Law International)) and journal articles too numerous to list. It is not without significance to note in this context that, in his fifth edition of *The Interpretation of Contracts* (2011, Sweet & Maxwell) (**Lewison**), Sir Kim Lewison added a chapter devoted to the interpretation of dispute resolution clauses. This chapter is expanded in the most recent, sixth, edition of *Lewison*, published in 2015. See also M Davies, A S Bell, P L G Brereton and M Douglas, *Nygh's Conflict of Laws in Australia* (10th ed, 2019, LexisNexis Butterworths) at 7.59 - 7.78.

52 The question raised by this appeal is purely one of construction. It is accordingly desirable to begin by identifying the principles applicable to the construction of a dispute resolution clause.

Legal principles applicable to the construction of dispute resolution clauses

53 It has been rightly observed that "the starting point is that the clause should be construed, just as any other contract term should be construed, to seek to discover what the parties actually wanted and intended to agree to": *Briggs* at 4.58; Insigma Technology Co Ltd v Alstom Technology Ltd [2009] 3 SLR 936 at [30]-[33]. In Australia, of course, the search is for the parties' intention, objectively ascertained: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52.

54 In short, the orthodox process of construction is to be followed: *Hancock Prospecting* at [167]; *Rinehart* at [18]. Thus, a dispute resolution clause, like any other clause of a commercial contract, must be construed by reference to

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the language used by the parties, the circumstances known to them and the commercial purpose or objects to be secured by the contract: see *Woodside* at [35]; *Mount Bruce* at [47].

55 Further, as the plurality observed in *Woodside* at [35], citing *Zhu v Treasurer of the State of New South Wales* (2004) 218 CLR 530; [2004] HCA 56 at [82], a commercial contract is to be construed so as to avoid it making commercial nonsense or working commercial inconvenience.

56 Contextual considerations are also important, as the High Court's decision in *Rinehart* (at [26]ff) illustrates. The context in which the dispute resolution clauses had been entered into in the two deeds under consideration in *Rinehart* bore heavily upon the interpretation in that case of the expression "dispute under this deed". The plurality (at [26]) cited with approval the observations of the Full Court of the Federal Court of Australia in *Hancock Prospecting* (the decision under appeal in the High Court), that "[c]ontext will almost always tell one more about the objectively intended reach of such phrases than textual comparison of words of a general relational character": see *Hancock Prospecting* at [193]. In his separate judgment in *Rinehart*, in agreement with that of the plurality on the question of construction, Edelman J observed at [83] that:

> "Every clause in a contract, no less arbitration clauses, must be construed in context. No meaningful words, whether in a contract, a statute, a will, a trust, or a conversation, are ever acontextual. "

57 It is also axiomatic that, in the construction of a contract including an arbitration agreement or an arbitration clause in a commercial agreement, as with the interpretation of a statute, a particular contractual clause or sub-clause must not be construed in isolation but as part of the contract as a whole: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109; [1973] HCA 36; *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522; [2005] HCA 17 at [16]; *Mastrobuono v Shearson Lehman Hutton Inc.* 514 U.S. 52 (1995). In the former case, Gibbs J (as he then was) famously said (at 109):

> "It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the

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> instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another."

58 One consequence of this is that the same clause, or the same phrase in a particular clause, may not bear an identical meaning from case to case: see *FAI* at 120-124 for a discussion of cases where identically worded jurisdiction agreements have been given different constructions.

59 In the context of dispute resolution clauses, whether they be arbitration or exclusive jurisdiction clauses, much authority can be found in support of affording such clauses a broad and liberal construction. A particularly well known statement in this area of discourse is that of Gleeson CJ in *Francis Travel* to which the primary judge referred and which has been reproduced at [28] above. In *Francis Travel*, Gleeson CJ referred to the decision of the United States Supreme Court in *Mitsubishi Motors Corp v Soler-Chrysler Plymouth Inc* 473 US 614 (1985). In that case, at 626, the Supreme Court said that "as with any other contract, the parties' intentions control, but those intentions are generously construed as to issues of arbitrability." (The Court's reference to "arbitrability" was, in context, a reference to the scope of the arbitration agreement.)

60 In *Welker* at [118], Bathurst CJ made reference not only to *Francis Travel* but also to the similarly well known observations of Allsop J (as he then was and with whom Finn and Finkelstein JJ agreed) in *Comandate* at [164], namely that:

> "The authorities … are clear that a liberal approach should be taken. That is not to say that all clauses are the same or that the language used is not determinative. The court should, however, construe the contract giving meaning to the words chosen by the parties and giving liberal width and flexibility to elastic and general words of the contractual submission to arbitration."

61 See also *Global Partners Fund Limited v Babcock & Brown Limited (in liq)* [2010] NSWCA 196; (2010) 79 ACSR 383 at [60] (**Global Partners**), per Spigelman CJ who identified the rationale for the broad construction of arbitration and exclusive jurisdiction clauses in the following passage (at [67]):

> "A significant purpose of an exclusive jurisdiction clause is to ensure that all disputes are determined in a coherent manner by a single jurisdiction. There is a clear commercial interest in minimising the possibility of a dispute being determined by multiple tribunals, with the consequent prospect of divergent

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> findings. Furthermore, the parties, in advance, have determined that a particular jurisdiction is acceptable to them, both in terms of the speed and efficacy of its civil dispute resolution procedures and for the competence and skill of its judges and lawyers."

62 A similar rationale had been identified by French J (as he then was) in *Paper Products Pty Ltd v Tomlinsons (Rochdale) Limited* (1993) 43 FCR 439 at 448; [1993] FCA 346, where his Honour noted that:

> "When the language of the arbitration clause in question is sufficiently elastic, then the more liberal approach of the courts to which Kirby P and others have referred can have some purchase. A wide construction of such clauses can be supported on the basis advanced by Clarke JA that it is unlikely to have been the intention of the parties to artificially divide their disputes into contractual matters which could be dealt with by an arbitrator and non-contractual matters which would fall to be dealt with in the courts. When, as here, the parties have agreed upon a restricted form of words which in their terms, and as construed in the courts, limit the reference to matters arising ex contractu, there is little room for movement."

63 In *TCL Air Conditioner* at [16], French CJ and Gageler J observed that "… parties who enter into an arbitration agreement for commercial reasons ordinarily intend all aspects of the defined relationship in respect of which they have agreed to submit disputes to arbitration to be determined by the same arbitral tribunal".

64 In Australia, unlike other jurisdictions, the process of contractual construction of dispute resolution clauses has not been overlaid by presumptions cf the jurisdictions surveyed in G B Born, *International Commercial Arbitration* (2nd ed, 2014, Wolters Kluwer) at 1325-1338. Thus, in *Welker* at [122], Bathurst CJ, although not eschewing the liberal approach that had been adumbrated in both *Francis Travel* and *Comandate* to the construction of arbitration clauses, rejected the adoption of a presumption that had arguably commended itself to the House of Lords in *Fiona Trust & Holding Corporation v Privalov* [2007] UKHL 40; [2007] 4 All ER 951. To quote from Lord Hoffmann's speech, the presumption was that the court should, in the construction of arbitration clauses, "start from the assumption that the parties, as rational businessmen, are likely to have intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal", and that the clause should be construed in accordance with that presumption, "unless the language makes it clear that certain questions were intended to be excluded from the arbitrator's jurisdiction": at [13]. The Full Court of the Federal

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Court in *Hancock Prospecting* (at [193]) treated *Fiona Trust* as not saying anything different in substance from *Francis Travel* and *Comandate* (the latter case being itself referred to in *Fiona Trust* at [31]).

65 In *Rinehart*, the plurality indicated that the appeals could be resolved with the application of orthodox principles of construction, which required consideration of the context and purpose of the Deeds there under consideration, without reference to *Fiona Trust*: at [18]. In his separate judgment, Edelman J described as a "usual consideration of context" the fact that "reasonable persons in the position of the parties would wish to minimise the fragmentation across different tribunals of their future disputes by establishing 'one-stop adjudication' as far as possible": at [83]. This may have been to treat the considerations underpinning cases such as *Francis Travel*, *Comandate* and *Fiona Trust* as not necessarily giving rise to a *presumption*, but rather as stating a commercially commonsensical *assumption*. It may be observed that Lord Hoffmann's speech in *Fiona Trust* (at [13]) slides from the language of "assumption" to that of "presumption".

66 The proper contemporary approach was eloquently articulated in the following passage in *Hancock Prospecting* (at [167]) which I would endorse:

> "The existence of a 'correct general approach to problems of this kind' does not imply some legal rule outside the orthodox process of construction; nor does it deny the necessity to construe the words of any particular agreement. But part of the assumed legal context is this correct general approach which is to give expression to the rational assumption of reasonable people by giving liberal width and flexibility where possible to elastic and general words of the contractual submission to arbitration, unless the words in their context should be read more narrowly. One aspect of this is not to approach relational prepositions with fine shades of difference in the legal character of issues, or by ingenuity in legal argument (Gleeson CJ in *Francis Travel* at 165); another is not to choose or be constrained by narrow metaphor when giving meaning to words of relationship, such as 'under' or 'arising out of' or 'arising from'. None of that, however, is to say that the process is rule-based rather than concerned with the construction of the words in question. Further, there is no particular reason to limit such a sensible assumption to international commerce. There is no reason why parties in domestic arrangements (subject to contextual circumstances) would not be taken to make the very same common-sense assumption. Thus, where one has relational phrases capable of liberal width, it is a mistake to ascribe to such words a narrow meaning, unless some aspect of the constructional process, such as context, requires it."

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67 For completeness, it may be noted that principles of construction relevant to the question of the *nature* of a dispute resolution clause (that is, as to whether or not it is exclusive or non-exclusive, as opposed to its scope) have been valuably identified and discussed by Giles J (as he then was) in *FAI* at 126-127.

Clause 23

68 Clause 23 of the Agreement, extracted at [18] above, is what might be styled a "multi-tiered" dispute resolution clause. Clause 23.1 contemplates, by implication, that court proceedings may be commenced by a party, but *proscribes* the commencement of court proceedings "until it has complied with this clause 23". Clause 23 makes provision, in subclauses 3 and 4, for the initial informal and then formal mediation of disputes. It also provides in subclause 6 for arbitration of certain types of dispute if there is a failure to resolve the dispute at formal mediation. Clause 23.11 also preserves the ability of the parties to have recourse to the court for urgent injunctive or declaratory relief.

69 It has been observed by the doyen of private international law scholars (see *Briggs* at 4.55-4.56) that:

> "… sometimes a clause will be encountered in which the parties appear to have agreed that a court has jurisdiction, and that disputes may or will be arbitrated. One reaction may be that this is incoherent, and that it has been brought about by the thoughtless copying of precedents. The case-law approaches the interpretation of such clauses, or combinations of clause, however, in a more constructive way. One sensible interpretation, which a court may strive to reach, is that the parties have agreed to submit to arbitration, and that the role of the court is that of supervision of the arbitration, but if neither side refers the dispute to arbitration, the jurisdiction agreement takes effect as the unchallenged provision for dispute resolution. Or to put it another way, the parties agree to the jurisdiction of the court (to be mutually exclusive or not mutually exclusive, as the case may be), but if one party exercises the right to refer the dispute to arbitration, this is thereafter the agreed means of dispute resolution, and the role of the court is supervisory if it is also the seat of the arbitration.
>
> More difficulty arises if the clause appears to make reference to arbitration mandatory, while also providing for the jurisdiction, exclusive or otherwise, of the courts. Where this happens, incoherence is avoided by interpreting the agreement as though the reference to arbitration were optional rather than mutually mandatory. And this may be the only plausible way to make sense of such an arrangement. For reference to arbitration is never fully mandatory: if neither party elects to refer the dispute to arbitration, no third party is going to do it for them." (footnotes omitted).

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70 One of the decisions footnoted by Professor Briggs in the above passage was that of the Supreme Court of New South Wales in *HIH Casualty*. The relevant clauses under consideration in that case have been reproduced in the Appendix to these reasons.

71 Although the Agreement in the present case meets the description in the first sentence of the passage from *Briggs* extracted at [69] above, cl 23 of the Agreement differs significantly from the articles of the reinsurance policy that were the subject of consideration in *HIH Casualty*, although those articles, like cl 23, appeared to contemplate both litigation of disputes arising under this Agreement in "any competent Court in the Commonwealth of Australia" and the arbitration of "[d]isputes arising out of this Agreement or concerning its validity…". The challenge for the Court in *HIH Casualty* was to ascertain whether the proceedings that had been commenced in the Supreme Court should be stayed in favour of arbitration. In the present case, the situation is the converse, namely whether a foreshadowed arbitration should be restrained in favour of litigation.

72 Articles XVIII and XIX in the reinsurance policy in *HIH Casualty* differed in their language in many respects, but most conspicuously, for present purposes, in the use of the prepositional phrase "dispute arising under this Agreement" in Article XVIII, on the one hand, and the different prepositional phrase "[d]isputes arising out of this Agreement" in Article XIX, on the other hand. The Court held (at [98]) that:

> "where, as here, a dispute arises under the policies, provided that the dispute is not in effect a claim for a confirmed balance [in which case it cannot be the subject of a reference to arbitration], HIH has an option to require that dispute to be litigated pursuant to Article XVIII in a competent court in the Commonwealth of Australia of its choosing or, alternatively, to submit that dispute for determination by way of arbitration."

73 Later in his reasons, Einstein J observed (at [116]) that:

> "It is also true that construing the policy as a whole as providing HIH with an option to litigate or arbitrate also satisfies the injunction contained in *Australian Broadcasting Corporation v Australasian Performing Right Association*, namely to construe a contractual document as a whole with a view to insuring an harmonious reading of all the clauses."

74 The decision in *HIH Casualty* did not turn upon the difference in prepositional language between Article XVIII and XIX of the reinsurance policy. In the

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present case, however, Mr Braham sought to attribute much significance to the breadth of the prepositional phrase "arising out of this Agreement" in cl 23.1 by way of contrast to what he submitted was the narrower language in cl 23.6.1, *viz* "the Dispute *concerns* any monetary amount payable and/or owed by either party to the other *under this Agreement*" (emphasis added).

75 It is true that the expression "arising under this agreement" has often been held to be narrower in compass than the phrase "arising out of this agreement" (see, for example, *Welker* at [123] per Bathurst CJ), but it has not always been narrowly construed, as the High Court's recent decision in *Rinehart* illustrates. In some cases, it has been equated with the phrase "arising out of": see *Samick Lines Co Ltd v Owners of the "Antonis P Lemos"* [1985] AC 711 at 727. The Full Court of the Federal Court described it in *Hancock Prospecting* as an "elastic relational phrase": at [205].

76 It must also be appreciated in the present case that cl 23.1 of the Agreement plays a very different role to that played by Article XVIII, for example, in the reinsurance policy considered in *HIH Casualty*. Unlike Article XVIII, cl 23.1 is not a service of suit or form of jurisdiction clause at all. Rather, it has two principal functions. First, it defines the term "Dispute" in unquestionably broad terms, and that term is then used in the balance of cl 23. Second, it proscribes the commencement of court proceedings by a party, until that party "has complied with this clause 23". That, of course, includes cl 23.6.1 to the extent it is engaged.

77 The broadly defined term "Dispute" is employed in cl 23.6.1. Thus, the Dispute in question, which may be the subject of arbitration, may be one arising out of the Agreement including, for example, a dispute "regarding any breach or purported breach of the Agreement". This follows from the definition of "Dispute" in cl 23.1, and the use of that defined term in cl 23.6.1. The critical question then becomes, for the purpose of determining if the dispute in the present case was required to be submitted to arbitration, whether or not it "concerns any monetary amount payable and/or owed by either party to the other under this Agreement". That is a question of construction and characterisation.

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78 In answering that question, the principles of construction I have sought to identify and summarise at [53]-[67] above should be applied. Apart from the fact that the parties were in an ongoing commercial relationship, there was nothing of particular significance going to matters of context that was relied upon by the parties to inform the proper construction of cl 23 generally, and cl 23.6.1 in particular. The focus then necessarily must be on the language employed by the parties in the Agreement.

79 I have already noted the broad definition of "Dispute" in cl 23.1, and the fact that that broadly defined term is carried into cl 23.6.1. The next key word to be considered in cl 23.6.1 is the word "concerns". This is a relational term of indeterminate ambit. It, like any other connecting or prepositional phrase, will take its meaning from its context, which includes the manner in which dispute resolution clauses have been construed in contemporary case law: see *Hancock Prospecting* at [165]; *Welker* at [221] and compare, in the case of statutory interpretation, *Attorney General for New South Wales v Melco Resorts & Entertainment Limited* [2020] NSWCA 40 at [86].

80 Whilst the usual caution is to be applied to consideration of the meaning of a term in other contracts or instruments, some recent examples of judicial consideration of the meaning of the term "concerns" may be given. In *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* [2011] FCAFC 52 at [197], the verb "concern", in the context of "in so far as the proceeding concerns", was giving the meanings "relate to; be about; affect or involve". However, in the earlier decision of *Australian Securities Commission v Lord* (1991) 33 FCR 144; (1991) 105 ALR 347 at 352, the Federal Court held that the term "concerns" (in relation to the phrase "concerns the management or affairs of a body corporate") had a narrower ambit than the phrase "relates to".

81 More recently, in *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31; [2015] HCA 43, the High Court considered the meaning of s 11(1) of the *Foreign States Immunities Act 1985* (Cth) which provides that "[a] foreign State is not immune in a proceeding in so far as the proceeding concerns a commercial transaction". Nettle and Gordon JJ observed (at [186]-[187]) that:

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> " … according to the plain and ordinary meaning of the words of s 11(1), a proceeding for the registration of a foreign judgment for a money sum owed under a commercial transaction is a proceeding which 'concerns' a commercial transaction.
>
> The fact that such a proceeding might also be described as one which concerns the registration of a foreign judgment does not detract from the semasiological propriety of describing it as a proceeding which concerns a commercial transaction. *The connecting term 'concerns' connotes a relationship between the proceeding and a commercial transaction. There is nothing in that term that suggests that a proceeding which concerns a commercial transaction must be one that bears only that single character*." (emphasis added).

82 There is no reason, in my opinion, to give the word "concerns" in cl 23.6.1 of the Agreement a narrow meaning, or to insist that the Dispute must only have a single character i.e. "be about" an amount payable or owed as a fee *cf*. Inghams' submission noted at [38(1)] above. The approach articulated in *Hancock Prospecting*, referred to at [66] above, supports that approach.

83 There are also a number of textual indications in cl 23.6.1 of the Agreement which suggest that the parties intended the clause to be construed broadly. Affording a narrow construction to the word "concerns" would be contrary to those other textual indications of breadth, which include the use of the indefinite pronoun "any" in the phrase "any monetary amount", the alternative formulation "payable and/or owed", and the phrase "including without limitation".

84 As to the use of the word "any" in the phrase "any monetary amount … under this Agreement", "any" is a word that has traditionally been understood to connote a breadth of matters. Thus, for example, in *Plenary Research Pty Ltd v Biosciences Research Centre Pty Ltd* [2013] VSCA 217 at [49], the Victorian Court of Appeal observed that a clause expressed to apply to "any dispute" suggested "a comprehensive approach to the class of disputes". See also *JTA Le Roux Pty Ltd as trustee for the FLR Family Trust v Lawson* [2013] WASC 293 at [74]; *Perovich v Whitton (No 2)* (2016) 250 FCR 272; [2016] FCAFC 152 at [48], in which the Full Court of the Federal Court said that "the word 'any' is a word of very broad import"; *Mineral Resources Ltd v Pilbara Minerals Ltd* [2016] WASC 338 at [61]; and *Lainson Holdings Pty Ltd v Duffy Kennedy Pty Ltd* [2017] NSWSC 203, where Stevenson J noted that "[t]he word 'any' is of the widest import": at [42].

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85 It is also significant, in my opinion, that the parties did not confine the scope of cl 23.6.1 of the Agreement to a dispute as to payment of the Fee or the question of fees more generally, but used the broader concept of "monetary amount", coupled with the indefinite pronoun "any". That composite concept is apt, in my opinion, to include compensatory damages. In oral argument, Mr Braham accepted that the phrase "monetary amount payable" could extend to include unliquidated claims for damages, but submitted that it did not mean this, or extend this far, in the particular context of cl 23 of the Agreement.

86 The requirement that the monetary amount be payable "under this Agreement" does not stand in the way of this construction, for at least two reasons. First, in *Welker* (at [125]), Bathurst CJ said that:

> "…if the outcome of the dispute was *governed or controlled by* the Settlement Deed, then there would be a dispute under the Settlement Deed irrespective of whether the claimant was invoking or enforcing some right created by the Settlement Deed. It may be that that was what the primary judge was referring to when he said the dispute must derive from or depend on the Settlement Deed." (emphasis added).

See also Young JA in *Welker* at [221]-[224]. It may be noted that the Full Court of the Federal Court in *Hancock Prospecting* (at [199]) respectfully regarded Bathurst CJ's interpretation of the phrase "under this Deed" in *Welker* as narrow and not liberal. The Court in *Hancock Prospecting* observed of the phrase that just because "it is a phrase that may be narrower in meaning than other phrases does not mean that its meaning is narrow": at [199].

87 Contractual damages are designed to put a party into the position it would have been in had the contract been performed: *Commonwealth v Amann Aviation Pty Ltd* (1992) 174 CLR 64 at 80; [1991] HCA 54 (**Amann Aviation**). Even applying the arguably narrow meaning given to the expression "under the deed" by Bathurst CJ in *Welker*, it may be said that the amount of compensatory damages for breach of the Agreement will be "governed or controlled by" the Agreement, because it will be by reference to the notional performance of the Agreement that the damages will be quantified. In *Amann Aviation* at 80, Mason CJ and Dawson J observed that:

> "The award of damages for breach of contract protects a plaintiff's expectation of receiving the defendant's performance. That expectation arises out of or is created by the contract. Hence, damages for breach of contract are often

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> described as 'expectation damages'. The onus of proving damages sustained lies on a plaintiff and the amount of damages awarded will be commensurate with the plaintiff's expectation, objectively determined, rather than subjectively ascertained. That is to say, a plaintiff must prove, on the balance of probabilities, that his or her expectation of a certain outcome, as a result of performance of the contract, had a likelihood of attainment rather than being mere expectation."

In this sense, compensatory damages can be said to be payable under the Agreement, in that they will be "governed and controlled" by it and payable as a result of its breach.

88 Secondly, and contrary to Inghams' submission that cl 23.6.1 of the Agreement is only concerned with primary obligations (see [38(5)] above), a secondary obligation to pay damages arises from or under the contract just as much as a primary obligation (although a secondary obligation will generally be implied).

89 In *Moschi v Lep Air Services Ltd* [1973] AC 331 at 350; [1972] 4 WLUK 46 (**Lep Air Services**), Lord Diplock said:

> "Generally speaking, the rescission of the contract puts an end to the primary obligations of the party not in default to perform any of his contractual promises which he has not already performed by the time of rescission ... The primary obligations of the party in default to perform any of the promises made by him and remaining unperformed likewise come to an end as does his right to continue to perform them. *But for his primary obligations there is substituted by operation of law a secondary obligation to pay to the other party a sum of money to compensate him for the loss he has sustained as a result of the failure to perform the primary obligations. This secondary obligation is just as much an obligation arising from the contract as are the primary obligations that it replaces".* (emphasis added).

This passage was fully extracted and cited with approval both by Brennan J in *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 48; [1985] HCA 14 and by Kiefel CJ, Bell and Keane JJ in *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32 at [12]; (2019) 93 ALJR 1164 (**Mann**). The passage was cited in support of the following observation by their Honours in *Mann* (at [12]): "The right to damages for loss of bargain that arises in such a case is, in this respect, no less a creature of the contract than the right to recover sums that become due before its termination."

90 In *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848-849; [1980] 2 WLUK 146 (**Photo Production**), Lord Diplock made it plain that a

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secondary obligation to pay damages was *sourced* in the contract. His Lordship observed:

> "Leaving aside those comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to substituted or secondary obligations on the part of the party in default, and, in some cases, may entitle the other party to be relieved from further performance of his own primary obligations. The secondary obligations of the contract breaker and any concomitant relief of the other party from his own primary obligations also arise by implication of law – generally common law, but sometimes statute, as in the case of codifying statutes passed at the turn of the century, notably the Sale of Goods Act 1893. *The contract, however, is just as much the source of secondary obligations as it is of primary obligations; and like primary obligations that are implied by law, secondary obligations too can be modified by agreement between the parties, although, for reasons to be mentioned later, they cannot, in my view, be totally excluded.* In the instant case, the only secondary obligations and concomitant reliefs that are applicable arise by implication of the common law as modified by the express words of the contract." (emphasis added).

In the same case, Lord Wilberforce (with whom Lord Keith and Lord Scarman agreed) expressly described Lord Diplock's statement that a secondary obligation to pay damages "is just as much an obligation arising from the contract as are the primary obligations that it replaces" as "enlightening", and as a "correct" statement of "the modern law of contract": at 845.

91 What Lord Diplock said as to the *source* of the secondary obligation has been expressly followed or accepted in a number of subsequent decisions, including by Lord Hoffmann (with whom the other Law Lords agreed) in *Harding v Wealands* [2007] 2 AC 1; [2006] UKHL 32 at [44] and, most recently, by Lord Reed (with whom Lady Hale P, Lord Wilson and Lord Carnwath agreed) in *Morris-Garner v One Step (Support) Ltd* [2019] AC 649; [2018] UKSC 20 at [34].

92 In New South Wales, in *Cherry v Steele-Park* (2017) 96 NSWLR 548; [2017] NSWCA 295 at [108] (**Cherry**), Leeming JA, with whom Gleeson and White JJA agreed, said in a case concerning the construction of a guarantee:

> "Even if the contractual damages are somehow outside the scope of 'Guaranteed Money', it is necessary in order for the appellants' construction to be accepted to conclude that the obligation by Bathurst Central to pay damage falls outside the words 'all [Bathurst Central's] other obligations to the [vendors] (monetary or non-monetary, present or future, actual or contingent) arising under or in connection with the Agreement'. *But the obligation to pay damages following a breach of contract is, surely, a classic example of an*

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> *obligation arising under or in connection with that contract.* True it is that according to one classification, the obligation to pay damages is a secondary obligation, rather than a primary obligation. But as Lord Diplock said in *Photo Production Ltd v Securicor Transport Ltd* [1980] UKHL 2; [1980] AC 827 at 849, a contract is 'just as much the source of secondary obligations as it is of primary obligations'." (emphasis added).

93 In D W Greig and J L R Davis, *The Law of Contract* (1987, The Law Book Company Limited) at 1292, it is observed that it followed from Lord Diplock's analysis of primary and secondary obligations in *Photo Production* that:

> "the secondary obligations arise at the time of entering into the contract, and … that any consensual modification or limitation of those secondary obligations (that is, a clause limiting liability in damages) has effect from the time of the making of the contract…"

94 It is entirely consistent with this line of authority that damages for breach of contract may, in cl 23.6.1, be treated as an amount payable under a secondary obligation of the Agreement following breach, especially if one adopts a liberal approach to the construction of cl 23.6.1 as the authorities referred to at [59]-[63] above, on my understanding of them, require. But I am by no means convinced that a liberal approach is necessary to reach this conclusion.

95 In this context, I agree with Meagher JA's observation at [137] that "the description of such amounts as 'payable and/or owed' 'under' the agreement directs attention to the *source* of the underlying payment obligation" (emphasis added). That observation is supported by the High Court's consideration of the phrase "under a contract" in both *Commissioner of Taxation (Cth) v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520; [2000] HCA 35 at [42] and *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81; [2007] HCA 53 at [55], both being decisions to which Meagher JA refers.

96 As the authorities referred to at [89]-[92] above indicate, however, the parties' contract is the source of the right to damages for breach. Indeed, as has been seen, Leeming JA in *Cherry* at [108] described the obligation to pay damages following breach as a "classic example" of an obligation arising under a contract.

97 Not all contractual obligations arise as a result of the parties' agreement; some are implied by operation of law into a contract, as Hope JA's well known decision in *Castlemaine Tooheys Ltd v Carlton & United Breweries Ltd* (1987)

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10 NSWLR 468 at 487 (**Castlemaine Tooheys**) illustrates. Such obligations are no less contractual in nature. Significantly, *Castlemaine Tooheys* was cited by Gleeson CJ, Gaudron and Gummow JJ in *Concut Pty Ltd v Worrell* (2000) 75 ALJR 312 at [23]; [2000] HCA 64. That paragraph of that decision was in turn cited by Nettle, Gordon and Edelman JJ in *Mann* at [195] as authority for the proposition that "the remedial obligation to pay damages for breach of contract has been understood as an obligation 'arising by operation of law'". This is the passage from *Mann* upon which Meagher JA places heavy reliance at [148].

98 Just because an obligation arises by operation of law as opposed to the parties' express agreement does not mean, however, that the contract may not be the source of that obligation. Terms implied by operation of law are not dependent upon the intentions, objectively ascertained, of the parties: *Castlemaine Tooheys* at 487; J D Heydon, *Heydon on Contract* (2019, Lawbook Co) at [10.130]. That the secondary implied contractual obligation to pay damages on breach may be modified by an exclusion or limitation clause also highlights that what is being modified or excluded is another contractual provision, for parties cannot modify the general law but only such obligations as are otherwise implied by operation of law into their contract: see [93] above.

99 To the extent that Nettle, Gordon and Edelman JJ were critical of Lord Diplock's analysis of primary and secondary obligations in *Mann* (and the extent to which they were is not clear – their Honours certainly did not describe his well known analysis as wrong), that criticism did not carry the support of a majority of the Court.

100 It is in this context that it is necessary to return to Mr Braham's central argument referred to at [39] above in relation to *Francis Travel*, and whether the broad and liberal approach towards the construction of arbitration clauses that that case, and others that have followed it, endorsed, should be applied in the present case. In my opinion, it should.

101 Mr Braham's argument, it will be recalled, was that what I have described at [65] above as the commonsense assumption that the parties did not intend to fracture or fragment the resolution of their disputes could not be made in the

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present case because cl 23.1 contemplated court proceedings. This being the case, the argument ran, the liberal approach to the construction of the scope of cl 23.6.1 was not appropriate or called for.

102 Parties to an arbitration agreement may always commence court proceedings. Whilst a stay of such proceedings is mandatory both under the *International Arbitration Act 1974* (Cth) and the uniform Commercial Arbitration Acts of the States, a stay requires a party to first seek it. Unlike court ordered mediation pursuant to the *Civil Procedure Act 2005* (NSW) s 26(1), or a transfer order under the *Jurisdiction of Courts (Cross-Vesting) Act 1987* (NSW) s 5(7) which the Supreme Court of New South Wales may make of its own motion, a court may not order a stay of proceedings and refer a matter to arbitration of its own motion, under either the *International Arbitration Act* or the Commercial Arbitration Acts of the States.

103 Thus, the fact that cl 23.1 of the Agreement contemplates the possibility of court proceedings does not, in my opinion, differentiate the current case from *Francis Travel*. It is always a case of construing the arbitration clause in question to determine its proper scope. What falls outside its scope, properly construed, may be the subject of litigation, and arbitral resolution may not be insisted upon.

104 As noted at [76] above, cl 23.1 is not itself a jurisdiction clause or service of suit clause, as was Article XVIII in *HIH Casualty*. Subject to cl 23.11, cl 23.1 establishes a contractual bar *against* the initiation of court proceedings, and mandates that a particular procedure be followed. That bar may be enforced by a stay application in the jurisdiction in which proceedings have been commenced in the face of it, or by an anti-suit injunction in another jurisdiction. Clause 23.1 is not, in my opinion, a textual contra-indication of the commonsense assumption that the commercial parties to the Agreement did not intend to fragment their dispute resolution processes any more than the language of their contract, liberally construed, required.

105 Clause 23.11 is significant in this regard, because it identifies particular types of cases where it will be appropriate to invoke the jurisdiction of the Court without either mediation or arbitration, namely, disputes where urgent

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interlocutory or declaratory relief is sought. This is not to deny, however, that there may be cases which do not fall within the ambit of cl 23.11, but which are also outside the scope of cl 23.6.1 (for example, suits for specific performance of a non-monetary contractual obligation such as the delivery of chicks). However, I do not consider that the present case falls into that category or that a broad and liberal approach to the interpretation of an arbitration clause, such as cl 23.6.1, should not be favoured.

106 One further difficulty for Inghams' construction and its submission that the "list" of matters referred to in cl 23.6 includes matters relating to "determination, adjustment or renegotiation of the Fee" or a number of other specified clauses, all of which concern the manner of calculation or adjustment of various monetary amounts payable under the Agreement (see [38(3)] above) is that that submission does not sit with or explain the inclusion of cl 12 of the Agreement in that list, as the primary judge observed (see [30] – [32] above). Clause 12 would not generate monetary claims for liquidated damages.

107 For the reasons set out above in addition to those of the primary judge, I favour Mr Hannigan's construction of the clause. He is entitled, subject to the argument of waiver which I consider below, to pursue his claim for damages by way of arbitration.

Consideration – the waiver issue

108 This claim may be dealt with in much shorter compass.

109 Had Mr Hannigan sought damages in the 2017 proceedings, there may have been some force in Inghams' argument based on waiver. He did not, however, for the reasons that I have referred to at [21] above. There was no unequivocal abandonment of any right to arbitrate the question of damages for breach of contract at some time in the future nor was there any attempt to resist or restrain the arbitration by reference to the principles in *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589; [1981] HCA 45 cf. *Kraft Foods Group Brands LLC v Bega Cheese Limited* (2018) 358 ALR 1; [2018] FCA 549.

110 Moreover, pursuing urgent declaratory relief in court proceedings was authorised by cl 23.11. That sub-clause is a carve out from the balance of clause 23. If, as I consider to be the case, the declaratory relief sought in the

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2017 proceedings fell within the description of "urgent injunctive or declaratory relief", the pursuit of those proceedings cannot be characterised as an election not to proceed with arbitration, or the waiver of a right to arbitrate any question of contractual damages. Rather, it was an action entirely consistent with the Agreement and, more pertinently, *not* inconsistent with the rights and obligations contained in clause 23.

111 By way of contrast to the urgent relief that was sought by Mr Hannigan in the 2017 proceedings, the pursuit of damages for breach of contract, underpinned by the ability of the Court to award interest, could not be described as "urgent".

112 The waiver argument also fell foul of cl 27.4 of the Agreement which provided that "[n]o right under this Agreement will be deemed to have been waived except by notice in writing signed by the party waiving the right".

113 For completeness, I should note an argument that was faintly submitted on behalf of Inghams, in effect by way of an alternative to the waiver argument.

114 Clause 23.6.1 requires the submission of disputes falling within its scope to arbitration, "unless otherwise agreed". It was submitted that, in some way, the 2017 proceedings either gave rise to or evinced an agreement by the parties not to submit any damages claim to arbitration. To the extent this argument was advanced in writing, it was done in a most exiguous way. The argument was entirely inconsistent with the conduct of Mr Hannigan in the 2017 proceedings, as summarised by the primary judge in the passage from his judgment extracted at [21] above.

115 Any agreement reached, within the terms of cl 23.6.1, would need to be of contractual force and effect. It would, in effect, be a variation of cl 23.6.1. Such a variation would, by cl 27.2, need to be in writing. No written variation was identified. Nor, for that matter, was any oral modification identified.

116 The alternative argument was a makeweight and should be rejected.

Conclusion and orders

117 For the above reasons, I would grant leave to appeal but dismiss the appeal with costs.

APPENDIX

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Schedule of Jurisdiction and Arbitration Clauses

Case Name	Citation	Clause
Tanning Research Laboratories Inc v O'Brien	(1990) 169 CLR 332; [1990] HCA 8	"10. Arbitration. Any controversy or claim arising out of, or relating to, this Agreement or the breach thereof, shall be settled by arbitration, in accordance with the rules, then obtaining, of the American Arbitration Association, and judgment upon the award rendered may be entered in any court having jurisdiction thereof."
IBM Australia Ltd v National Distribution Services Ltd	(1991) 22 NSWLR 466; (1991) 100 ALR 361	"9. Governing Law and Arbitration This Agreement will be construed in accordance with and governed by the laws of New South Wales. Any controversy or claim arising out of or related to this Agreement or the breach thereof will be settled by arbitration. The arbitration will be held in Sydney, New South Wales and will be conducted in accordance with the provisions of the *Commercial Arbitration Act*, 1984 (as amended). The decision of the arbitrator(s) will be final and binding."
Francis Travel Marketing Pty Ltd v Virgin Atlantic	(1996) 39 NSWLR 160; (1996) 131 FLR	"ARTICLE 19 *Arbitration* Any dispute or difference arising out of this Agreement shall be referred to the

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Airways Ltd	422	arbitration in London of a single Arbitrator to be agreed upon by the parties hereto or in default of such agreement appointed by the President for the time being of the Royal Aeronautical Society. The and the provisions of the Arbitration Act 1950 and any statutory modifications or re-enactments therefore for the time being in force shall apply. (sic) ARTICLE 20 *Applicable Law* This Agreement shall in all respects be interpreted in accordance with the Laws of England."
Akai Pty Ltd v People's Insurance Co Ltd	(1996) 188 CLR 418; [1996] HCA 39	"Governing Law This policy shall be governed by the laws of England. Any dispute arising from this policy shall be referred to the Courts of England."
FAI General Insurance Co Ltd v Ocean Marine Mutual Protection & Indemnity Association	(1997) 41 NSWLR 117	"This Reinsurance is subject to English jurisdiction", with a manuscript addition: "Choice of Law: English"
Hi-Fert Pty Ltd v Kiukiang	(1998) 90 FCR 1;	"Any dispute arising from this charter or any Bill of Lading issued hereunder

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Maritime Carriers (No 5)	(1998) 159 ALR 142	shall be settled in accordance with the provisions of the *Arbitration Act* 1950 and any subsequent Acts, in London, each party appointing an Arbitrator, and the two Arbitrators in the event of disagreement appointing an Umpire whose decision shall be final and binding upon both parties hereto. This Charter Party shall be governed by and construed in accordance with English Law. The Arbitrators and Umpire shall be commercial men normally engaged in the Shipping Industry. Any claim must be in writing and claimant's Arbitrator appointed within six months of the Vessel's arrival at final port of discharge, otherwise all claims shall be deemed to be waived."
Recyclers of Australia Pty Ltd v Hettinga Equipment Inc	(2000) 100 FCR 420; [2000] FCA 547	"*Applicable Law, Pricing and Terms of Sale*: Any contract between Buyer and Hettinga shall be governed, construed and interpreted under the law of the State of Iowa, and shall be subject to the terms and conditions listed below. Any Purchase Order issued by Buyer as a result of this quotation shall be deemed to incorporate the terms and conditions of this quotation. If there is any conflict between these conditions of sale and those of the buyer, these

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		conditions shall control … … *Arbitration*: All disputes hereunder, including the validity of this agreement, shall be submitted to arbitration by an arbitrator in Des Moines, Iowa USA under the Rules of the American Arbitration Association, and the decision rendered thereunder shall conclusively bind the parties. Judgment upon the award may be entered in any court having jurisdiction."
HIH Casualty & General Insurance Ltd (in liq) v RJ Wallace	(2006) 68 NSWLR 603; [2006] NSWSC 1150	"ARTICLE XVIII SERVICE OF SUIT The Reinsurer hereon agrees that: i. In the event of a dispute arising under this Agreement, the Reinsurers at the request of the Company will submit to the jurisdiction of any competent Court in the Commonwealth of Australia. Such dispute shall be determined in accordance with the law and practice applicable in such Court. ii. Any summons notices or process to be served upon the Reinsurer may be served upon MESSRS. FREEHILL, HOLLINGDALE & PAGE M.L.C. CENTRE, MARTIN PLACE, SYDNEY,

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N.S.W. 2000 AUSTRALIA who has authority to accept service and to enter an appearance on the Reinsurer's behalf, and who is directed, at the request of the Company to give a written undertaking to the Company that he will enter an appearance on the Reinsurer's behalf.

iii. If a suit is instituted against any one of the Reinsurers all Reinsurers hereon will abide by the final decision of such Court or any competent Appellate Court.

ARTICLE XIX

ARBITRATION:

Disputes arising out of this Agreement or concerning its validity shall be submitted to the decision of a Court of Arbitration, consisting of three members, which shall meet in Australia.

The members of the Court of Arbitration shall be active or retired executives of Insurance or Reinsurance Companies.

Each party shall nominate one arbitrator. In the event of one party failing to appoint its arbitrator within four weeks after having been required by the other party to do so, the second arbitrator shall be appointed by the

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		President of the Chamber of Commerce in Australia. Before entering upon the reference, the arbitrators shall nominate an umpire. If the arbitrators fail to agree upon an umpire within four weeks of their own appointment, the umpire shall be nominated by the President of the Chamber of Commerce in Australia. The Arbitrators shall reach their decision primarily in accordance with the usages and customs of Reinsurance practice and shall be relieved of all legal formalities. They shall reach their decision within four months of the appointment of the umpire. The decision of the Court of Arbitration shall not be subject to appeal. The costs of Arbitration shall be paid as the Court of Arbitration directs. Actions for the payment of confirmed balances shall come under the jurisdiction of the ordinary Courts."
Comandate Marine Corporation v Pan Australia Shipping Pty Ltd	(2006) 157 FCR 45; [2006] FCAFC 192	"(b) London All disputes arising out of this contract shall be arbitrated at London and, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators

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		carrying on business in London who shall be members of the Baltic Mercantile & Shipping Exchange and engaged in Shipping one to be appointed by each of the parties, with the power to such Arbitrators to appoint an Umpire. No award shall be questioned or invalidated on the ground that any of the Arbitrators is not qualified as above, unless objection to his action be taken before the award is made. Any dispute arising hereunder shall be governed by English Law. …"
Armacel Pty Ltd v Smurfit Stone Container Corporation	(2008) 248 ALR 573; [2008] FCA 592	"21.3.1 This Agreement must be read and construed according to the laws of the state of New South Wales, Australia and the parties submit to the jurisdiction of that State. If any dispute arises between the Licensor and the Licensee in connection with this Agreement or the Technology, the parties will attempt to mediate the dispute in Sydney, Australia. 21.3.2 In the event that there is a conflict between the laws of the State of New South Wales, Australia and the jurisdiction in which the Equipment is located, then the parties agree that the laws of the State of New South

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		Wales shall prevail. 21.3.3 If the licensee is in breach of this Agreement, the Licensee must pay to the Licensor on demand the amount of any legal costs and expenses incurred by the Licensor for the enforcement of its rights under this Agreement and this provision shall prevail despite any order for costs made by any Court."
BHPB Freight Pty Ltd v Cosco Oceania Chartering Pty Ltd	(2008) 168 FCR 169; [2008] FCA 551	"(b) Any dispute arising out of this Charter Party or any Bill of Lading issued hereunder shall be referred to arbitration in accordance with the Arbitration Acts 1996 and any statutory modification or re-enactment in force. English law shall apply … (c) The arbitrators, umpire and mediator shall be commercial persons engaged in the shipping industry. Any claim must be made in writing and the claimant's arbitrator nominated within 12 months of the final discharge of the cargo under this Charter Party, failing which any such claim shall be deemed to be waived and absolutely barred."
Paharpur Cooling Towers Ltd v Paramount (WA) Ltd	[2008] WASCA 110	[Background: "Clause 22 of the contract provides that when any dispute arises between the parties any party may give to the other party a notice in writing that a dispute exists.

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Clause 22 then sets out a process by which the parties are to endeavour to resolve the dispute. If they are unable to do so, Paramount (as Principal) at its sole discretion:"]

"[S]hall determine whether the parties resolve the dispute by litigation within the jurisdiction of the courts of Western Australia or arbitration under the Commercial Arbitration Act. [Paramount] shall notify [Paharpur], by notice in writing, of its decision to refer the dispute to litigation or arbitration within 28 days of either [Paramount] or [Paharpur] electing that the dispute be determined by either litigation or arbitration."

"'Dispute' means a dispute or difference between the parties as to the construction of the Contract or as to any matter or thing of whatsoever nature arising, whether antecedent to the Contract and relating to its formation or arising under or in connection with the Contract, including any claim at common law, in tort, under statute or for restitution based on unjust enrichment or for rectification or frustration or a dispute concerning a direction given and/or acts or failing to act by the Engineer or the Engineer's Representative or

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		interference by the Principal or the Principal's Representative."
Electra Air Conditioning BV v Seeley International Pty Ltd ACN 054 687 035	[2008] FCAFC 169	"20. Dispute Resolution 20.1 If at any time there is a dispute, question or difference of opinion ("Dispute") between the parties concerning or arising out of this Agreement or its construction, meaning, operation or effect or concerning the rights, duties or liabilities of any party, one party may serve a written notice on the other party setting out details of the Dispute. Thereafter: (a) senior management of each party will try to resolve the Dispute through friendly discussions for a period of thirty (30) days after the date of receipt of the notice; and (b) if senior management of each party are unable to resolve the Dispute under Section 20.1(a), it shall be referred to arbitration in accordance with the Rules for the Conduct of Commercial Arbitrations of the Institute of Arbitrators and Mediators Australia. The number of arbitrators shall be 1. The place of arbitration shall be Melbourne, Australia. The language of arbitration shall be English. The arbitral award

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		shall be final and binding upon both parties. 20.2 Pending the resolution of the Dispute under Section 20.1, the parties shall continue to perform their obligations under this Agreement without prejudice to a final adjustment in accordance with any award. 20.3 Nothing in this Section 20 prevents a party seeking injunctive or declaratory relief in the case of a material breach or threatened breach of this Agreement." "25. Governing law and Jurisdiction This Agreement is governed by the laws of Victoria, Australia. Subject to Section 20, the parties irrevocably submit to the courts of Victoria, and any courts of appeal from such courts, in relation to the subject matter of this Agreement."
Ace Insurance Ltd v Moose Enterprise Pty Ltd	[2009] NSWSC 724	<u>Policy</u> "Should any dispute arise concerning this policy, the dispute will be determined in accordance with the law of Australia and the States and Territories thereof. In relation to any such dispute the parties agree to submit to the jurisdiction of any competent court in a State or Territory

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		of Australia." Expona Endorsement "Provided that all claims which fall under the terms of this endorsement, it is agreed: (i) the limits of liability are inclusive of costs as provided under supplementary payment in this policy. (ii) that should any dispute arise between the insured and ACE over the application of this policy, such dispute shall be determined in accordance with the law and practice of the Commonwealth of Australia."
Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)	[2010] NSWCA 196; (2010) 79 ACSR 383	Limited Partnership Agreement "This Agreement and the rights, obligations and relationships of the parties hereto under this Agreement and in respect of the Private Placement Memorandum shall be governed by and construed in accordance with the laws of England and all the parties irrevocably agree that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Agreement or the Private Placement Memorandum or the acquisition of Commitments, whether or not governed by the laws of England, and that accordingly any

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suit, action or proceedings arising out of or in connection with this Agreement or Private Placement Memorandum or the acquisition of Commitments shall be brought in such courts. The parties hereby waive, to the extent not prohibited by applicable law, and agree not to assert by way of motion, as a defence or otherwise, in any such proceeding, any claim that it is not subject personally to the jurisdiction of such courts, that any such proceedings brought in such courts is improper or that this Agreement or the Private Placement Memorandum, or the subject matter hereof or thereof, may not be enforced in or by such court."

Deed of Adherence

"14. This Deed of Adherence and the rights, obligations and relationships of the parties under this Deed of Adherence and the Partnership Agreement and in respect of the Private Placement Memorandum shall be governed by and construed in accordance with the laws of England.

15. The Applicant irrevocably agrees that the courts of England are to have exclusive jurisdiction to settle any disputes which may arise out of or in connection with this Deed of

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		Adherence, the Partnership Agreement, the Private Placement Memorandum, or the acquisition of Commitments whether or not governed by the laws of England, and that accordingly any suit, action or proceedings arising out of or in connection with this Deed of Adherence, the Partnership Agreement, the Private Placement Memorandum, or the acquisition of Commitments shall be brought in such courts. The Applicant hereby waives, to the extent not prohibited by applicable law, and agrees not to assert by way of motion, as a defence or otherwise, in any such proceeding, any claim that the Applicant is not subject personally to the jurisdiction of such courts, that any such proceeding brought in such courts is improper or that this Deed of Adherence, the Partnership Agreement or the Private Placement Memorandum, or the subject matter hereof or thereof, may not be enforced in or by such court.
Faxtech Pty Ltd v ITL Optronics Ltd	[2011] FCA 1320	"the agreement shall be interpreted, construed and enforced in accordance with the laws of England, and the parties submit to the jurisdiction of the competent courts of England (London)."

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Cape Lambert Resources Ltd v MCC Australia Sanjin Mining Pty Ltd	[2013] WASCA 66; (2013) 298 ALR 666	Asset Sale Agreement "16.2 Governing Law and Dispute Resolution (a) This agreement is governed by the laws of Western Australia. (b) Subject to clause 16.2(d), the procedures prescribed in this clause 16 must be strictly followed to settle a dispute arising under this agreement. (c) If any dispute arises out of or in connection with this agreement, including any question regarding the existence, validity or termination of this agreement; (1) within ten Business Days of the dispute arising senior representatives from each party must meet in good faith, act reasonably and use their best endeavours to resolve the dispute by joint discussions; (2) failing settlement by negotiation, either party may, by notice to the other party, refer the dispute for resolution by mediation: (A) at the Singapore Mediation Centre (SMC) in Singapore; (B) under the SMC Mediation Procedures; (C) with one mediator;

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(D) with English as the language of the mediation; and

(E) with each party bearing its own costs of the mediation; and

(3) failing settlement by mediation, either party may, by notice to the other party, refer the dispute for final and binding resolution by arbitration:

(A) at the Singapore International Arbitration Centre (SIAC) in Singapore;

(B) under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL) in force on the date of this agreement, which are deemed to be incorporated by reference into this clause;

(C) to the extent, if any, that the UNCITRAL do not deal with any procedural issues for the arbitration, the procedural rules in the SIAC Arbitration Rules in force on the date of this agreement will apply to the arbitration;

(D) with the substantive law of the arbitration being Western Australian law;

(E) with one Arbitrator;

(F) with English as the language of the arbitration; and

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(G) with each party bearing its own costs of the arbitration.

(d) Nothing in this clause 16:

(1) prevents either party seeking urgent injunctive or declaratory relief from the Supreme Court of Western Australia in connection with the dispute without first having to attempt to negotiate and settle the dispute in accordance with this clause 16; or

(2) requires a party to do anything which may have an adverse effect on, or compromise that party's position under, any policy of insurance effected by that party."

Guarantee Agreement

"9.9. Governing law and jurisdiction

(a) This document is governed by the laws of Western Australia.

(b) Subject to clause 9.9(c)(iii)(G), the procedures prescribed in this clause 9.9 must be strictly followed to settle a dispute arising under this document.

(c) If any dispute arises out of or in connection with this document, including any question regarding the existence, validity or termination of this document:

(i) within 10 Business Days of the

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		dispute arising senior representatives from each party must meet in good faith, act reasonably and use their best endeavours to resolve the dispute by joint discussions; (ii) failing settlement by negotiation, any party may, by notice to the other parties, refer the dispute for resolution by mediation; and (A) at the Singapore Mediation Centre (SMC) in Singapore; (B) with one mediator; (C) with English as the language of the Mediation; and (D) with each party bearing its own costs of the mediation; and (iii) failing settlement by mediation, any party may, by notice to the other parties, refer the dispute for final and binding resolution by arbitration: (A) at the Singapore International Arbitration Centre (SIAC) in Singapore or in Hong Kong; (B) under the United Nations Commission on International Trade Law Arbitration Rules (UNCITRAL) in force on the date of this agreement, which are deemed to be incorporated by reference into this clause;

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		(C) to the extent, if any, that UNCITRAL do not deal with any procedural issues for the arbitration, the procedural rules in the SIAC Arbitration Rules in force on the date of this agreement will apply to the arbitration; (D) with the substantive law of the arbitration being Western Australian law; (E) with one arbitrator; (F) with English as the language of the arbitration; and (G) with each party bearing its own costs of the arbitration. (d) Nothing in this clause 9.9: (i) prevents any party seeking urgent injunctive or declaratory relief from the Supreme Court of Western Australia in connection with the dispute without first having to attempt to negotiate and settle the dispute in accordance with this clause 9.9; or (ii) requires a party to do anything which may have an adverse effect on, or compromise that party's position under, any policy of insurance effected by that party."
AAP Industries Pty	[2015] NSWSC	Supply Agreement

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Limited v Rehaud Pte Limited	468	"The agreed place of jurisdiction, irrespective of the amount in dispute, is Singapore." Conditions of Purchase "This contract shall be construed in accordance with and governed in every respect by the laws of Singapore, and all disputes arising out of or in connection with this agreement shall be brought in the courts of Singapore."
Rinehart v Rinehart (No 3) (and *Rinehart v Welker,* in relation to the Hope Downs Deed; and *Rinehart v Hancock Prospecting Pty Ltd*, in relation to the Hope Downs Deed and April 2005 Deed of Obligation and Release)	(2016) 257 FCR 310 (and (2012) 95 NSWLR 221; and [2019] HCA 13; (2019) 366 ALR 635)	April 2005 Deed of Obligation and Release "This Deed shall be governed by and shall be subject to and interpreted according to the laws of the State of Western Australia, and the parties hereby agree, subject to all disputes hereunder being resolved by confidential mediation and arbitration in Western Australia, to submit to the exclusive jurisdiction of the Courts of Western Australia for all purposes in respect of this Deed." Hope Downs Deed "20. CONFIDENTIAL MEDIATION/ARBITRATION In the event that there is any dispute under this deed then any party to his [sic] deed who has a dispute with any

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other party to this deed shall forthwith notify the other party or parties with whom there is the dispute and all other parties to this deed ('Notification') and the parties to this deed shall attempt to resolve such difference in the following manner.

20.1 Confidential Mediation

(a) the disputing parties shall first attempt to resolve their dispute by confidential mediation subject to Western Australian law to be conducted by a mediator agreed to by each of the disputing parties and GHR (or after her death or non-capacity, HPPL);

(b) each of the disputing parties must attempt to agree upon a suitably qualified and independent person to undertake the mediation;

(c) the mediation will be conducted with a view to:

(i) identifying the dispute;

(ii) developing alternatives for resolving the dispute;

(iii) exploring these alternatives; and

(iv) seeking to find a solution that is acceptable to the disputing parties.

(d) any mediation will not impose an outcome on the disputing parties. Any

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outcome must be agreed to by the disputing parties;

(e) any mediation will be abandoned if:

(i) the disputing parties agree;

(ii) any of the disputing parties request the abandonment.

20.2 Confidential Arbitration

(a) Where the disputing parties are unable to agree to an appointment of a mediator for the purposes of this clause within fourteen (14) days of the date of the Notification or in the event any mediation is abandoned then the dispute shall on that date be automatically referred to arbitration for resolution ('Referral Date') and the following provisions of this clause shall apply;

(i) in the event that no agreement on the arbitrator can be reached within three (3) weeks of the Referral Date, the arbitrator will be Mr Tony Fitzgerald QC (provided he is willing to perform this function and has not reached 74 years of age at that time), or in the event Mr Tony Fitzgerald QC is unwilling or unable to act, the Honourable Justice John Middleton (provided he is no longer a Judge of the Federal or other Australian Court

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and provided he has not reached 74 years of age at that time), and irrespective of whether either of these persons have carried out the mediation referred to above, or in the event that neither is willing or able to act,

(ii) subject to paragraph (iv) below by confidential arbitration with one (1) party to the dispute nominating one (1) arbitrator, and the other party to the dispute nominating another arbitrator and the two (2) arbitrators selecting a third arbitrator within a further three (3) weeks, who shall together resolve the matter pursuant to the Commercial Arbitration Act of Western Australia and whose decision shall be final and binding on the parties;

(iii) if the arbitrators nominated pursuant to paragraph 2(a)(ii) are unable to agree in the selection of a third arbitrator within the time provided in paragraph 2(a)(iii), the third arbitrator will be designated by the President of the Law Society of Western Australia and shall be a legal practitioner qualified to practise in the State of Western Australia of not less than twenty (20) years standing.

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(iv) in the event that a disputing party does not nominate an arbitrator pursuant to Clause 2(a)(ii) within twenty-one (21) days from being required to do so it will be deemed to have agreed to the appointment of the arbitrator appointed by the other disputing party.

(b) The dispute shall be resolved by confidential arbitration by the arbitrator agreed to by each of the disputing parties or appointed pursuant to paragraph 2(a)(i) above (or if more than one is appointed pursuant to paragraph 2(a)(ii) then as decided by not less than a majority of them) who shall resolve the matter pursuant to the Commercial Arbitration Act of Western Australia and whose decision shall be final and binding on the parties.

(c) The arbitration will take place at a location outside of a Court and chosen to endeavour to maintain confidentiality and mutually agreed to by the disputing parties and failing agreement in Western Australia and the single Arbitrator or the Chairman of the Arbitral Tribunal as the case may be will fix the time and place outside of a Court for the purposes of the confidential hearing of

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such evidence and represen-tations as any of the disputing parties may present. If any of the parties request wheelchair access, this will be taken into account in the selection of the premises and parking needs. Except as otherwise provided, the decision of the single arbitrator or, if three arbitrators, the decision of any two of them in writing will be binding on the disputing parties both in respect of procedure and the final determination of the issues.

(d) The arbitrators will not be obliged to have regard to any particular information or evidence in reaching his/their determination and in his/their discretion procure and consider such information and evidence and in such form as he/they sees fit;

(e) The award of the arbitrator(s) will be to the extent allowed by law non-appealable, conclusive and binding on the parties and will be specifically enforceable by any Court having jurisdiction. …

[21. the deed] shall be governed by and be subject to and interpreted according to the laws of the State of Western Australia”.”

August 2009 Deed of Further

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		Settlement "16. The CS Deed and this Deed will be governed by the following dispute resolution clause: (i) the parties shall first seek to resolve any dispute or claim arising out of, or in relation to this Deed or the CS Deed by discussions or negotiations in good faith; (ii) Any dispute or claim arising out of or in relation to this Deed or the CS Deed which is not resolved within 90 days, will be submitted to confidential arbitration in accordance with the UNCITRAL Arbitration Rules then in force. There will be three arbitrators. JLH shall appoint one arbitrator, HPPL shall appoint the other arbitrator and both arbitrators will choose the third Arbitrator. The place of arbitration shall be in Australia and the exact location shall be chosen by HPPL. Each party will be bound by the Arbitrator's decision. (iii) A party may not commence court proceedings in relation to any dispute arising out of or in relation to this Deed or the Original Deed or the CS Deed; (iv) The costs of the arbitrators and the arbitration venue will be borne

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		equally as to half by JLH and the other half by the non JLH party. Each party is responsible for its own costs in connection with the dispute resolution process; and (v) Despite the existence of a Dispute, the parties must continue to perform their respective obligations under this Deed."
Mobis Parts Australia Pty Ltd v XL Insurance Company SE	[2016] NSWSC 1170	"The place of jurisdiction for any dispute arising out of this Policy shall be Bratislava", with an anterior clause: "This Policy shall be governed exclusively by Slovakian law. This also applies to Insured Companies with a foreign domicile."
Parnell Manufacturing Pty Ltd v Lonza Ltd	[2017] NSWSC 562	"16.5 Governing Law/Jurisdiction. This Agreement is governed in all respects by the laws of the State of Delaware, without regard to its conflicts of laws principles. The Parties agree to submit to the jurisdiction of the courts of Delaware."
Royal Bank of Scotland plc v Babcock & Brown DIF III Global Co-Investment Fund LP	[2017] VSCA 138	"This Letter Agreement shall be governed by, and construed and interpreted in accordance with, the laws of the State of New York applicable to contracts executed in and to be performed in that State. Each of the parties hereto (a) consents to submit itself to the

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		personal jurisdiction of the United States District Court for the Southern District of New York or any court of the State of New York located in such district in the event any dispute arises out of this Letter Agreement or any of the transactions contemplated by this Letter Agreement, (b) agrees that it will not attempt to deny or defeat such personal jurisdiction or venue by motion or other request for leave from any such court and (c) agrees that it will not bring any action relating to this Letter Agreement or any of the transactions contemplated by this Letter Agreement in any court other than such courts sitting in the State of New York. THE PARTIES HEREBY WAIVE TRIAL BY JURY IN ANY ACTION, SUIT, PROCEEDING OR COUNTERCLAIM BROUGHT BY EITHER OF THEM AGAINST THE OTHER IN ANY MATTERS ARISING OUT OF OR IN ANY WAY CONNECTED WITH THIS AGREEMENT."
Australian Health & Nutrition Association Ltd v Hive Marketing	(2019) 99 NSWLR 419; [2019] NSWCA 61	Risk Transfer Agreement "The parties shall strive to settle any dispute arising from the interpretation or performance of this Agreement through friendly consultation within 30 days after one party asks for

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Group Pty Ltd		consultation. In case no settlement can be reached through consultation, each party can submit such matter to the court. The English Courts shall have the exclusive jurisdiction for all disputes arising out of or in connection with this Agreement." <u>Promotion Agreement</u> "This Agreement is governed by the law in force in New South Wales. The parties submit to the non-exclusive jurisdiction of the courts having jurisdiction in New South Wales and any courts, which may hear appeals from those courts in respect of any proceedings in connection with this Agreement."

118 **MEAGHER JA**: I agree with Bell P that the applicant, Inghams, should have leave to appeal. The question in the appeal is whether Mr Hannigan's contested claim against Inghams, for damages for breach of contract is a dispute which "concerns any monetary amount payable and/or owed by either party to the other under" the chicken growing agreement between them (cl 23.6.1). I agree also with the President's conclusion that if that dispute is required to be referred to arbitration Mr Hannigan has not waived his right to insist that occur.

119 As the President observes that question is "purely one of construction" and accordingly to be determined by the application of orthodox principles of construction. Those principles provide that the meaning of the terms in a commercial contract, such as here, is to be determined objectively and accordingly by reference to what a reasonable person in the circumstances of the parties would have understood those terms to mean: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37 at

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[47] (French CJ, Nettle and Gordon JJ). That inquiry requires attention to the language of the contract, the commercial context which it addresses and the objects which it is intended to secure: *McCann v Switzerland Insurance Australia Limited* (2000) 203 CLR 579; [2000] HCA 65 at [22] (Gleeson CJ). Those principles do not describe a process which is rule based, rather than concerned with the construction of the words in question in their context. Nor is that process overlaid by assumptions or presumptions which cannot be justified as informing what a reasonable person would have understood the words to mean in their commercial context: *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442; [2017] FCAFC 170 at [167] (Allsop CJ, Besanko and O'Callaghan JJ).

120 For the reasons which follow it is my view that Mr Hannigan's claim for breach of Inghams' general obligation to supply chickens (cl 3.1) is not a dispute within cl 23.6.1 and accordingly not one which must, in the absence of any ad hoc agreement, be submitted to arbitration. The primary judge erred in concluding otherwise: *Inghams Enterprises Pty Ltd v Francis Gregory Hannigan* [2019] NSWSC 1186.

The chicken growing agreement

121 The relevant terms of this agreement are extracted by the President at [7]-[18]. The "general obligations" of the parties (cll 3 and 4) describe their respective obligations in relation to the growing of the chickens. On Inghams' part those obligations fundamentally include to supply one day old chicks, feed and the technical services required for Mr Hannigan to perform his primary obligation, which is to "raise" those chicks in his shed facilities in accordance with a detailed Manual supplied by Inghams. There follow a provision making clear that at all times the chickens remain the property of Inghams (cl 6), and provisions governing the collection of the chickens for processing (cl 7) and Inghams' rights of access to the grower's premises (cl 8).

122 Clauses 9 to 13 address the payment obligations of the parties, principally Inghams' obligation to make ongoing payments to the grower for the term of the agreement, initially a period of five years. In essence Inghams agrees, in relation to each batch of chickens raised and collected, to pay the grower a

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Fee calculated on a per chicken basis. That Fee is to be adjusted annually, following negotiations and after taking account of defined "productivity criteria". In addition the grower may be entitled to an additional payment calculated in accordance with a "Pool Payment System", which takes account of the productivity of the grower measured against the productivity of a pool of growers (cll 9.1, 10.1 and Annexures 1 and 2).

123 There follow provisions which qualify the ordinary position that the grower receives payments determined in accordance with Annexures 1 and 2. First, where the payment to the grower in respect of a batch is less than 85 per cent of the Fee as a consequence of a single event determined by Inghams to be a "disaster", a different regime applies for the determination of the Fee. It does so depending on whether the disaster has been caused by the action of Inghams, neither of the parties or is attributable partially to each of them (cl 11).

124 Secondly, Inghams is entitled to deduct from any payment due to the grower financial losses suffered by it (limited to the cost of all goods supplied to the grower and excluding all consequential and indirect losses) as a result of the grower's negligence in raising the chickens (cl 12.1). Inghams may also "charge to and recover from the grower" losses and expenses incurred in collecting and raising any chickens to which cl 12.1 losses are referrable (cl 12.3). Thirdly, in the event that the compulsory slaughter of chickens is required by any statutory authority Inghams is required to pay to the grower part of any financial compensation received by it in respect of that destruction (that part to be calculated in accordance with a specified formula) (cl 13).

125 Finally, in addition to Annexures 1 and 2 providing for variations and adjustments to the annual Fee, cl 15.3.3 provides that in the event that the Manual with which the grower must comply (cl 4.2) is amended, the parties agree to "renegotiate the Fee having regard to the effect of [any] relevant amendments".

The chicken supply dispute

126 Mr Hannigan's formulation and notification of the relevant dispute is extracted in the President's judgment at [24]. It is constituted by Mr Hannigan's contested claim to damages for breach of Inghams' general obligation to supply, during

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the period 8 August 2017 to 17 June 2019, batches of chicks in accordance with the terms of the agreement. The ordinary measure of damages for loss sustained by such a breach is the amount required to place Mr Hannigan in the same position in money terms as he would have been in had the contract been performed: *Robinson v Harman* (1848) 1 Exch 850; 154 ER 363 at 855;365 (Parke B). Applying that measure, the matters to be taken into account will ordinarily include the payments to which Mr Hannigan would have been entitled, on the hypothesis that chicks had been supplied, raised and collected (in whole or in part) during the relevant period, as well as the variable and other costs which would have been, but were not in fact, incurred by him in so doing.

The dispute resolution clause

127 The relevant provisions of the dispute resolution clause are extracted by the President at [18] above. It is convenient nevertheless to set out cll 23.1, 23.6, 23.8 and 23.11 in these reasons:

> 23.1 A party must not commence court proceedings in respect of a dispute arising out of this Agreement ("Dispute") (including without limitation any Dispute regarding any breach or purported breach of this Agreement, the interpretation of any of its provisions, any matters concerning a party's performance or observance of its obligations under this Agreement, or the termination or the right of a party to terminate this Agreement) until it has complied with this clause 23.
>
> …
>
> 23.6 If:
>
> > 23.6.1 the Dispute concerns any monetary amount payable and/or owed by either party to the other under this Agreement, including without limitation matters relating to determination, adjustment or renegotiation of the Fee under Annexure 1 or under clauses 9.4, 10, 11, 12, 13 and 15.3.3; and
> >
> > 23.6.2 the parties fail to resolve the Dispute in accordance with Clause 23.4 within twenty eight (28) days of the appointment of the mediator
>
> then the parties must (unless otherwise agreed) submit the Dispute to arbitration using an external arbitrator (who must not be the same person as the mediator) agreed by the parties or, in the absence of agreement, appointed by the Institute Chairman.
>
> …
>
> 23.8 The parties must use their reasonable endeavours to enable the arbitrator to make a determination as quickly as possible and the arbitrator must (unless otherwise agreed in writing) make that determination within 2 (two) months of accepting the appointment. For that purpose the parties agree to co-operate

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> with the arbitrator and each other in fixing a timetable and taking such steps as are required under that timetable or as may otherwise be reasonably directed by the arbitrator in order to enable the arbitrator to complete the arbitration with[in] that period.
>
> …
>
> 23.11 Nothing in this Clause 23 shall prevent the making of an application to the court by any party to the dispute for urgent injunctive or declaratory relief.

128 Clause 23.1 prohibits each party from commencing court proceedings in respect of the universe of disputes "arising out of" their agreement and that prohibition applies until the relevant party "has complied with this clause 23". There is no reason to construe this provision narrowly. The rational assumption of a reasonable person in the position of the parties would be that the provisions of this clause should apply to all of the disputes relating to their agreement. Approaching the construction of this overriding provision by reference to such an assumption is merely an application of the objective theory of contract.

129 This clause also recognises the breadth of the types of dispute which may arise and, particularly, that they may arise before or after the time for performance or observance of an obligation, no distinction in that context being drawn between what the agreement describes as "general" obligations and those providing for the payment of money.

130 The matters which must be complied with respect to all disputes "arising out of" the agreement are that any dispute be notified to the other party (cl 23.2), that the parties use "best endeavours" to resolve that dispute (cl 23.3), and that if the dispute cannot be resolved it must thereafter be mediated (cll 23.4, 23.5).

Clause 23.6.1

131 Clause 23.6.1 provides that a subset of the universe of disputes arising out of the agreement must then be referred to arbitration. The necessary characteristic of disputes in that subset is that they "concern" "any monetary amount payable and/or owed by either party to the other under this Agreement". This language does not suggest this characteristic has to be the defining or only characteristic which those disputes bear: *Firebird Global Master Fund II Ltd v Republic of Nauru* (2015) 258 CLR 31; [2015] HCA 43 at [187] (Nettle and Gordon JJ).

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132 That composite description requires that subject matter be "any" "monetary amount" which is "payable and/or owed" by one party to the other where the attribute of being "payable and/or owed" is qualified by the words "under this Agreement". There must then be a sufficient relationship between the dispute and that subject matter such that the former "concerns" the latter.

133 What is immediately apparent is that cl 23.6.1 does not purport to refer to arbitration any dispute "arising out of this Agreement" or, for that matter, any dispute "under this agreement". Here, subject to the qualification introduced by cl 23.11 in relation to "urgent injunctive or declaratory relief", the parties clearly intended that only a subset of the disputes within the universe of disputes "arising out of" their agreement must be resolved by arbitration: cf *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165 (Gleeson CJ); *Hancock Prospecting Pty Ltd v Rinehart* at [167] (Allsop CJ, Besanko and O'Callaghan JJ); and *Fiona Trust Holding Corporation v Privalov* [2007] UKHL 40; [2007] 4 All ER 951 at [13] (Lord Hoffman).

134 Furthermore, whilst cl 23.6.1 requires attention to the sense in which the expression "under this Agreement" is used, it does not do so in relation to its use in a clause referring all disputes answering that description to arbitration. Accordingly whether there is any distinction in that context between disputes "arising under" and disputes "arising out of" an agreement is a controversy which does not arise in this case: see *Rinehart v Hancock Prospecting Pty Ltd* [2019] HCA 13; (2019) 93 ALJR 582 at [18]-[25] (Kiefel CJ, Gageler, Nettle and Gordon JJ).

135 The question as to the meaning of the expression "under this Agreement" used in relation to an amount "payable and/or owed" remains. As Lindgren J observed in *Energy Resources of Australia Ltd v Commissioner of Taxation* (2003) 52 ATR 120 at [37] the word "under" admits of "degrees of precision and exactness on the one hand, and of looseness and inexactness on the other" making it "necessary to have regard to the context in order to identify the meaning of the word intended in a particular case." See more generally *The Queen v Khazal* (2012) 246 CLR 601; [2012] HCA 26 at [31] (French CJ); and *Cherry v Steele-Park* (2017) 96 NSWLR 548; [2017] NSWCA 295 at [102]

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(Leeming JA) (There the guaranteed money in question was defined to mean "all amounts (including damages) that are payable, owing but not payable or that otherwise remain unpaid … on any account at any time under or in connection with" the relevant agreement).

"monetary amount payable"

136 The expression "monetary amount payable" describes an amount of money that is or may become liable to be paid, and accordingly "payable". Thus it can refer to an amount that will from time to time fall due for payment, as well as to an amount due for payment. These different senses in which the word "payable" may be used, are discussed by Hoffman J (as his Lordship then was) in *Tea Trade Properties Ltd v CIN Properties Ltd* (1990) 1 EGLR 155 at 158, in a passage cited in K Lewison, *The Interpretation of Contracts* (6th Ed, 2015, Sweet & Maxwell) at p 367. Thus an amount that will from time to time fall due as a fee, which is the subject of negotiation or variation or adjustment, will at that time nevertheless be a "monetary amount payable". That expression is to be contrasted with the expression "monetary amount owed" which describes an amount liable to be paid, due for payment and unpaid. The use of the joining words "and/or" recognises that the money amounts which these expressions describe may overlap.

"under this Agreement"

137 The description of such amounts as "payable and/or owed" "under" the agreement directs attention to the source of the underlying payment obligation and whether the agreement governs or controls its existence, as the following three cases demonstrate. In *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242; [1989] HCA 63 a lease of land contained a provision by which a person, who was a party to the lease, guaranteed the performance by the lessee of its obligations "under this lease". The majority (Mason CJ, Brennan, Deane and McHugh JJ) considered that the word "under" referred "to an obligation created by, in accordance with, pursuant to or under the authority of, the lease. The obligation which arose under the common law tenancy at will [did] not answer this description" (at 249).

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138 The appeal in *Commissioner of Taxation v Sara Lee Household & Body Care (Australia) Pty Ltd* (2000) 201 CLR 520; [2000] HCA 35 concerned the "time of disposal" of assets for the purpose of determining the year of income in which a net capital gain accrued. Where the "asset was acquired or disposed of under a contract" *Income Tax Assessment Act 1936* (Cth), s 160U(3) deemed the time of disposal to be "the time of the making of the contract" (at [33], [34], [37]). The plurality (Gleeson CJ, Gaudron, McHugh and Hayne JJ) held (at [42]) that "the words 'under a contract', in s 160U(3), direct attention to the source of the obligation which was performed by the transfer of assets which constituted the relevant disposal". In that case an agreement of 31 May 1991 "was the source of the obligation which [Sara Lee] discharged" by performance of its obligation to transfer on 30 August 1991.

139 Finally, in *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81; [2007] HCA 53 the question was whether the registration of a transfer of two Torrens title mortgages vested in the transferee a right to recover moneys owed under a loan agreement which was separate from, but secured by, one of the mortgages. *Land Title Act 1994* (Qld), s 62 defined the "rights" transferred as including the right "to recover a debt or enforce a liability under the mortgage". The Court (Kiefel J, Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ agreeing) held that the right to recover moneys under the loan agreement was not assigned, observing at [55] that this conclusion was confirmed by the words "under the mortgage" in s 62(4):

> The word 'under' with respect to an obligation 'under this lease', has been held to refer to an obligation created by, in accordance with, pursuant to, or under the authority of the lease. Likewise the words 'under a contract' in a statute may direct attention to the source of the obligation in question; and a decision 'under an enactment' to the statute to which the decision sought to be reviewed owes, in an immediate sense, its existence. [citations omitted]

140 Returning to the language in the growers' agreement, the words "payable and/or owed" when used in relation to "a monetary amount" describe an obligation owed by one party to the other and the use of the phrase "under this Agreement" with respect to that obligation identifies their contract as its source. That is the natural and ordinary meaning of this language and there is nothing in the text or context which suggests that a reasonable person in the circumstances of the parties would have understood it to mean otherwise.

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"including without limitation"

141 The inclusion in cl 23.6.1 of the list of "matters relating to [the] determination, adjustment or renegotiation of the Fee under Annexure 1" is wholly consistent with the subject matter of the reference to arbitration being disputes concerning payment obligations under the agreement. The words introducing that list - "including without limitation" - convey that the listed matters are not intended either to restrict the matters which would otherwise fall within the language of the preceding description or to narrow the construction of that language by reason of any genus of the matters listed. As to that being the function of such an inclusive "definition" see *Corporate Affairs Commission (SA) v Australian Central Credit Union* (1985) 157 CLR 201 at 206-207 (Mason ACJ, Wilson, Deane and Dawson JJ); [1985] HCA 64.

"Dispute concerns"

142 The purpose for the parties' agreement that disputes which "concern" payment obligations should be referred to arbitration emerges in cl 23.8. By that provision the parties agree to "use their reasonable endeavours to enable the arbitrator to make a determination [of such disputes] as quickly as possible". Their commercial reasons for doing so, particularly from the perspective of the grower, are obvious. In argument this Court was informed that a batch of chickens takes between 35 and 45 days to be raised and collected, thus allowing for the delivery of batches every two months or so. In Mr Hannigan's case that meant that up to six batches a year might be raised, with the potential for over 200,000 chickens in each of those batches. In such a short cycle and high turnover business, an expeditious dispute resolution procedure directed to payment obligations under the agreement seeks to ensure continuity of cash flow, from the perspective of the grower, and ongoing certainty as to the costs of production, from the perspective of Inghams.

143 It follows that the connecting word "concerns" should be given sufficient "width and flexibility" to ensure that any dispute which relates to the negotiation, adjustment, determination or performance of a payment obligation "under this Agreement" is submitted to arbitration. Doing so, a dispute will "concern" a payment obligation under the agreement if the dispute is about such an obligation, which will be the case where there is a claim to payment or for

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damages for breach of such an obligation; if the dispute affects or involves or relates to such a payment obligation which would be the case where there is an issue concerning the negotiation, adjustment or determination of any fee to be paid; or if there is a dispute as to an entitlement of a party to deduct any sum from a payment which it is otherwise liable to make. These examples are obviously not exhaustive. However they recognise that the relational word "concerns" will be satisfied if a dispute relates to or is about or affects or involves a money payment obligation under the agreement.

Is the chicken supply dispute one within cl 23.6.1?

144 The subject matter of the notified dispute is a claim for unliquidated damages for breach of Inghams' obligation under cl 3.1. It is not a claim to or about an amount "payable" or "owed" by Inghams to Mr Hannigan under an express or implied term of their agreement. Nor is it a dispute which affects or relates to the negotiation, adjustment or determination of any amount "payable" or "owed" under such a term. The argument that Mr Hannigan's claim concerns a monetary amount payable under the agreement proceeds as follows. First, it is said that a claim to "compensatory damages" will result in a judgment or award for a monetary amount which, when determined, will be "payable". For the purposes of argument, that much may be accepted.

145 The second part of the argument addresses the qualification that the obligation which makes that amount "payable" is created by, or in accordance with the parties' agreement. This part of the argument is put in two ways. First, it is said that the amount of damages once awarded is payable "under" the agreement because the measure of damages includes as an element an amount which would have been payable had the agreement been performed. To that extent the quantum of those damages is said to be "governed or controlled" by the agreement. It is not however contended that the source of the underlying obligation to pay damages is the agreement, or that the contract says anything about the amount recoverable and how it is to be calculated.

146 The second way in which the argument is put is captured in the judgment of the President at [88]-[90]. It is that damages for breach of contract may be treated or described as an amount payable under a "secondary obligation" of the

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agreement following the breach of a primary obligation. In support of that analysis reference is made to the statements of Lord Diplock in *Moschi v Lep Air Services Ltd* [1973] AC 331 at 350 and *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 848-849, and the statement of Kiefel CJ, Bell and Keane JJ in *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32; (2019) 93 ALJR 1164 at [12] that:

> the right to damages for loss of bargain that arises in such a case [a termination for wrongful dismissal] is, in this respect, no less a creature of the contract than the right to recover sums that become due before its termination.

147 However, none of those statements suggest that the obligation to pay damages for breach of contract is created by or arises under the contract. On the contrary, Lord Diplock's analysis in *Lep Air Services* and *Photo Production* acknowledges that the so-called "secondary obligation" arises "by operation of law" or by "implication of the common law", which is the same thing. The description of the right to loss of bargain damages following a termination for wrongful dismissal as a "creature of the contract" does not take this analysis any further.

148 The orthodox and uncontroversial position remains as stated by Nettle, Gordon and Edelman JJ in *Mann v Paterson Constructions* at [195]:

> Traditionally, the remedial obligation to pay damages for breach of contract has been understood as an obligation "arising by operation of law". Whether or not there is any role for the objective or manifested intention of the parties in ascertaining boundaries of liability in an award of damages, the proposition that the award of damages is somehow a product of the agreement of the parties as an alternative to performance is not easily reconciled with several established notions at law and in equity, including the normative principles which govern the quantification of damages and the grant of specific performance and injunctions on the basis that damages are an "inadequate" remedy. The parties contract for performance, not damages. In short, as Windeyer J said, "[i]t is ... a faulty analysis of legal obligations to say that the law treats a promisor as having a right to elect either to perform his promise or to pay damages. Rather ... the promisee has 'a legal right to the performance of the contract'." (citations omitted)

149 It is equally wrong, as a matter of legal theory, to suggest that the assessment of unliquidated damages for breach of contract is "governed or controlled by" the contract simply because the measure of damages at common law takes account of benefits which would have been received as a result of

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performance. The position is as stated by Gageler J in *Mann v Paterson Constructions* at [83]:

> Contracting parties are, of course, at liberty to determine by contract the "secondary" obligations, which are to arise in the event of breach or termination of the "primary" obligations they have chosen to bind them. Even where the parties have not so determined, it may for some purposes be appropriate to describe obligations that the common law imposes to pay damages for breach of contract as "secondary" obligations which, in the event of termination by acceptance of a repudiation, are "substituted" for the primary obligations. However, it would be artificial as a matter of commercial practice and wrong as a matter of legal theory to conceive of contracting parties who have not addressed the consequences of termination in the express or implied terms of their contract as having contracted to limit themselves to the contractual remedy of damages in that event.

150 The distinction between monetary amounts which are payable or owed "under a contract" and remedies which arise by operation of law is a recognised and meaningful one. Whereas 'liquidated damages' are recoverable in satisfaction of a right of recovery created by the contract itself and accruing by reason of breach, unliquidated damages for breach of contract are compensation assessed by the court in accordance with common law principles for loss occasioned by breach: *Rotheberger Australia Pty Ltd v Poulsen* [2003] NSWSC 788 at [27] (Barrett J); *Galafassi v Kelly* (2014) 87 NSWLR 119 at [178] (Gleeson JA, Bathurst CJ and Ward JA agreeing). That distinction has been endorsed as one which it is "essential" to maintain: *Galafassi* at [177].

151 It follows that the notified dispute does not concern a monetary amount payable or owed by Inghams to Mr Hannigan under their agreement and accordingly it is not a dispute referred to arbitration by cl 23.6.1.

The reasoning of the primary judge

152 It remains necessary to consider three aspects of the primary judge's reasoning in support of his contrary conclusion that cl 23.6.1 includes a contested claim to unliquidated damages for breach of a non-money payment obligation under the agreement.

153 The first is his Honour's conclusion at [62] that the inclusion of the reference to cl 12 in the list in cl 23.6.1 is inconsistent with the description of the relevant subject matter of the clause as limited to claims to enforce payment obligations arising under the agreement because cl 12 describes no more than a claim for

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damages. As the President ventures at [32] the significance of the argument accepted by the primary judge may lie in the fact that no "genus of dispute could be derived from the specific clauses referred to in cl 23.6.1 to suggest what did and did not fall within the scope of the arbitration agreement". However that observation does not take account of the words "without limitation" which indicate that no constructional inference regarding the meaning of the descriptive definition should be drawn from any shared features or lack of shared features of the matters included in the list.

154 More significantly, the primary judge's analysis gives a narrower meaning to the word "concerns" than is consistent with the purpose of cl 23.6 and overlooks the application of cl 12.1 which permits Inghams to deduct losses to be borne by the grower "from any Payments due to the Grower" for the relevant batch. Thus any dispute as to the fact or amount of such loss necessarily "concerns" a "monetary amount" "payable" "under" the agreement because of the entitlement by cl 12.1 of Inghams to deduct any amount to which it is entitled from that "monetary amount".

155 The second is that the primary judge considered at [64] that on the construction urged by Inghams, cl 23.6.1 would have the consequence that a claim in debt for non-payment of a fee due under cl 9.1 would be referred to arbitration whereas a claim to damages for the same breach would not. His Honour described that inconsistency in outcome as "hardly [to] have been intended by the contracting parties". In this respect the primary judge's analysis again depends on a narrower construction of the connecting term "concerns" than I consider it should be given, as appears above, particularly at [142]-[143]. If the notified dispute involves a claim for damages for breach of cl 9.1, that dispute bears a sufficient relationship to a "monetary amount payable" under the agreement because the claim is for breach of such an obligation. Accordingly, the dispute is about or involves that monetary obligation, and in that sense is a dispute which "concerns" it. Therefore no inconsistency in outcome arises.

156 Thirdly, the primary judge at [65] considered that because one integer in the assessment of Mr Hannigan's damages was the amount which would have been received under cl 9.1 had the supply obligation been performed, the

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relevant dispute could be said to "concern" "monetary amounts" payable under the agreement. The difficulty for this argument is identified above at [145]. Whilst the assessment of damages may involve attention to amounts which would have been paid or payable had the contract been performed, the dispute in this respect does not relate to or involve a monetary amount that is or may become liable to be paid so that it answers the description of an amount "payable" under the agreement. Rather that dispute concerns an amount which might have been payable in a hypothetical counterfactual adopted for the purpose of assessing damages under the common law.

Conclusion

157 For these reasons I would make the following orders:

(1) Grant leave to appeal.

(2) Allow the appeal.

(3) Set aside orders (1) and (3) made by Slattery J on 16 September 2019.

(4) Declare that the dispute the subject of the respondent's Notice of Dispute dated 29 May 2019 is not required to be submitted to arbitration pursuant to cl 23.6 of the Queensland Broiler Chicken Growing Agreement between the parties dated 22 September 2015.

(5) The respondent pay the appellant's costs of the proceedings at first instance and on appeal.

158 **GLEESON JA**: I agree with the orders proposed by Meagher JA and with his Honour's reasons.

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