DISTRICT COURT OF QUEENSLAND

CITATION:	*Spray Coupe Pty Ltd v RMI Pty Ltd* [2020] QDC 78
PARTIES:	**SPRAY COUPE PTY LTD** (applicant) **v** **RMI PTY LTD** (respondent)
FILE NO/S:	315 of 2020
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court of Queensland
DELIVERED ON:	24 March 2020 (delivered ex tempore)
DELIVERED AT:	Brisbane
HEARING DATE:	24 March 2020
JUDGE:	Porter QC DCJ
ORDER:	**1. The Respondent pay the Applicant the sum of $329.986.65 being judgment for debts totalling $316,384.03 and interest on those debts of $13,602.62.** **2. The Respondent pay the Applicant's costs of and incidental to the proceeding to be assessed on the standard basis.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where the applicant agreed to provide ground spraying services to the respondent – where the dispute concerns the proper construction of a clause in the contract – where the respondent agreed to pay the applicant a "*monthly retainer…in advance against their monthly spraying charges, for services supplied during the month*" – whether the clause operates as a guaranteed minimum payment of $40,000 per month – whether this clause can be construed as a payment on account
COUNSEL:	J P Hastie (applicant) J D Byrnes (respondent)
SOLICITORS:	Macpherson Kelley (applicant) Holding Redlich (respondent)

Summary

[1] The applicant (**Spray Coupe**) is a supplier of spraying services for cotton crops. The respondent (**RMI**) is a cotton grower. From about 1996 until December last year, the applicant had provided spraying services to the respondent. Although the relationship was never entirely exclusive, it was uncommon for either party to stray. It was evidently a long standing commercial relationship marked by confidence by the respondent in the ability of the applicant to do the work.

[2] In about April 2016, discussions occurred between Mr Sim, the guiding mind of the applicant, and Mr McCosker, a Special Project Manager for the respondent (and evidently a long standing employee of great experience), who had in the past been the managing director of the company. Mr McCosker is also the father of the current managing director, Ms Andrea McCosker.

[3] The gravamen of the discussions was that RMI considered Spray Coup needed to modernise its equipment if it was to continue to provide services to RMI. Mr Sim told Mr McCosker that Spray Coupe could not fund the equipment without a formal agreement and regularly monthly income.

[4] The resulting negotiations led to a contract dated 6 September 2016 for spraying services to be supplied by Spray Coupe to RMI for a term of 5 years (the **Contract**). The key clause of that Contract for this proceeding is clause 8 which provides:

> Refer to Annexure D, RMI will pay Spray Coupe a monthly retainer of $40,000, in advance against their monthly spraying charges, for services supplied during the month.

[5] I will discuss Annexure D further below.

[6] In December last year, the parties fell into dispute over the proper construction of clause 8. As finally developed in oral argument, Spray Coupe's construction is that the payment of $40,000 is to be made in advance each month, and must be applied to reduce the liability of RMI to pay for spraying services in that month. However, if the payment exceeds that liability, Spray Coupe is entitled to retain the balance.

[7] In practice then for, say, the month of January:

(a) $40,000 is to be paid before January commences;

(b) If there is a liability for spraying services provided during January calculated under the Contact which exceeds $40,000 (say $60,000), then Spray Coupe gets paid the balance, being an additional $20,000;

(c) If there is a liability for spraying services in January calculated under the Contact which is less than $40,000 (say $30,000), then Spray Coupe gets to retain the balance of $10,000.

[8] It can be seen that the effect of Spray Coupe's construction is that clause 8 operates as a guaranteed minimum payment per month of $40,000.

[9] RMI on the other hand, submits that on the proper construction of clause 8, it does not create a guaranteed minimum monthly payment. It contends that the effect of the clause properly constructed is that the monthly payment of $40,000 was only a payment on account. It submits that that result can be reached by construing the clause in either of two alternative ways.

[10] First, it submits that the proper construction is that the $40,000 is paid on account of amounts due for spraying services over the whole period of the Contract. Thus in the situation where the amount due for spraying services in a particular month under the Contract is $30,000, RMI can carry forward the balance of $10,000 as a credit against future amounts due in future months which exceed the monthly $40,000 payment. I understood this to be the primary argument.

[11] Alternatively, RMI submits that even if the proper construction is that the $40,000 is paid on account of amounts due for spraying services in the month of the payment, then the practical outcome of the contract is the same. As I understood this argument, it proceeded on the basis that RMI accepted that if services in a month are less than $40,000, Spray Coupe is entitled to retain the balance. However, the argument went on, in practice the parties would treat any such liability as part of a running account between them.

[12] In practice then using January as the starting month, on the primary argument:

(a) $40,000 is to be paid before the commencement of the month;

(b) If there is a liability for spraying services in January calculated under the Contract which exceeds $40,000 (say $60,000), then Spray Coupe gets paid an additional $20,000;

(c) If there is a liability for spraying services in January calculated under the Contract which is less than $40,000 (say $30,000), then either:

(a) The $10,000 is carried forward, added to the $40,000 in February; and

(b) The $50,000 is able to be set off against the liability for spraying services in February;

(c) If February gives rise to a liability for spraying services of $35,000, then $15,000 is carried forward to be added to the $40,000 in March, giving a credit of $55,000;

(d) This continues until the total accumulated credit is used against other monthly amounts or the Contract ends.

[13] On the alternative argument, the respondent says that the same situation unfolds, but rather by reason of the practical approach likely to be applied in the administration of the Contract rather than as a matter of strict entitlement of RMI to a credit for the excess amounts in each month.

[14] In my view, the construction contended for by Spray Coupe is the correct construction.

[15] Counsel for the parties explained that, if I had reached that view, the only dispute as to the amount owing related to the month of December 2019. That depended on whether the Contract was terminated before or after the commencement of that month. I find that the Contract terminated on 6 December 2019. Further, I could see no basis to conclude that the obligation to pay the $40,000 for that month would

not be payable simply because the Contract was to terminate only 6 days into December 2019.

The Contract

[16] There is reliance placed by Spray Coupe in particular on extrinsic circumstances to support its construction. Both parties agree that even if there is an ambiguity gateway, and even if it requires latent ambiguity, this matter passes through that gateway. I agree. Clause 8 is sufficiently ambiguous on its face to meet that requirement.

[17] However, in my view, the case for the applicant's construction is compelling on the words of the Contract itself and I intend to undertake that analysis first.

[18] I should make clear that I have read the submissions on the law in the written submissions of both parties. The propositions advanced are not in my opinion controversial, nor is their application until one comes to the extrinsic circumstances points. As I have said I will deal with those later.

[19] Mr Hastie has described the Contract accurately as follows:

> 1. The Agreement is comprised of five parts. The operative terms of the agreement and four annexures (Annexures A to D).
>
> 2. The terms of the Agreement included:
>
> (a) Clause 2 – "Services Provided by the Contractor". That clause stated, inter alia, that:
>
> "Subject to but not limited to the clauses below and the areas described in "Annexures B &C"
>
> **2.1 Equipment**
> - Three (3) x 36 metre spray rigs on 2 metre centres and more if needed.
> - 2cm GPS which is compatible with RMI on all machines (Outback).
> - Ability to generate coverage maps.
> - Variable rate and section controlled spray controllers on all machines.
> - In the event of a subcontractor being engage, they must also operate all of the above of the same make and type.
> - Should subcontractors be engaged – RMI must be informed and consent given with induction procedures adhere to.
>
> (b) Clause 5, which stated:
>
> "The Grower may terminate this Agreement at any time by giving the Contractor seven (7) days' notice or immediately if the Contractor is in default of any of its obligations under the Agreement"; and
>
> (c) Clause 8, which stated:
>
> "Refer to Annexure D, RMI Pty Ltd will pay Spray Coupe Pty Ltd a monthly retainer of $40,000, in advance against their monthly spraying charges, for services supplied during the month".

3. Annexure A to the Agreement was the schedule of rates for spraying work performed by Spray Coupe. Those rates are each expressed as being a rate per hectare of water volume (excluding GST but plus fuel). It is also noted that the "duration of the engagement" shall be from July 2016 until 30 June 2021 with "annual reviews".

4. Annexure B to the Agreement is a list of contract details for: (a) persons within RMI with responsibility for certain farms and (b) agronomists with responsibility for certain farms.

5. Annexure C to the Agreement is a series of maps showing the areas the subject of work under the Agreement.

6. Annexure D to the Agreement is a copy of letter signed by Ms Andrea McCosker on behalf of RMI. It states, *inter alia*:

> "The Carrington Cotton Corporation Group of Companies currently engages Spray Coupe Pty Ltd as our preferred ground spraying contractor for pesticide application and spray management of 18,000 hectares of our farming country.
>
> We are currently in the process of drafting a formal agreement between the Carrington Group of Companies and Spray Coupe Pty Ltd, for their contracting services moving forward. This agreement will included, a monthly retainer of $40,000 to Spray Coupe Pty Ltd in advance against their monthly spraying charges, for services supplied during the month. This agreement will be formalised in the coming weeks."

[20] The one exception to my statement that I will deal with the extrinsic evidence after construing the document on its terms is to do with Annexure D. It is uncontentious that that letter was provided on or about 21 July 2016, the date it bears, was signed by the Managing Director Ms McCosker and was provided to Spray Coupe at its request.

[21] The purpose of that document being provided also seemed to be uncontentious. To the extent it was not, I find in terms of paragraph 25 of Mr Hastie's outline:

> It is common ground that the letter which became Annexure D of the Agreement was provided to Spray Coupe, by RMI, in the course of the negotiations which led to the signing of the Agreement. It was provided to Spray Coupe to assist it obtaining finance for the purchase of the equipment it required to perform the works under the Agreement.

[22] That is consistent with the evidence of Mr Sim at paragraphs 38 to 39 of his affidavit. It reads:

> On or about June/July 2016 I met with Dianna Whiteman (**Dianna**) at the ANZ branch in Goondiwindi. I explained to Dianna my relationship with RMI and the matters arising from the discussions I had with Chris. I informed Dianna of the equipment RMI wanted me to acquire and the agreement reached regarding payment of a fixed monthly retainer of $40,000.00 with a view to facilitate the purchase of equipment required by RMI. Dianna commenced a facility restructuring application with a view to finance the proposed acquisition of the equipment.
>
> Dianna asked me to provide a written confirmation from RMI confirming the agreement in relation to the payment of a fixed monthly retainer. In response I contacted Chris and explained to him that I require a letter from RMI confirming the agreement regarding the payment of the fixed retainer of $40,000.00 per month so that I could advance the finance application for the acquisition of the equipment. RMI provided a letter dated 21 July 2016 and signed by Andrea confirming the agreement and the payment of the retainer. A true and correct copy of the letter appears at page 39 of the Exhibit.

[23] Mr McCosker did not go quite as far. He swore:

> In about July 2016, I had a conversation with Mr Sim regarding Spray Coupe needing a written confirmation from RMI about the prospective contract for ground spraying services. During the conversation, we said words to the effect:
>
> > Mr Sim said: "I need a letter about our agreement that Spray Coupe would have $40,000 in its account at the beginning of each month."
> >
> > I said: "Yes, we can supply that."

[24] However, given the other uncontentious facts to be set out further below about the genesis of the transaction being the upgrading of Spray Coupe's equipment, and the form of the letter itself, I have no reason to doubt Mr Sims' evidence.

[25] In my view, the construction contended for by the applicant is the correct one for the following reasons.

[26] **First**, the payment provided for in clause 8 is described as a monthly retainer. The word retainer is a word which would be taken to have been chosen by the parties to the Contract for a purpose. It is not a word one would expect just to be randomly included.

[27] The ordinary meaning of retainer depends on its context. It is defined in the Macquarie Dictionary (5th ed) relevantly as follows:

> 1. the act of retaining in one's service.
>
> 2. the fact of being so retained.
>
> 3. a fee paid to secure services, as of a barrister.
>
> 4. a reduced rent paid during absence for a flat or lodging as an indication of future requirement.

[28] The respondent emphasises the meaning in definition 1 or perhaps definition 2. That is to use the word retainer in its sense of describing particular category of agreement i.e., one for the provision of services. This is most commonly used in the context of agreements for legal services, which are commonly called retainer agreements. There are other examples.

[29] The applicant emphasises the meaning in definition 3. That is using retainer in its sense to describe the content of an agreement. That is, a fee paid to secure the future provision of services. This is most well known in the context of barristers, who can be retained for the purpose of securing their services in all matters of a particular kind or in all matters against a particular party. That is not the only context where retainer in this sense is used.[1]

[30] In my view, the use of the word in clause 8 is inconsistent with the first meaning. True it is that the Contract could be described as a retainer to provide spraying services, but that is not how it is used. It is used in the much more specific sense of "Monthly retainer", which is consistent only with a meaning other than the broader

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[1] *Australian Air Express Pty Ltd v Langford* [2005] NSWCA 96 at [74] where it was observed that the word was in the context "equally consistent with the notion of a retainer paid to ensure the continued availability of the respondent's truck and services even in periods where the appellant's business was not as busy as usual."

sense. A fortiori where the reference to monthly retainer is linked to a monthly payment.

[31] While the word retainer has to be given meaning taking into account the context where it was used, it seems to me that the correct starting point is that the word in its ordinary meaning refers to an agreement to secure Spray Coupe's services, rather than any other alternative ordinary meaning.

[32] As will be seen, the relevant extrinsic circumstances support that construction. I will come to that later.

[33] **Second**, clause 8 after identifying the monthly retainer of $40,000, states: *"$40,000, in advance against their monthly spraying charges, for services supplied during the month*"

[34] In my view, it is clear, despite the comma after $40,000, that the phrase "*in advance*" is intended to identify *when* the monthly retainer is to be paid. The respondent submitted that its primary function was to identify that the monthly retainer was "in advance against …monthly spraying charges". I do not see that it matters much either way. It is evident from the words after the word "against" that there is to be some form of accounting between the $40,000 paid and the monthly spraying charges.

[35] The real question is: what kind of accounting? Mr Byrnes submits that the emphasis must be on the first part of the phrase – that is the payment is against RMI monthly spraying charges generally. If that emphasis is adopted, then one could see how the balance in any given month might be carried forward.

[36] However, that approach to the clause does not grapple in a meaningful way with the phrase "for services supplied in *the* month". The clause thus focuses on each month of the contract. It provides for a payment of a *monthly retainer*, and then expressly specifies it to be in advance against spraying charges supplied during *the month*.

[37] This is a powerful textual indicator that the monthly retainer goes against the charges in that month. I could identify no persuasive argument of textual analysis to the contrary.

[38] Accordingly, in my view the clause 8 permits the $40,000 to be set against the monthly spraying charges in that month. I see no credible alternative reading. Read alone, Clause 8 seems to compel the conclusion that the $40,000 goes against spraying charges in that month.

[39] This means, on a textual analysis of the clause alone, Mr Byrnes' primary argument fails. That is because his construction assumes that the $40,000 is a payment which, if not utilised by RMI in "the month", is carried forward to be used against other months.

[40] Are there broader textual considerations or points of construction which might sustain his primary argument in any event? I do not consider that there is.

[41] Mr Byrnes relied on the provision for termination on 7 days' notice. He contended the existence of such a clause told against inferring a monthly retainer which permitted Spray Coupe to keep the balance because it would permit RMI to simply

end the on-going relationship virtually at will. That argument is less persuasive once extrinsic circumstances are considered, but even without them, I do not find it persuasive. Mr Hastie submitted that this can be answered on that basis that once the contract is terminated, Spray Coupe is free to supply services to other parties. There is nothing inherently inconsistent between a retainer to provide services and a power to terminate the agreement containing the retainer.

[42] That argument was advanced by Mr Hastie with more force in the context of the extrinsic facts, but is seems to me it works as a matter of construction of the Contract itself.

[43] Mr Byrnes also submitted that a monthly retainer which permitted Spray Coupe to keep the balance if the amount was unused was commercially improbable and should be rejected on that basis. Again that argument was advanced by reference to some extrinsic considerations. However looking at the Contract alone, I do not see why the argument would be persuasive. The retaining of key suppliers is not an unknown commercial objective in business and only the client is in a place to judge the worth of such a retainer. There is nothing inherently uncommercial about such agreements.

[44] Further, it is to be noted that the retainer will only disadvantage on a monthly basis if the monthly charges are less than $40,000. As will be seen, I see nothing uncommercial about that in the light of the relevant extrinsic circumstances.

[45] It is convenient here to deal with Annexure D. I have already explained that this was provided by Ms Andrea McCosker to Spray Coupe for use by Spray Coupe to secure finance. I have already found that the text of the Contract excludes the construction of balances being carried forward. That leaves the alternative construction advanced by Mr Byrnes, that there was no right to retain any balance in a month.

[46] I should first observe that I do not consider the argument that the parties could be assumed to treat the balances as amounts due on account as between themselves, even though actually owed by Spray Coupe, is a particularly persuasive one on construction. The Contract must be construed at the time it was entered into. Further, it is difficult to see how it is valid to construe a Contract on the assumption that RMI would not choose to enforce rights to any unused balance. That is the domain of estoppel or misrepresentation not construction.

[47] Having made that observation, it seems to me that the provision of the letter for use to obtain finance would, to an objective commercial observer, be consistent with the construction in which a minimum amount of $40,000 is payable. That is because such an observer would be aware that ability to service repayment is a, if not the, primary consideration in assessing finance applications, or it should be anyway.

[48] Mr Byrnes submitted on this the following[2]:

> ***Thirdly***, even if Spray Coupe could establish the context relied on, RMI's construction meets the contended commercial object of the payment under clause 8 of the Agreement (namely, to give comfort to a financier). That is because the payment of $40,000 as a regular advance against the value of its spraying services would show to a financier that Spray Coupe was

[2] Mr Byrne's submissions are 47 to 49.

> receiving regular payments or cash flow (even though Spray Coupe was only entitled to retain payment to the value of work ultimately done).
>
> This is in the context where Spray Coupe had been paid an average of $620,969 per financial year (plus GST) and the amount of monthly payments fluctuated (with some months being more than $150,000).[3]
>
> On one view, the payment of a monthly advance is a monthly payment irrespective of whether work is done. That is not changed because Spray Coupe would only be entitled to keep the payment to the extent of the value of spraying work actually done.

[49] I disagree. It was notorious that spraying was potentially intermittent work, affected by rain, drought, season and any other of a number of factors (I make that finding below). A few months without spraying where the $40,000 was legally recoverable would (if recovered) leave Spray Coupe unable to meet its repayments. That is exactly what a financier would need reassurance could not happen.

[50] The construction in which the $40,000 a month might be called for repayment at the end of the month would mean the Contract was singularly unreliable as a foundation for supporting a finance application.

[51] I recognise that this construction is not the usual form of retainer, where there is an express agreement not to take other instructions, or an enforceable agreement to make services available on the contractual terms.

[52] Mr Byrnes also made this point. He emphasised that there was no express obligation of that kind in the contract. The response to that point, well made though it was, is that the obligation to make the services available was enforceable by RMI by use of the summary termination provision. If Spray Coupe was not sufficiently available for RMI's purposes, then RMI could end its obligation to make the payments.

[53] There are other answers arising out of the extrinsic circumstances. However that sufficiently answers it as a matter of internal construction.

[54] Clause 8 does not create what might be called a typical retainer agreement (if there is such a thing) which simply limits rights to work for others or imposes obligations to work for the other party. That does not mean, however, that the word, in the context used, did not sustain a right to retain at least the monthly amount. In my view, the terms of clause 8 and the contract as a whole support the conclusion that an on-going minimum payment was to be earned per month.

[55] Both parties put various arguments in favour of their construction which said that if what the other party said was intended, the parties would have been expected to say so. Mr Byrnes made the point, inter alia, in this way: if it was expected that a minimum payment was made, it should have said so. An example from Mr Hastie was: if it was intended that any balance in a month was to be repayable, the contract would surely have said so.

[56] I find those arguments unpersuasive. The parties here are sophisticated business people in the area of cotton growing and spraying. The evidence demonstrated the scale and experience of both parties. However, they are not persons who it would

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[3] Mr Collyer's First Affidavit at [10] to [15]; Mr McCosker's Affidavit at [24].

be expected to go to great lengths in their agreement to say everything which lawyers think would be expected to be said. The agreement is short, admirably so. The key to construction is to construct the words that are there. While in general, the argument that "if something was so it should be said specifically" might be relevant in some contexts, I did not think any of the points made on either side in that regard engaged it in the circumstances of this case.

[57] I now turn to extrinsic circumstances. I want first to point out that the approach I have adopted of looking to the text first was one of convenience in organising this ex tempore judgment. The extrinsic circumstances were fully considered in argument and I have been aware of them in preparing these reasons. My view however is that to the extent they are relevant, they tend to support the applicant's case.

[58] I should first make clear that I make findings in terms of Mr Hastie's propositions as to what was common knowledge between the parties as to the background to and purpose of this Agreement. Those matters are as set out in paragraphs 54(a) to (c):

> In this case, it was known to both Spray Coupe and RMI that:
>
> (a) RMI's requirement for spraying work was not consistent from month-to-month and would vary depending on, *inter alia*, seasonal and weather conditions and the type of crops planed by RMI;
>
> (b) RMI expected Spray Coupe to be available to perform ground spraying services when required;
>
> (c) Spray Coupe was, in order to meeting RMI's requirements, required to purchase the Upgraded Equipment

[59] I also find in terms of paragraph 56(e). As to that, I also find as stated in paragraph 56: that the need for Spray Coupe to obtain a guarantee of monthly work and regular monthly income was firmly in the minds of the parties for the reasons Mr Hastie advances at 56(a) to (f):

> (a) Mr Sim states, in paragraph 23 of this affidavit, that he explained to Mr McCosker of RMI that:
>
> > "…whilst being at RMI's beck and call, to the exclusion of other work, there was not much point in upgrading my equipment at considerable costs. I told Chris that I was unsure, having regard to declining business, if I would be able to obtain finance to purchase new equipment. I said to Chris that the only way I can see it work was if RMI committed to paying me a fixed monthly retainer irrespective of whether I work or not to cover the repayments, insurance and fixed monthly expenses of the new equipment RMI wanted."; and
>
> (b) Mr McCosker, who conducted the negotiations with Spray Coupe on behalf of RMI, states in paragraph 15 of his affidavit that some formal agreement and a regular monthly income";
>
> > "ANZ won't lend me the money without some formal agreement and a regular monthly income";
>
> (c) Mr McCosker states, further, that Mr Sim stated that, in relation to the need to acquire upgraded equipment that:
>
> > "I can't afford that right now, especially if there is no guarantee of ongoing work. I will need a guarantee of monthly work and high rates";

(d) Mr McCosker also states, in paragraph 23 of his affidavit that:

> "Mr Sim also said that he would need to be paid a certain amount each month to meet his expenses. I cannot recall what that amount was, but I assumed that his expenses would include payments for three new rigs and would included (sic) some contingencies. I cannot recall him explaining any calculates (sic) relating to this amount"; and

(e) the file note taken by Mr McCosker of the matters discussed with Mr Sim reflected that understanding, as it includes the notation "Guarantee of monthly work" and then appears to refer to a rate per day of $1,000 which totalled $365,000 per year; and

(f) the letter, which became Annexure D of the Agreement, was, uncontroversial, provided so that Spray Coupe could, in turn, provide it to its bank for the purposes of obtaining finance.

[60] To those matters should be added the facts that:

(a) The parties had dealt with each other for 20 years when the Agreement was negotiated; and

(b) RMI was plainly keen to retain Spray Coupe as its principal spray contractor.

[61] Those extrinsic circumstances tend to support a number of the points of construction already considered.

[62] **First**, the lack of specific terms requiring Spray Coupe to be available as a quid pro quo for the retainer is of less relevance where the Contract was made in the context of a very long standing relationship of confidence in each other and where the expectation that Spray Coupe would make RMI its priority at all times was well established (and able to be enforced by summary termination).

[63] **Second**, the broader context of the need to upgrade equipment at RMI's insistence and the communicated need for consistent cash flow to secure such finance supports the construction of clause 8 that the retainer was to be paid and kept regardless of work done in each month.

[64] It is possible that all this could have been obtained if the $40,000 payment was made a monthly on account, and taken into account on a running balance over the life of the contract. However, that is the one construction which it seems to me is excluded by the express words of the contract in clause 8 which set the monthly retainer against the spray charges in the month.

[65] For these reasons, I find that the applicant's construction is the correct construction of the Contract.

[66] I now turn to the residual issue on quantum. Sadly, after some 23 years of working together, on the 26th of November 2019 it became evident the relationship was ending. RMI, wrote in these terms:

> Dear Craig,
>
> **Termination of the ground spraying services agreement – 2016/2017 season**
>
> We refer to the ground spraying agreement…executed by you on 5 September 2016.

> **Termination of the services agreement**
>
> In accordance with clause 5 of the services agreement we hereby terminate…the agreement effective on 6 December 2019, being more than seven days from the date you receive this letter.
>
> **Amounts owing to RMI Pty Ltd.**
>
> As at 28 October 2019 RMI has paid you $101,865.84 for services you are yet to provide. RMI reserves our right…

[67] On the same day, the Applicant's solicitors responded on these terms, after referring the Contract and referring to the letter, stated:

> The services agreement…expressly provides for a fixed term commencing on 1 July 2016 and expiring on 30 June 2017, and has terminated on the expiry date resulting in a period month-to-month contract requiring one calendar month termination notice.
>
> In the circumstances, your client's purported termination relies on clause 5 of the services agreement is fatally flawed, and it amounts to repudiation of the services agreement.
>
> Our client accepts your client's repudiation and elects to terminate.
>
> Our client reserves its right to pursue your client for damages arising from the termination.

[68] In an unusual turn-around, Mr Hastie submitted that his own solicitor's letter was ineffective to terminate because it was wrong in law. The situation arose in this way: on the face of the 1st November 2019 letter from Mr Byrnes' client, the termination of the agreement was to occur on the 6th of December 2019. That, of course, was some days into December 2019, and the prima facie consequence of that is that the obligation to pay the monthly retainer for December would have accrued prior to the termination of the Contract.

[69] Mr Byrnes argued that I could ignore the fact that the Contract terminated during the month of December because of the termination by Macpherson Kelley in their letter of 26 November 2019. If that termination was effective, the contract terminated in November 2019, not December 2019. In response, Mr Hastie contended that the termination by his client was self-evidently without proper foundation, and ineffective. I agree. The Macpherson Kelley letter, in paragraph 2 was based on a mistaken understanding of the terms of the Contract.

[70] It was plain that RMI was entitled to terminate in the way they did. Therefore, there was no repudiation by RMI and the purported termination by Spray Coupe based on alleged repudiation was ineffective at law. Mr Byrnes contended that I could infer, from the fact that there was no response to the Macpherson Kelley letter, that the parties had chosen to abandon the contract, given their joint attitude that the Contract had been terminated. Abandonment can be a difficult doctrine to apply. Fortunately, I do not have to grapple with that difficulty, and that is because Mr Byrnes' argument depends on my inferring some intent in the parties, and in particular, his client. I cannot see any basis to do that.

[71] His client's position was that it had validly terminated the contract from 6 December, and it said nothing to the contrary after the erroneous assertion of entitlement to terminate that came back. In those circumstances, I cannot see any objective basis to infer some sort of common abandonment. The objective

circumstances support the conclusion that the Contract terminated in accordance with the valid termination by Mr Byrnes' client.

[72] Mr Byrnes, with admirable persistence, did not give the game away at that point. He contended that, on the proper construction of the Contract the entitlement to the monthly retainer would not accrue where the Contract was, effectively, to terminate during the month referable to the payment. I cannot think of a good argument in favour of that, in circumstances where the termination was to occur on the 6th of December. There is no evidence from which I would be able to infer that a substantial amount of spraying work couldn't be done in the six days that the Contract remained on foot. And it might be different if, in the termination period, Spray Coupe had refused to perform under the Contract, but nothing of that kind was established.

[73] It is an orthodox application of *McDonald v Denny Lascelles Ltd* (1933) 48 CLR 457. Rights that accrue before termination remain on foot thereafter, absent some express provision to the contrary. It seems to me, the right accrued to Spray Coupe to the December 2019 payment before the termination by RMI took effect.

[74] Therefore, I order judgment for the amount that, apparently, with admirable co-operation, the Parties have been able to agree on the basis that it includes the December 2019 monthly retainer plus interest, as they calculate and/or agree. I'll hear, Mr Hastie, about whether there's utility in ordering the declaration he seeks. I'll hear the parties as to costs.