SUPREME COURT OF QUEENSLAND

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CITATION:	*Vangale Pty Ltd (in liq) v Kumagai Gumi Co Ltd* [2002] QSC 137
PARTIES:	**STARELEC (QLD) PTY LTD (IN LIQUIDATION) ACN 009 946 356** **(first plaintiff)** **and** **VANGALE PTY LTD (IN LIQUIDATION) ACN 059 728 577** **(second plaintiff/respondent)** **v** **KUMAGAI GUMI CO LTD ARBN 002 810 317** **(defendant/applicant)**
FILE NO:	S3114 of 1996
DIVISION:	Trial Division
DELIVERED ON:	17 May 2002
DELIVERED AT:	Brisbane
HEARING DATE:	7 March 2002
JUDGE:	Mullins J
ORDER:	**The application is dismissed.**
CATCHWORDS:	CORPORATIONS LAW - CHARGE - floating charge - whether upon crystallisation, charge conferred rights on chargee to pursue in chargor's name rights of action in contract and tort and a *quantum meruit* claim CONTRACT - CONSTRUCTION AND INTERPRETATION - competing constructions of correspondence forming basis of contract - possibility of relevant extrinsic evidence - not appropriate to grant summary relief on basis of one possible construction of the correspondence NEGLIGENCE - whether a right of action for damages for negligence assignable - whether assignee has substantial commercial interest *UCPR* r 171, r 293 *Beatty v Brashs Pty Ltd* [1998] 2 VR 201 *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93

Re Bond Worth Ltd [1980] 1 Ch 228
Brownton Ltd v Edward Moore Inbucon Ltd [1985] 3 All ER 499
Business Computers Ltd v Anglo-African Leasing Ltd [1977] 1 WLR 578
Re Charge Card Services Ltd [1987] Ch 150
Defries v Milne [1913] 1 Ch 98
Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd (1993) 113 ALR 225
Ellis v Torrington [1920] 1 KB 399
First City Corporation Ltd v Downsview Nominees Ltd [1989] 3 NZLR 710
Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd [1994] 1AC 85
National Mutual Life Nominees Ltd v National Capital Development Commission (1975) 6 ACTR 1
Poulton v Commonwealth (1953) 89 CLR 540
Prosser v Edmonds (1835) 1 Y&C Ex 481; 160 ER 196
Relwood Pty Ltd v Manning Homes Pty Ltd (*No 2*) [1992] 2 QdR 197
Sheahan v Carrier Air Conditioning Pty Ltd (1997) 189 CLR 407
Trendtex Trading Corporation v Credit Suisse [1982] AC 679
Re Turner Corporation Ltd (*in liq*) (1995) 17 ACSR 761
Vibex Industries Pty Ltd v Gaylor (1997) 15 ACLC 750
Westgold Resources NL v St George Bank Ltd (1998) 29 ACSR 396

COUNSEL: D J S Jackson QC and M R Bland for the applicant
B D O'Donnell QC and A E Lyons for the respondent

SOLICITORS: McCullough Robertson for the applicant
Dibbs Barker Gosling for the respondent

[1] **MULLINS J:** By application filed on 31 May 2001 the defendant in this proceeding (to which I will refer as "the applicant") is applying for judgment against the second plaintiff (to which I will refer as "the respondent") pursuant to r 293 of the *UCPR* or that the respondent's statement of claim be struck out pursuant to r 171 of the *UCPR*. The applicant obtained judgment against the first named plaintiff (to which I will refer as "Starelec") in the proceeding by consent on 27 July 2000.

Background facts

[2] The applicant was engaged as project manager for the development of the Royal Pines Resort situated at Ashmore on the Gold Coast. The applicant engaged Thiess Watkins White ("TWW") as the head contractor. A written subcontract dated 23 November 1989 ("the subcontract") was entered into by TWW and Starelec which provided for TWW to engage Starelec as subcontractor to carry out electrical services works for the development. Starelec had commenced to carry out the works on 17 August 1989.

[3] On 14 May 1990 Starelec gave a fixed and floating charge registered under number BC902875 ("the charge") to Natwest Australia Bank Ltd ("Natwest") over all its undertaking and assets whatsoever and wheresoever both present and future. In May 1990 a receiver was appointed to TWW.

[4] On 30 May 1990 Starelec and the applicant entered into agreement in relation to the completion of the electrical services which were the subject of the subcontract between TWW and Starelec. By letter dated 28 June 1990 the applicant gave notice to Starelec that the receiver of TWW had executed formal assignment of the benefit of the subcontract between TWW and Starelec to the applicant on 28 June 1990.

[5] Starelec completed the electrical services works in November 1990.

[6] By 24 April 1991 Natwest had crystallised the floating charge over Starelec's assets. Starelec was ordered to be wound up on 31 May 1991.

[7] The respondent was registered as a company on 3 June 1993. Natwest assigned its rights under the charge to the respondent in consideration of the payment of $20,000 by deed dated 14 September 1993. Notice of the assignment of the charge to the respondent was given to the applicant in or around 1995.

[8] This proceeding was commenced on 12 April 1996.

[9] On 1 April 1999 the respondent went into voluntary liquidation pursuant to a resolution of its directors.

[10] A statement of claim was filed in this proceeding on 1 October 1999.

[11] Starelec's claim against the applicant was dismissed by the consent of Starelec and the applicant on 27 July 2000.

[12] The respondent filed an amended statement of claim ("the second statement of claim") on 15 December 2000. Immediately prior to the hearing of this application, the respondent filed a further amended statement of claim ("the third statement of claim").

Basis of the respondent's claim in the proceeding

[13] The respondent pleads in para 9 of the third statement of claim that, as a result of the respondent's being the assignee from Natwest of all Natwest's rights under the charge of which notice was given to the applicant, all debts or other obligations to pay money or damages owed by the applicant to Starelec became payable by the applicant to the respondent.

[14] The respondent's claim against the applicant depends entirely upon the respondent's being able to enforce causes of action which it alleges had accrued to Starelec against the applicant.

[15] The facts which are pleaded by the respondent to raise these causes of action are complex. It is necessary to briefly summarise the relevant allegations to give context to the arguments pursued on the application.

[16] The respondent alleges that at all times material to the proceeding until about 29 May 1990 TWW was acting as an agent of the applicant in passing from the

applicant to subcontractors engaged at the development including Starelec directions as to the work to be performed, drawings and sketches detailing the work to be performed and information required to enable the work to be performed. It is alleged that in January or February 1989 the applicant decided that the development would be designed and built on a "fast track" basis, none of the tendered documents relating to the electrical services works described that they were to be developed and constructed on a fast track basis, at none of the pre-contract meetings did the applicant or TWW inform Starelec that the development was to be designed and built on a fast track basis and Starelec's final tender was made in reliance on representations about the extent of the works which were made on behalf of the applicant, but which did not disclose the true nature of the works.

[17] The respondent alleges that a contract was entered into between TWW and Starelec which is referred to in the third statement of claim and will also be referred to in these reasons as "the Contract" when Starelec commenced to carry out the works on 17 August 1989. The terms of the Contract are pleaded in paras 81 to 85 of the third statement of claim. Apart from the subcontract and the documents incorporated by reference as part of the subcontract, it is pleaded that the Contract incorporated identified correspondence, minutes of a pre-contract meeting and certain implied terms, as a result of the pre-contract representations alleged by the respondent against TWW.

[18] Apart from the Contract, an allegation is made by the respondent against the applicant that it owed a duty to Starelec to exercise reasonable care in making the representations which are described in para 65 of the third statement of claim and will also be referred to in these reasons as "the Design Representations" where the applicant realised or ought to have realised that it was being relied upon by Starelec to give information or advice accurately as a basis for action on the part of Starelec.

[19] It is pleaded in para 89 of the third statement of claim that while Starelec was performing the works until 29 May 1990, TWW and the applicant, and thereafter, the applicant, issued directions to Starelec to vary the works with the result that the works constructed were fundamentally different from the design which was the basis of Starelec's entry into the Contract. The respondent alleges that as a result of those variations, both TWW and the applicant breached certain terms implied in the Contract and made the Design Representations negligently.

[20] Even though the third statement of claim seeks to set up the basis for the applicant to be liable directly to Starelec, as a result of the applicant's pre-contract conduct and that which could be attributed to it by virtue of the allegation that TWW was its agent to the extent that is alleged, para 96 of the third statement of claim sets out the basis on which it is alleged by the respondent that Starelec contracted with the applicant, after the receiver was appointed to TWW, as follows:

> "On or about 30 May 1990 Starelec entered into an agreement with Kumagai, by which:
>
> (1) Starelec undertook to be responsible to Kumagai as head contractor and principal for the performance of all the work comprised in Starelec's contract with TWW;
> (2) Starelec agreed to provide in favour of Kumagai as head contractor all warranties, undertakings, performance bonds

and securities provided or to be provided by Starelec under its contract with TWW;

(3) Kumagai agreed to pay to Starelec:

(1) The difference between the value of work performed by Starelec to 30th May 1990 and the audited total amount paid by TWW to Starelec under the contract;

(2) The difference between the final certified contract sum and the value of work performed by Starelec to 30th May 1990

Particulars

The agreement was made by a letter from Kumagai to Starelec dated 30 May 1990, which was signed and returned by Starelec."

[21] This allegation in para 96 of the third statement of claim differs from the allegation that was made by the respondent in paras 96 to 100 of the second statement of claim to the effect that there was a novation of the Contract.

[22] Paragraph 96 of the second statement of claim alleges that the applicant wrote to Starelec by letter dated 30 May 1990 which made an offer in the following terms:

> "As you may be aware, our company is the Principal of this Project and had previously engaged Thiess Watkins White Constructions Limited ("TWW") as Construction Manager and our agent with whom we understand you have entered ("the Contract") [sic] for work on the Project.
>
> … To prevent hardship to our contractors and to maintain progress on the job, we are prepared to confirm the terms of a direct contract with you, based on the terms of your existing Contract.
>
> In consideration of your company confirming that it is bound to the terms of the Contract with us as Head Contractor and Principal, the terms of that confirmation being -
>
> 1. Your Company will undertake to be responsible to our company as Head Contactor and Principal for the performance of all of the work comprised in the Contract;
>
> 2. Our Company as Head Contractor will undertake to pay the difference between the Final Certified Contract Sum and the value of work certified at the date of this letter over the period of the contract;
>
> 3. All warranties, undertakings, performance bonds and securities provided or to be provided by your company should now be provided in favour of our Company as Head Contractor;

> then we will pay to your Company the difference between the value of work certified at the date of this letter and the audited total amount paid to your Company by T.W.W. under the contract.
>
> If your Company wishes to avail itself of the offer contained in this letter, please sign and return to us the duplicate copy of this letter."

[23] In para 97 of the second statement of claim the respondent alleges that Starelec accepted this offer by signing and returning to the applicant the duplicate copy of the letter and that as a result of that offer and acceptance and the letter dated 28 June 1990 from the applicant to Starelec giving notice of the assignment by the receiver appointed to TWW, Starelec agreed to deal with the applicant, as if it were dealing with TWW and the applicant adopted the benefits and burdens of the Contract.

[24] It will be necessary to consider whether there is any significance to this application on the changing basis between the second and third statements of claim on which the respondent seeks to establish the contractual relationship between Starelec and the applicant post 30 May 1990.

[25] The third statement of claim details the amounts claimed to be owing to Starelec by the applicant under the Contract and the losses alleged to have been suffered by Starelec, as a result of the breaches of the Contract by and the negligence of the applicant. There is also pleaded a claim on a *quantum meruit* against the applicant by reason of the allegation that variations were required to the works.

[26] The respondent claims to be able to recover from the applicant the sums alleged to be due and owing by the applicant pursuant to the Contract or, alternatively, as reasonable remuneration for work done and material supplied to the applicant by Starelec at the applicant's request or, alternatively, for damages for breach of contract and/or negligence.

Issues on the application

[27] As the respondent makes its claims against the applicant as the assignee of Natwest and its rights cannot be any greater than those which accrued to Natwest, the application logically raises the issue of whether the charge, upon crystallisation, conferred rights on Natwest which enabled it to pursue Starelec's rights of action in contract, tort and on a *quantum meruit* against the applicant by bringing proceedings in its own name. This is the first issue to be dealt with.

[28] The primary argument pursued by the applicant on the application was that insofar as the respondent was seeking to enforce Starelec's rights to claim for moneys payable under or damages for breach of the subcontract, cl 32 of the subcontract had the effect of prohibiting the assignment by Starelec of the benefit of the subcontract and therefore made any purported assignment by Starelec to Natwest ineffective. Clause 32 of the subcontract relevantly provided:

> "The Subcontractor shall not assign this Contract without the prior written consent of the Builder."

Because of the change effected to para 96 by the third statement of claim, as to the terms of the contract which existed between Starelec and the applicant, a preliminary issue was raised as to whether or not the contract between Starelec and the applicant included cl 32 of the subcontract. That is the second issue to be

determined on the application. The third issue to be considered will be that which was the primary argument of the applicant, as to the effect of cl 32 of the subcontract.

[29] Insofar as the respondent's claim includes a claim for damages in negligence, the issue was also raised as to whether that right of action was assignable from Starelec to Natwest. That is the fourth issue to be dealt with.

Nature of rights conferred on the chargee under the charge

[30] Clause 4.1 of Pt 4 of the charge provided that Starelec charged to Natwest all its estate and interest in the mortgaged property which was all its undertaking and assets, both present and future. Subsequent provisions of Pt 4 of the charge dealt with the extent to which the charge operated as a fixed charge, a floating charge and the circumstances in which the floating charge became fixed.

[31] Prior to crystallisation of the charge, Starelec's interest under and any rights of action accruing from the subcontract were the subject of the floating charge.

[32] The nature of a floating charge is such that in respect of existing property, it is an equitable security, but does not take effect as an immediate proprietary interest. As is stated in WJ Gough *Company Charges* (2nd ed, 1996) at p 97:

> "Even in respect of property owned by the chargor at the time the floating charge is created, at law there is nothing that has taken place which is of any dispositive effect or is capable in any way of operating as present assignment."

[33] The nature of the interest of a chargee under a floating charge changes upon crystallisation of the charge. It is stated in *Company Charges* at p 332:

> "Under a floating charge, the chargee acquires an equitable proprietary interest in the charged assets only at the time of crystallisation. Prior to crystallisation, the floating chargee obtains a personal equity, or 'mere' equity, against the chargor arising under the floating charge contract."

and at p 333:

> "The charged assets to be vested in the chargee are not specifically identified or ascertained during the floating phase of the charge. Specific identification or ascertainment of the charged assets is deferred until crystallisation, when the charge is intended to convert into a specific charge. The charged assets are specifically identified or ascertained at crystallisation, so that the mere ownership of existing assets at crystallisation date or the mere acquisition of post-crystallisation assets constitutes final and irrevocable appropriation of the charged assets to the charge contract. An equitable proprietary interest vests in the chargee at crystallisation because final and irrevocable appropriation of the charged assets to the charge contract occurs at crystallisation. Under a floating charge, the process of vesting of an equitable proprietary interest is deferred until crystallisation. For this reason, the floating charge is described as a present security and also as an incomplete assignment."

[34] The respondent relied on the description of crystallisation given by McPherson SPJ (as his Honour then was) in *Relwood Pty Ltd v Manning Homes Pty Ltd* (*No 2*) [1992] 2 QdR 197, 201:

> "Even before its crystallisation a floating charge is said to be an 'existing' or a 'present' charge: *Evans v. Rival Granite Quarries Limited* [1910] 2 K.B. 979, at 994, 999; but its operation as a security on specific assets is deferred to the happening of a defined future event that will cause it to become a fixed security: ibid., at 999, per Buckley L.J. In the interim the chargee no doubt has rights at least as extensive as those of the assignee of future property described by Dixon C.J. in *Palette Shoes Pty Ltd v. Krohn* (1937) 58 C.L.R. 1, 26-27; but, even if it is then properly considered an 'equity', the right before crystallisation is nevertheless not (as Walton J. in *Cairney v. Back* [1906] 2 K.B. 746, 752, seemed disposed to think) an equity of such a kind as to prevail in a competition with a proprietary interest in a particular asset. Not until crystallisation does the charge fix and attach specifically to any asset. Once it does so, the company becomes trustee of the asset for the benefit of the chargee as equitable mortgagee of that asset, and must deal with it accordingly."

[35] Although it is clear that the equitable proprietary interest of the chargee takes effect on crystallisation, what is not clear is the true nature of the equitable proprietary interest which arises upon crystallisation.

[36] The respondent submitted that the effect of the crystallisation was that there was an assignment in equity in favour of Natwest of all of Starelec's rights against the applicant, relying on *National Mutual Life Nominees Ltd v National Capital Development Commission* (1975) 6 ACTR 1, 5 and *Vibex Industries Pty Ltd v Gaylor* (1997) 15 ACLC 750, 753. Although the latter case refers to the proposition that the effect of the attachment of the charge is to assign the property in equity to the chargee and the authority of *National Mutual Life Nominees Ltd v National Capital Development Commission* for that proposition, the proposition is modified somewhat by the following passage from the judgment at 753:

> "The assignment, however, was not absolute, but by way of charge only: *Bailey v New South Wales Medical Defence Union Ltd; New South Wales Medical Defence Union Ltd v Crawford* (1995) ACLC 1,698 at 1,722; (1995) 184 C.L.R. 399 at 446; 132 A.L.R. 1 at 34, per McHugh, Gummow, JJ.; *George Barker (Transport) Ltd v. Eynon* [1974] 1 All E.R. 900 at 908-9, per Stamp, L.J. See also Gough, *Company Charges*, 2nd ed 1996, pp. 18-21. Legal title in property the subject of the fixed charge remained with the chargor: *Re Bond Worth Ltd* [1980] 1 Ch 228 at 250, per Slade, J."

[37] The following description of the effect of a charge is set out in *Company Charges* at pp 18-19:

> "A charge, in the sense of a hypothecatory form of security, is created by contractual act of the parties and exists, as well as being enforceable, only in equity. In relation to the charged asset, a charge transfers neither the property (ie beneficial ownership title), by contrast with a mortgage, nor the right to possession, by contrast with possessory securities such as pledge and lien. An equitable chargee has no right, therefore, to foreclosure. A chargee has a right of

> realisation in the event of default through judicial process whether by order for sale or the appointment of a receiver." (footnotes omitted)

Reference is found at pp 20-21 of *Company Charges* to the statement of Millett J in *Re Charge Card Services Ltd* [1987] Ch 150, 176:

> "Thus the essence of an equitable charge is that, without any conveyance or assignment to the chargee, specific property of the chargor is expressly or constructively appropriated to or made answerable for payment of a debt, and the chargee is given the right to resort to the property for the purpose of having it realised and applied in or towards payment of the debt. The availability of equitable remedies has the effect of giving the chargee a proprietary interest by way of security in the property charged."

[38] To the same effect is the statement of Slade J in *Re Bond Worth Ltd* [1980] 1 Ch 228, 250:

> "The technical difference between a 'mortgage' or 'charge', though in practice the phrases are often used interchangeably, is that a mortgage involves a conveyance of property subject to a right of redemption, whereas a charge conveys nothing and merely gives the chargee certain rights over the property as security for the loan … ."

[39] The statement of McPherson SPJ in *Relwood Pty Ltd v Manning Homes Pty Ltd* (*No 2*) to the effect that upon crystallisation of the floating charge, the chargor becomes trustee of the asset for the benefit of the chargee arguably supports the concept that the equitable proprietary right acquired by the chargee of a charge to a particular asset on crystallisation is the right to appropriate the proceeds of that asset in payment of the debt the subject of the charge, rather than assume the title to that asset. On the other hand, the other authorities relied on by the respondent support the contention that, upon crystallisation, there is a completed equitable assignment to the chargee of the assets charged: *Biggerstaff v Rowatt's Wharf Ltd* [1896] 2 Ch 93, 106 and *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 1 WLR 578, 582.

[40] The applicant referred in submissions to the commentary in EI Sykes & S Walker *The Law of Securities* (5th ed, 1993) at p 960:

> "It would seem that the floating charge is a security of the hypothecation type and does not involve, even on crystallisation, an assignment or transfer of the company's property and the apparent possession of a right of foreclosure on the part of the chargee would seem to be something of an anomaly. However, Blackburn J. in *National Mutual Life Nominees Ltd v. National Capital Development Commission* held that the crystallisation of a floating charge operated as an assignment in equity to the debenture holder of the *property* in the debts due to the company giving the charge. This holding is very debatable. It moreover seems to have been unnecessary to the decision, as clearly the rights of the debenture holder, even in their character of charge in the sense of hypothecation, crystallised before any rights were acquired for the supplier companies under the New South Wales *Contractors' Debts Act* 1897." (footnotes omitted)

and submitted that there was a potential question whether the charge operated as an equitable assignment of property at all.

[41] Although the applicant flagged this potential question, Mr Jackson QC who led Mr Bland on behalf of the applicant expressly stated in the course of oral submissions that this was a question which the applicant did not require to be decided.

[42] The conflict which appears to emerge in the authorities variously referred to by the applicant and the respondent as to the nature of the rights of the chargee to the charged assets on crystallisation of the charge was not explored in argument.

[43] In any case, the true effect of the charge given by Starelec to Natwest must be determined by reference to the provisions of the charge which may assist in determining whether on crystallisation the charge takes effect as a charge only or as an equitable assignment of the charged property. See *Sheahan v Carrier Air Conditioning Pty Ltd* (1997) 189 CLR 407, 422-423 per Brennan CJ. There is a difficulty with the copy of the charge which is Exhibit ST2 to the affidavit of Mr S Tashiro filed on 31 May 2001. Mr Tashiro is the Australian branch manager of the applicant and it appears that the copy of the charge exhibited to his affidavit has been obtained from a microfiche copy of the document. It is some 62 pages in length and many of the pages of the exhibit contain illegible parts. It is not possible to reach a conclusion about the true nature of the rights conferred on Natwest by the charge, in the absence of a consideration of all relevant clauses of the charge.

[44] It is critical to the applicant's argument based on cl 32 of the subcontract that I assume that the charge operate as an equitable assignment of the property charged. The applicant's argument can be successful only if the effect of the charge was that there was an assignment in equity of the benefit of the subcontract which fell within cl 32 of the subcontract. It is not appropriate to decide an application for summary relief on the basis of an assumption which may not be well founded.

[45] It was submitted on behalf of the applicant that if the charge did not operate as an equitable assignment of property at all, that might be another reason why the respondent could not recover judgment in its own name. That submission was not developed in argument and was not the basis on which the applicant sought to maintain the application. If the charge did not operate as an equitable assignment of the charged property, the question whether Natwest, and now the respondent, could bring this proceeding in its own name would also depend on the construction of all relevant provisions of the charge. Again, that is not possible to do so on this application because of the illegibility of many of the provisions of the charge in the copy of the document which is an exhibit on the application.

[46] The question arises whether I should request the parties to provide a legible copy of the charge to enable this threshold issue of the nature of the rights conferred by the charge on Natwest to be determined in this application. As my conclusion on the second issue is against the applicant, there is no need to endeavour to resolve the issue relating to the proper construction of the charge at this stage.

Whether cl 32 of the subcontract was incorporated into the contract between Starelec and the applicant

[47] For the applicant to be successful on this application in respect of its argument based on cl 32 of the subcontract, there must not be an issue for trial as to whether

or not cl 32 of the subcontract was incorporated into the contract between Starelec and the applicant.

[48] As with the other issues raised by this application, the applicant bears the onus on this application of showing that a trial on this issue is not necessary.

[49] As the respondent's pleading stood under the second statement of claim, the respondent asserted that the terms of the subcontract (including cl 32) applied to the contract between Starelec and the applicant. That was changed by para 96 of the third statement of claim.

[50] On the hearing of the application the applicant relied on the contents of its letter dated 30 May 1990 (as set out in para 96 of the second statement of claim) to assert that, as a matter of construction of that letter, the applicant contracted with Starelec on the basis of the subcontract which necessarily incorporated cl 32.

[51] The difficulty with the applicant's position is that the respondent's claim, as currently pleaded, is that set out in the third statement of claim. It asserts that the contract between Starelec and the applicant was of limited terms and only incorporated those terms of the subcontract that were expressly provided for in the letter dated 30 May 1990.

[52] Although Mr O'Donnell QC who led Mr Lyons for the respondent acknowledged that the statement in the second paragraph quoted from the letter dated 30 May 1990 in para 96 of the second statement of claim where reference is made to the applicant's being "prepared to confirm the terms of a direct contract with you, based on the terms of your existing Contract" is a reference to the existing contract between TWW and Starelec, Mr O'Donnell then submitted that the confirmation is then narrowed by the express statement in the third paragraph quoted from that letter and that the words used of "the terms of *that* confirmation being" (emphasis added) limited the terms of the subcontract to those then expressly set out in numbered paragraphs 1, 2 and 3 of the letter dated 30 May 1990.

[53] Even though that is not a particularly appealing construction of the letter dated 30 May 1990, the respondent is asserting in para 96 of the third statement of claim a construction of that letter which is not untenable and could be affected by any admissible extrinsic evidence relating to the making of the direct contract between the applicant and Starelec. It is for the applicant to show on this application that there is no other evidence relevant to determining the basis on which Starelec entered into the contract with the applicant, if the applicant wished to agitate for the construction of the letter dated 30 May 1990 to be determined solely on its contents, rather than in the context of the circumstances in which it was made. The applicant did not attempt to show there was no other relevant evidence, presumably as the third statement of claim was filed only 2 days before the hearing of the application.

[54] I accept the submissions made on behalf of the respondent, that it would be an unusual result if this application were disposed of on the basis of a factual matter found in the respondent's second statement of claim from which the respondent has expressly resiled by the amendments made in the third statement of claim.

[55] I am not satisfied that the applicant has satisfied the onus it bears for the purpose of this application of showing that cl 32 of the subcontract was incorporated into the contract between Starelec and the applicant.

Effect of cl 32 of the subcontract

[56] The conclusion which I have reached on the second issue raised by the application makes it unnecessary for me to consider the applicant's primary argument. Because it was the applicant's primary argument, it is appropriate to make some observations in respect of it.

[57] The applicant relies on the decision of the House of Lords in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1AC 85 ("*Linden Gardens*").

[58] That decision concerned the assignability of a building contract by the owner where cl 17 of the contract relevantly provided:

> "(1) The employer shall not without the written consent of the contractor assign this contract. (2) The contractor shall not without the written consent of the employer assign this contract … "

[59] There were, in fact, two cases involving cl 17 which were the subject of that decision. In the first case the owner had commenced proceedings against the builder which had a contract to remove asbestos from the property. The owner sold the property and assigned to the new owner its rights of actions in the proceedings against the builder. The consent of the builder to that assignment as required by cl 17(1) was not obtained. In the second case which also involved the sale by the owner of the relevant property which included an assignment of the full benefit of all contracts and engagements entered into by the assignor and existing at the date of assignment for the construction and completion of the relevant development, there were no subsisting relevant breaches of the building contract at the time of the assignment and the consent of the builder to the assignment as required by cl 17(1) was also not obtained.

[60] The leading judgment in *Linden Gardens* was given by Lord Browne-Wilkinson. At the outset Lord Browne-Wilkinson referred to the poor drafting of the clause and the trite proposition that the burden of a contract can never be assigned without the consent of the other party, in which event such consent will give rise to a novation. He therefore concluded, at 103, that cl 17(1) of the contract prohibited the assignment by the employer of the benefit of the contract.

[61] With respect to the argument that a prohibition of the assignment of the benefit of the contract did not necessarily prohibit the assignment of accrued rights of action vested in the employer, Lord Browne-Wilkinson stated at 105:

> "The question is to what extent does clause 17 on its true construction restrict rights of assignment which would otherwise exist? In the context of a complicated building contract, I find it impossible to construe clause 17 as prohibiting only the assignment of rights to future performance, leaving each party free to assign the fruits of the contract. The reason for including the contractual prohibition viewed from the contractor's point of view must be that the contactor wishes to ensure that he deals, and deals only, with the particular employer with whom he has chosen to enter into a contract. Building contacts are pregnant with disputes: some employers are much more reasonable than others in dealing with such disputes. The disputes frequently arise in the context of the contractor suing for the price and being met by a claim for abatement of the price or cross-claims founded on an allegation that the

> performance of the contract has been defective. Say that, before the final instalment of the price has been paid, the employer has assigned the benefits under the contract to a third party, there being at the time existing rights of action for defective work. On the Court of Appeal's view, those rights of action would have vested in the assignee. Would the original employer be entitled to an abatement of the price, even though the cross-claims would be vested in the assignee? If so, would the assignee be a necessary party to any settlement or litigation of the claims for defective work, thereby requiring the contractor to deal with two parties (one not of his choice) in order to recover the price for the works from the employer? I cannot believe that the parties ever intended to permit such a confused position to arise."

[62] Lord Browne-Wilkinson concluded, at 106, that the parties who had specifically contracted to prohibit the assignment of the contract could not have intended to draw a distinction between the right to performance of the contract and the right to the fruits of the contract and, at 109, an assignment of contractual rights in breach of a prohibition against such assignment is ineffective to vest the contractual rights in the assignee.

[63] Although Mr O'Donnell submitted that the decision in *Linden Gardens* had not yet been considered at appellate level in Australia and was inconsistent with the approach of the Full Court of the Federal Court in *Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd* (1993) 113 ALR 225, 236 (which was decided prior to *Linden Gardens*), the decision has been referred to with approval in a number of single judge decisions in Australia (including *Re Turner Corporation Ltd* (*in liq*) (1995) 17 ACSR 761, 766-767 and *Westgold Resources NL v St George Bank Ltd* (1998) 29 ACSR 396, 415) and its reasoning and authority are persuasive.

[64] If cl 32 of the subcontract did apply to the contract between Starelec and the applicant in terms that required the applicant to consent to an assignment of the subcontract by Starelec, there are timing issues in relation to the granting of the charge and the making of the contact between Starelec and the applicant. The charge was granted with effect from 14 May 1990 prior to the making of the contract between Starelec and the applicant on 30 May 1990. The issue arises as to whether the relevant date for determining whether there has been an assignment by Starelec within the meaning of cl 32 of the subcontract is the date of the crystallisation of the charge. These matters of timing were not the subject of submissions.

[65] In addition, there must be an issue as to whether the charge amounts to an assignment for the purpose of cl 32 of the subcontract. It was implicit in the applicant's submissions that the charge had that effect. That is a matter, however, which would need to be determined by determining the nature of the charge by reference to all relevant provisions of the charge.

[66] It is therefore not possible to reach any conclusions at this stage about the prospects of success of the applicant's argument based on cl 32 of the subcontract, if it did apply to the contract between Starelec and the applicant.

[67] The applicant had an alternative argument, if the finding were that cl 32 was not incorporated in the subcontract, and that was that a bare right to damages for breach

of contract is incapable of assignment, relying on *Ellis v Torrington* [1920] 1 KB 399. That argument raises similar issues to that involved in whether the right to sue for damages in negligence is assignable.

Assignability of claim for damages in negligence

[68] The applicant relies on a number of authorities for the proposition that the right to sue for damages in tort is always regarded as a bare right of action, never property, and thus unassignable: *Prosser v Edmonds* (1835) 1 Y&C Ex 481; 160 ER 196, *Defries v Milne* [1913] 1 Ch 98 and *Poulton v Commonwealth* (1953) 89 CLR 540, 602.

[69] The strict application of these authorities and those relating to the assignment of a bare right to claim damages for breach of contract has been modified in circumstances where the assignee has a genuine substantial interest or a genuine commercial interest in maintaining the cause of action: *Trendtex Trading Corporation v Credit Suisse* [1982] AC 679, 694, 703 ("*Trendtex*"), *First City Corporation Ltd v Downsview Nominees Ltd* [1989] 3 NZLR 710, 757-8 and *Beatty v Brashs Pty Ltd* [1998] 2 VR 201, 209-215.

[70] The rationale for the unassignability of a bare right of action was that it was objectionable on the grounds of maintenance: *Brownton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499, 505. The authorities commencing with *Trendtex* have changed the laws relating to maintenance and champerty and provided a basis on which an assignment of a right to claim damages for breach of contract or tort which is not coupled with a right of property can be justified. In view of these developments, it is wrong to rely on the statement in *Poulton v Commonwealth* to the effect that the right of action for the tort was incapable of assignment either at law or in equity, when the assignee in that case did not have a pre-existing genuine substantial or commercial interest in the cause of action that was assigned and the case was also decided before the modern developments in the law of negligence: *Beatty v Brashs Pty Ltd* at 215. The analysis in *First City Corporation Ltd v Downsview Nominees Ltd* and *Beatty v Brashs Pty Ltd* for not drawing any distinction between rights of action in tort and contract in applying the principles of *Trendtex* is compelling.

[71] Starelec granted the charge to Natwest prior to the accrual of Starelec's rights against the applicant. There can be no issue about the genuine commercial interest of Natwest as a secured creditor in those rights of action when they accrued. According to the affidavits filed on behalf of the respondent the shares in Starelec were ultimately owned by Mr Edward Burness and Mrs Anita Burness and their three children through Burness family trusts and family companies; Mr and Mrs Burness were substantial creditors of Starelec; Mr Burness and his two adult sons were employed in the business and dependent on it for their livelihood; the applicant's non-payment for Starelec's work on the development led to Starelec's inability to service the debt it owed Natwest and to Natwest exercising its rights as mortgagee resulting in Starelec's business operations closing and liquidation; the substantial assets of the company (apart from its rights against the applicant) were taken by Natwest; Mr Burness and his two sons lost their employment and their source of income; and Mr and Mrs Burness lost their residence and possessions which led to the bankruptcy of Mr Burness.

[72] Natwest declined to institute proceedings in respect of Starelec's claims against the applicant. Mr Burness sought to have Natwest's rights transferred to his wife and him which Natwest declined to do. The respondent was a shelf company acquired by the three children of Mr and Mrs Burness with their two sons being appointed directors for the purpose of acquiring from Natwest the rights of action of Starelec against the applicant. The respondent acquired the charge as trustee of the Garich Family Trust which is a discretionary trust the beneficiaries of which are the members of the Burness family. The intention of the Burness family is that any moneys which are recovered from the applicant will ultimately be distributed for the benefit of the Burness family, after paying out the creditors of the respondent.

[73] There is therefore factual material relevant to showing a genuine commercial interest on the part of the respondent in pursuing Starelec's claims against the applicant.

[74] For the purpose of considering whether summary relief should be granted to the applicant on this issue, I am satisfied that there should be a trial as to whether, in all the circumstances pertaining to the assignment of the charge to the respondent, it can be said that the right to sue for damages in negligence was unassignable. If it were necessary to determine the issue of whether the right to sue for damages for breach of contract was unassignable, it is clear that, on the basis of the existing material, that issue could not be disposed of on a summary basis against the respondent.

Order

[75] It follows that the application should be dismissed. I will hear submissions from the parties, as to the appropriate order for the costs of the application.