SUPREME COURT OF QUEENSLAND

CITATION:	*Thiess P/L v FLSMIDTH Minerals P/L* [2010] QSC 006
PARTIES:	**THIESS PTY LTD** ACN 010 221 486 (plaintiff) v **FLSMIDTH MINERALS PTY LTD (FORMERLY FFE MINERALS AUSTRALIA PTY LTD)** ACN 000 221 590 (defendant)
FILE NO/S:	BS 4735 of 2008
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 January 2010
DELIVERED AT:	Brisbane
HEARING DATE:	20–21 October 2008, 7–11, 21–23 and 25 September 2009
JUDGE:	McMurdo J
ORDER:	**The document described as "Contractor's and Consultant's Side Deed" made between the plaintiff and the defendant in about July 2005 be rectified in the manner claimed in paragraph 1 of the prayer for relief in the further amended statement of claim.**
CATCHWORDS:	EQUITY – GENERAL PRINCIPLES – MISTAKE – EQUITABLE RELIEF IN CASE OF MISTAKE – RECTIFICATION – PARTICULAR CASES – where plaintiff made an agreement for the design and construction of calciners for the Gladstone plant of Queensland Aluminium Limited ("QAL") – where defendant was a subcontractor of plaintiff and responsible for much of the design work – where plaintiff, defendant and QAL suffered, or claimed to have suffered, losses due to the failure of structural members of the calciners – where plaintiff commenced proceedings against defendant claiming that losses were caused by defendant's breach of contract, negligence and contraventions of the *Trade Practices Act* 1974 (Cth) – where a Main Deed of settlement was reached between plaintiff, defendant, QAL and other owners of the Gladstone plant and a Side Deed of settlement was reached between plaintiff and defendant – where plaintiff claims rectification of the Side Deed on the basis of common or alternatively unilateral mistake – whether the Side Deed should be rectified

TRADE AND COMMERCE – TRADE PRACTICES ACT 1974 (CTH) AND RELATED LEGISLATION – CONSUMER PROTECTION – MISLEADING AND DECEPTIVE CONDUCT OR FALSE REPRESENTATIONS – PARTICULAR CASES – CONTRACTS GENERALLY – where plaintiff claims that it executed the Side Deed induced by misleading and deceptive conduct by defendant as to effect of the deed – whether conduct of defendant contravened s 52 of the *Trade Practices Act* 1974 (Cth)

Insurance Contracts Act 1984 (Cth), s 54
Trade Practices Act 1974 (Cth), s 52, s 87

Bacchus Marsh Concentrated Milk Co Ltd (in liq) v Joseph Nathan & Co. Ltd (1919) 26 CLR 410, cited
Bofinger v Kingsway Group Ltd (2009) 239 CLR 269; [2009] HCA 44, cited
Bush v National Australia Bank Ltd (1992) 35 NSWLR 390, applied
Club Cape Schanck Resort Co Ltd v Cape Country Club Pty Ltd (2001) 3 VR 526, considered
Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd (1995) 41 NSWLR 329, considered
Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 CLR 226, cited
George Wimpey UK Ltd v VI Components Ltd [2005] EWCA Civ 77, cited
Issa v Berisha [1981] 1 NSWLR 261, cited
Jones v Dunkel (1959) 101 CLR 298, cited
Mander Pty Ltd v Clements (2005) 30 WAR 46, cited
Maralinga Pty Ltd v Major enterprises Pty Ltd (1973) 128 CLR 336, cited
Pukallus v Camron (1982) 180 CLR 447, cited
Re Estate of Nina Spinks, unreported, Supreme Court of New South Wales, 22 August 1990, cited
Ryledar Pty Ltd v Euphoric Pty Ltd (2007) 69 NSWLR 603, cited
Tucker v Bennett (1887) 38 Ch D 1, cited
Winks v WH Heck & Sons Pty Ltd [1986] 1 Qd R 226, cited

COUNSEL: J K Bond SC, with J P O'Regan, for the plaintiff
J T Gleeson SC, with S A Kerr SC and R C A Higgins, for the defendant

SOLICITORS: Thynne & Macartney for the plaintiff
Middletons for the defendant

[1] In 2001, the plaintiff ("Thiess") made an agreement with Queensland Aluminium Limited ("QAL") for the design and construction of three calciners for the plant

operated by QAL at Gladstone. The defendant ("FFE") was a subcontractor of Thiess and responsible for much of the design work. FFE also contracted directly with QAL for some other associated work. I will refer to this head contract between Thiess and QAL in 2001, as all three parties did in agreements which they made in 2005, as "the Contract". I will refer to the subcontract between Thiess and FFE in 2001, again as the parties did in the 2005 documents, as "the Consultancy Agreement".

[2] By mid-2003, the calciners had been built to FFE's design when during the process of commissioning, problems were encountered. Some of the structural members of the calciners failed. In consequence, each of these three parties suffered, or claimed to have suffered, losses. Thiess claimed that these problems were caused by FFE's breach of contract, negligence and contraventions of the *Trade Practices Act* 1974 (Cth), as a result of which Thiess had incurred the costs of rectifying works and had lost bonuses which would otherwise have been paid by QAL. FFE incurred its own losses in attempting to remedy the design of the calciners. QAL claimed to have suffered losses, for which it attributed legal responsibility to Thiess and FFE.

[3] In December 2004, Thiess commenced proceedings against FFE in this Court.[1] By its statement of claim in that case, Thiess alleged that it had incurred cost overruns totalling $18.328 million and had lost bonuses totalling $5.295 million, making for a total claim of the order of $23.6 million. I will refer to that case as "the Proceedings".

[4] In early 2005, QAL, Thiess and FFE began negotiations towards a settlement of some of their differences. Ultimately two agreements were reached, each within a deed dated 30 July 2005. There was a deed of settlement ("the Main Deed") between QAL, Thiess, FFE and four companies which were the owners of the Gladstone plant. Secondly, there was a so-called Side Deed between Thiess and FFE.

[5] It is the Side Deed which gives rise to the present case. The principal claim by Thiess is for rectification of this instrument, upon the basis of a common or alternatively a unilateral mistake. Thiess also claims that it executed the Side Deed induced by misleading and deceptive conduct by FFE as to its effect. In essence, the dispute concerns a term of the Side Deed which provided that Thiess's causes of action as then claimed could still be pursued within the Proceedings, notwithstanding that other rights and obligations between Thiess and FFE would merge in the settlement.

[6] The dispute concerns the extent to which Thiess's rights to recover damages as claimed in the Proceedings were preserved. Thiess says that the intention was to preserve them entirely; FFE says that the intention was to preserve them only to the extent which was unambiguously recorded in the Side Deed. There was an agreed limitation in the Side Deed upon Thiess's rights in respect of the Proceedings according to certain liability insurance indemnifying FFE. There were two policies which were potentially available to FFE to indemnify it against its liability to Thiess in the Proceedings. First there was a policy issued by QBE Insurance (Australia) Limited ("QBE"), for which the cover for any one claim was limited to $20 million. Secondly, there was a policy issued by Liberty Mutual Insurance Company ("Liberty"), which was a "follow form" policy, for which the

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1 BS 4735 of 2008.

cover was $40 million for any one claim, in excess of the $20 million covered by the QBE policy.

[7] In 2001, Thiess and FFE had included a term in the Consultancy Agreement that the liability of either party to the other should be limited to the extent to which that liability was insured by what that contract described as the Project Specific PI Policy. At least on Thiess's case, that referred to the insurance constituted by the layers which were the QBE and Liberty policies. As I will discuss, for present purposes that is not disputed by FFE.

[8] It is common ground that in purporting to preserve the rights of Thiess which were the subject of its claims in the Proceedings, the Side Deed expressly limited FFE's potential liability in the Proceedings to the extent to which it was indemnified by only the QBE policy. Thiess says that this was a mistake and that the common intention, or at least its intention, was that the limit should be according to the available indemnity under the QBE and the Liberty policies.

[9] For each of Thiess's present claims, it is necessary to discuss the process of negotiation and legal drafting which resulted in the agreements of July 2005. These events were the subject of a more than thorough investigation in the examination and cross-examination of employees of Thiess and two solicitors who acted for it as well as a witness called in FFE's case, who was its then solicitor. The account must begin with the relevant terms of the Contract and the Consultancy Agreement.

The 2001 agreements

[10] In the Contract, made between QAL as "the Principal" and Thiess as "the Contractor", a term required Thiess to effect and maintain certain liability insurance as follows:

> "**16B Professional Indemnity Insurance**
>
> Before commencing [work under the Contract], the *Contractor* shall effect and maintain the *Project Specific PI Policy* with levels of cover not less than stated in *Item 24(a)*.
>
> The *Project Specific PI Policy* shall be maintained until the *final certificate* is issued and thereafter for the period as stated in *Item 24(b)*.
>
> The *Project Specific PI Policy* shall:
>
> (a) cover the *Contractor* and [FFE] and each of their *related bodies corporate* for their respective liabilities to any one or more of the *Owners* and the *Principal* for any *Loss* they may suffer or incur arising out of or in connection with professional services performed by the *Contractor*, [FFE] and each of their *related bodies corporate* in connection with [work under the Contract]; and
>
> (b) be in the joint names of the *Contractor* and [FFE] and on terms and conditions no less favourable than the policy set out in Schedule 6.

> The *Principal* shall, on demand and production of a tax invoice … from the relevant insurer, pay the relevant premium directly to the relevant insurer."

The term Project Specific PI Policy was defined in cl 1 of the Contract to mean:

> "the professional indemnity policy required to be taken out by the Contractor in accordance with clause 16B…"

Item 24 of an annexure to the Contract was as follows:

"24 Professional indemnity insurance (clause 16B and subclause 9.2(e))	
(a) Levels of cover of *Contractor's* professional indemnity insurance shall be not less than	Sixty million dollars ($60,000,000) If nothing stated, $5,000,000
(b) Period for which *Contractor's* professional indemnity insurance shall be maintained"	44 months from the date of the *Contract* If nothing stated, 6 years

[11] Schedule 6 of the Contract was in the form of an insurance policy. That document did not identify an insurer. But it was in terms of the policy which was issued subsequently by QBE. Relevantly, that proposed policy document contained these terms:

> "**5** ***THE SUM INSURED***
>
> A$20,000,000 any one Claim and in all in excess of the Excess. Subject to two automatic reinstatements as per Condition 12.
>
> **6** ***EXCESS***
>
> 45.2 A$500,000 each and every Claim (Exclusive / inclusive of Costs and Expenses) – two or more Claims arising out of a single act, error or omission shall be treated as a single Claim.
>
> Only one Excess shall apply to a Claim arising from a single act, error or omission if such a Claim requires cover under both Insuring Clauses (a) and (b).

…

12. ***AUTOMATIC REINSTATEMENT***

Upon notification to the Insurers during The Period of Insurance of any Claim or of circumstances which are likely to give rise to a Claim or of any loss or expense, this Policy shall be deemed to be reinstated for such amount, if any, as may be ultimately paid by the Insurers in respect of such Claim or loss, so as to remain in force during The Period Of Insurance for The Sum Insured of this Policy, provided always that the aggregate of the amounts so reinstated shall not exceed an amount equal to twice The Sum Insured.

It is the intention of this Policy that the sums thus reinstated shall provide cover in respect of subsequent Claims or losses which are totally unrelated to the Claim(s) or circumstance(s) or loss(es) that gave rise to the Claim(s), circumstance(s) or loss(es) previously notified.

In these circumstances, the Insurers agree that the liability of the Insurers:

(a) in respect of all Claims or losses resulting from one occurrence or series of occurrences arising out of the same act, error or omission, or

(b) in respect of all Claims or losses resulting from the dishonesty or infidelity of any one person or in which such person is concerned or implicated,

shall not exceed The Sum Insured except that (subject to the provisions of this Policy) the Insurers will in addition pay the costs and expenses incurred in the defence or settlement of any Claim."

[12] By cl 44 of the conditions of the Contract, it was provided that the liability of each party should be limited as set out in an annexure, but that this limitation of liability would not apply to:

"(i) liability of the *Contractor* to the extent that the *Contractor* is entitled to claim indemnity in respect of such liability under the *Project Specific PI Policy*, subject to the relevant indemnity being paid in accordance with the policy …"

[13] In the Consultancy Agreement between Thiess as "the Contractor" and FFE as "the Consultant", cl 16B provided for professional indemnity insurance in similar terms to those of the Contract, as follows:

"**16B Professional indemnity insurance**

Before *the Services* are commenced by the *Consultant*, the *Contractor* shall effect and maintain the *Project Specific PI Policy* with levels of cover not less than stated in *Item 28*.

> The *Project Specific PI Policy* shall be maintained until the *final certificate* is issued and thereafter for the period as stated in *Item 28*.
>
> The *Project Specific PI Policy* shall be in the joint names of the *Contractor* and the *Consultant* on the terms and conditions no less favourable than the policy set out in Schedule 8."

Similarly Item 28 was as follows:

> "28. Professional indemnity insurance (clause 16B) — AUD $60,000,000 As per Schedule 8"

Schedule 8 of the Consulting Agreement was a document in the same terms as the proposed policy in schedule 6 of the Contract. Again the term Project Specific PI Policy was defined in identical terms.

[14] There was a limitation of liability under the Consultancy Agreement which relevantly corresponded with that under the Contract. Clause 44 of the Consultancy Agreement provided that:

> "… the parties' rights and remedies against each other and each parties' [sic] liability to the other shall be limited to:
>
> …
>
> (j) liability of [FFE] or [Thiess] to the extent [FFE] or [Thiess] is entitled to claim indemnity in respect of such claim under the *Project Specific PI Policy* subject to the relevant indemnity being paid in accordance with the policy …"

[15] Accordingly, the Project Specific PI Policy required by the Consultancy Agreement was that also required by the Contract. The liability, in particular, of FFE to Thiess was limited to the extent of FFE's entitlement to indemnity under that insurance and the amount actually paid under it.

The policies

[16] The QBE policy was dated 1 August 2001. The insured were Thiess and FFE for their respective rights and interests. Its terms corresponded with those set out in the proposed policy within the Contract and the Consultancy Agreement. The period of insurance was specified as 31 July 2001 to 30 April 2005. The insuring clauses were as follows:

> "Insurers hereby agree to cover the Insured up to but not exceeding in the aggregate the amount stated as the Sum Insured:
>
> (a) for any sum or sums which the Insured may become legally liable to pay arising from any Claim first made against them during the Period of Insurance and notified to the Insurers;
>
> (b) for loss or expense sustained by the Insured which is directly attributable to the costs to achieve compliance with

> their contractual responsibilities and which is first discovered and notified to the Insurers;
>
> during the Period Of Insurance arising directly out of an act, error or omission in the conduct or execution of the Professional Activities and Duties Of the Insured."

The liability of the insurer was expressed not to "exceed in the aggregate for any one Claim under this Policy the Sum Insured", which, as I have set out above, was specified as "A$20,000,000 any one Claim and in all in excess of the Excess". Professional Activities and Duties of The Insured was defined, in effect, as the insured's work on this Calciner project.

[17] The Liberty policy was dated 10 October 2001. Again, the insured were Thiess and FFE and the period of cover was 31 July 2001 to 30 April 2005. It referred to the QBE policy as the Primary Policy and its terms were expressly incorporated as terms of the Liberty policy. It provided that a claim under the Liberty policy would be payable only if a claim in respect of the same event or circumstance had been accepted for payment by QBE under the Primary Policy and the amount of the loss in respect of which the claim was made was more than A$20,000,000. The amount payable on a claim under this policy was the excess of the Insured's loss over $20,000,000 and "that the most Liberty has to pay … is the amount set out in item 7" of its policy which was in these terms:

> "7. Limit of Indemnity — Up to A$40,000,000 any one claim and A$120,000.000 in the aggregate for the period of insurance in excess of A$20,000,000 any one claim and A$60,000,000 in the aggregate for the period of insurance."

[18] The Project Specific PI Policy required by the Contract and the Consultancy Agreement was insurance with "levels of cover not less than" $60 million. It is fundamental to Thiess's case that the obligation to effect that insurance, the Project Specific PI Policy, was met only by the combined operation of the QBE and Liberty policies. If the Project Specific PI Policy in the Consultancy Agreement meant only the QBE policy, then the rectification sought by Thiess would serve no purpose. This is because it seeks to rectify the Side Deed so as to provide that the limit of FFE's liability in the Proceedings is the amount for which FFE is indemnified by the Project Specific PI Policy according to the meaning of that term in the Consultancy Agreement. Thiess emphasises that what was required was insurance with "levels of cover" not less than $60 million. The QBE policy, operating alone, provided a level of cover of $20 million per claim. The fact that it also provided for automatic reinstatements, Thiess argues, is irrelevant.

[19] That argument has force. It is likely that the parties to each of these contracts intended to provide for a certain "level" of insurance, and in turn a certain limit of liability according to the extent of that insurance, by reference to the amount of an

anticipated loss and consequent claim from one occurrence or series of related occurrences, rather than from a series of unrelated events resulting in distinct claims. The amount or "levels" of cover was agreed to be that as specified in a distinct item in the schedule. The levels of cover were not agreed by reference to the form of policy in the schedule. Rather, the parties incorporated that document apparently to describe the required terms and conditions other than the amount or levels of cover and the period of the cover. Had the intention been to specify the amount of the cover as effectively that which would be provided by a policy in the form of that in the schedule, there would have been no reason for the specific provision that the amount or levels of cover would be according to what was specified elsewhere in each of these contracts. And the use of the plural "levels", in describing the amount of the cover, was apt because of the possibility that the insurance would be provided by several levels or layers, such as by these policies which were subsequently issued.

[20] FFE pleaded in the present case that the QBE policy alone constituted the Project Specific PI Policy on the proper interpretation of that term in the Contract and the Consultancy Agreement. But ultimately, FFE did not argue the point, although it did not concede the correctness of Thiess's argument. Counsel for FFE submitted no more than that there was an ambiguity and said that it was unnecessary for that question of construction to be resolved within this judgment. That was consistent with the conduct of the FFE case. For example, evidence by solicitors who acted for Thiess in the negotiations and preparation of the Side Deed, that they then believed the Project Specific PI Policy in the Consultancy Agreement was effectively the QBE and Liberty policies, was not challenged upon the basis that such an interpretation of the Consultancy Agreement could not have been made. Accordingly, FFE made no submission that the rectification which is sought by Thiess would be futile and should be refused on that ground.

[21] If the Thiess argument were clearly wrong, there would be no need for the court's intervention by the grant of the remedy of rectification and nor would there be any basis for like relief under s 87 of the *Trade Practices Act*. But the interpretation for which Thiess contends is not clearly wrong. Because of the conduct of the FFE case, it is unnecessary to resolve this question. I accept that there was some ambiguity in the relevant terms of the 2001 agreements and that this could have provided at least a basis for a belief that the Project Specific PI Policy was constituted by a single policy, in the form and with the amount of cover set out in the document in the schedule to each agreement. In other words it was not improbable that some of those involved in the relevant events would have had the understanding that the limit of FFE's liability under the Consultancy Agreement was according to the QBE policy alone. That possibility is relevant in the consideration of what the individuals involved in the negotiation of the 2005 settlement and the drafting of the 2005 deeds intended to be the effect of the Side Deed.

Negotiations and drafting of the 2005 agreements

[22] The negotiations and drafting of the agreements ultimately signed on or about 30 June 2005 occupied several months. There were dealings between employees of each of QAL, Thiess and FFE as well as between their respective solicitors: Minter Ellison for QAL, Corrs Chambers Westgarth ("Corrs") for Thiess and Sparke Helmore for FFE. The communications between these parties, whether or not through their solicitors, is well recorded by contemporaneous documents. There

were some telephone discussions of which, in some cases, there are diary notes. Although there were differing recollections of some of these conversations, ultimately none of the differences is critical. More broadly, there is no significant factual issue as to what passed between the parties. The controversies concern what relevant individuals believed to be the effect of the proposed contracts in their various drafts and, in the case of some, why they held those beliefs.

[23] Certain aspects of the detail which follows should be noted at this point. The first is that each of the relevant parties: Thiess, FFE and QAL, whether through their solicitors or otherwise, was from time to time inconsistent in describing what constituted the Project Specific PI policy under the 2001 agreements. Secondly, there were no negotiations as to what should be the monetary limit of Thiess's rights in relation to the Proceedings. Put another way, at no time was this an issue which was the subject of commercial bargaining. Thirdly, there was no discussion between the respective lawyers for Thiess and FFE as to what should be that monetary limit. There were discussions between them as to what causes of action should be included within the Proceedings. In particular there were drafts and re-drafts exchanged between Corrs and Minter Ellison on the question of the extent to which Thiess should be allowed to amend its pleadings in the Proceedings, and as will be seen, there were various drafts of the term by which Thiess's rights in relation to the Proceedings should be limited by FFE's indemnity from insurance. But there was no discussion between the lawyers on the specific subject of whether that insurance should be constituted by both policies or the QBE policy only. Fourthly, there are numerous statements and other indications within these dealings of a common intention to *preserve* whatever were Thiess's rights upon which it had sued in the Proceedings.

[24] The critical point in these dealings was an email from Mr Cameron of Sparke Helmore to Corrs of 27 May 2005, to which was attached a draft Side Deed between Thiess and FFE. This was in place of previous drafts by Mr Cameron, sent to Corrs on 5 and 25 May, which were in terms that accord with the effect of the Side Deed as Thiess would have it rectified. It is that draft of 27 May which can be seen to be the origin of the term of the Side Deed by which FFE's liability in the Proceedings became effectively limited to whatever was paid by QBE. Yet that change effected by that draft of 27 May was not discussed between the solicitors or between their clients.

Events prior to 27 May – early drafts

[25] On 12 April 2005 QAL sent its proposed terms of settlement to Thiess, which immediately forwarded them to FFE. On the following day FFE sent QAL's draft to Mr Cameron. The draft proposed an amendment of the Contract by a so called Deed of Variation on the terms which were there set out. They provided, in effect, for Thiess to be discharged from further liability under the Contract on condition that certain payments were made to QAL. In turn, the obligation to make those payments was conditional upon the receipt by Thiess or FFE of insurance proceeds. I set out the terms as to those payments, because they refer to both the QBE policy and the Liberty policy as relevant insurance:

> "3A. If, at any time, within three (3) years from the date of the execution of the Deed of Variation, proceeds are received by FFE or Thiess under the Project specific PI policies (policy reference A07971767PID) with QBE Insurance (Australia)

> Limited and (policy reference SY-SPC-01500174) with Liberty Mutual Insurance, FFE and Thiess agree to pay the first five million dollars ($5M) of the net proceeds received by either FFE or Thiess to QAL (the clause 3A payment).
>
> 3B. If, the clause 3A payment is less than three million dollars ($3M), Thiess and FFE will, on the third anniversary of the date of execution of the Deed of Variation procure to QAL the payment of three million dollars ($3M) or the difference between the clause 3A payment and three million dollars ($3M) whichever is the lesser (the clause 3B payment).
>
> 3C. If, at any time after the third anniversary of the Deed of Variation, Thiess or FFE receive proceeds under the Project specific PI policies which are equal to or greater than the difference between five million dollars ($5M) and the combined clause 3A and 3B payments, FFE and Thiess agree to procure to QAL the payment any amount equal to the difference between five million dollars ($5M) and the combined clause 3A and 3B payments (the clause 3C payment). For the avoidance of doubt the combined clause 3A, 3B and 3C payments shall not exceed five million dollars ($5M)."

[26] Thiess and FFE discussed a response to that proposal. In the course of doing so, FFE sought a release from any claim by Thiess against it with the express qualification that this would not affect the Proceedings. On 21 April, Mr Yovich of FFE emailed Mr Buttner and others from Thiess as follows:

> "I think the revised letter [of response to QAL] was fine …
>
> Assuming we are in agreement with the changes it can go, subject to Thiess and [FFE] concluding a few matters as nominated in Brian's email below.
>
> 1. …
>
> 2. With respect to the waiver, I believe what Brian meant, is that the waiver of existing or future claims by QAL to Thiess will need to be extended from Thiess to [FFE] except for the current litigation and *to the extent that any payout is limited to the net recovery from the Insurer*.
>
> …" (emphasis added)

[27] On the same day, Mr Halpin of Thiess replied to Mr Yovich, saying amongst other things:

> "An extension of the waiver of existing or future claims to include claims from Thiess to [FFE] is acceptable in principle, but needs to be *heavily qualified to exclude all current litigation* and possible rectification for items with extended warranty. We need to develop this response (including legal input)." (emphasis added)

[28] On 22 April, apparently after a meeting between them, Mr Yovich emailed Mr Halpin to summarise their negotiations to that point. Relevantly he referred to

the FFE proposal that it have a release from Thiess and to what he understood to be the Thiess response:

> "The waiver of existing or future claims by QAL to Thiess will be extended from Thiess to [FFE] except for the current litigation and to the extent that any payout is limited to the net recovery from the Insurer.
>
> Thiess agree to this principle and will provide for appropriate wording in the settlement with [FFE]."

[29] On 28 April, Mr Halpin emailed Mr Yovich and another from FFE referring to discussions of the previous evening. Relevantly he said:

> "The conditional waiver of FFE's liability as per Ian Yovich's email of 22/4/05 will be agreed."

By a further email from Thiess that day it was confirmed that this was an intended reference to FFE's term as set out in Mr Yovich's emails.

[30] The consensus between Thiess and FFE then permitted Thiess to write a letter of offer to QAL. The letter, dated 28 April, did not refer to the position between Thiess and FFE at least so far as the Proceedings were concerned. The letter did refer to the insurance available for FFE to make payments to QAL, but in terms that the Project Specific PI Policy was the QBE policy. But the omission of any reference to the Liberty policy might be explained by the fact that FFE's payments to QAL were to be no more than $4,000,000.

[31] The period of insurance under the QBE and Liberty policies was then about to expire. In that circumstance Mr Halpin of Thiess emailed Mr O'Neill of QAL as follows:

> "We confirm our discussions today re Thiess letter ref 07090 dated 28/4/05 as follows:
>
> 1. QAL agree to the terms of the settlement offer in principle with the exception of Item 5 which will be the subject of further discussion over the next few days.
>
> 2. The Project's Professional Indemnity Policy expires on 30/4/05 and cannot be renewed in the same terms in today's market conditions.
>
> 3. Thiess require the Project cover to be extended pending finalisation of the Contract to the satisfaction of the Insurers. Cover can be provided through Thiess' group primary layer policy at an annual cost of approx $200,000 pa plus tax etc.
>
> 4. FFE will not be covered under this arrangement.
>
> 5. If we are unable to finalise the Contract in a time frame acceptable to the Insurers we require QAL to pay the premium for this cover in accordance with the Contract.
>
> …"

That email was copied to Mr Field of FFE. Thiess's requirement of QAL was apparently in reliance upon cl 16B of the Contract which, whilst obliging Thiess to

maintain the Project Specific PI Policy, required QAL to "pay the relevant premium directly to the relevant insurer". Mr Halpin's reference to the "primary layer policy" was apparently to the QBE policy. What he there described the "Project Indemnity Policy" included but was not limited to that primary layer. At the same time, Mr Yovich emailed Mr Halpin saying that Thiess was in breach of the Consultancy Agreement by not renewing the "PI policy".

[32] What appears to have been the first draft of a deed of settlement with QAL and the owners was prepared by Mr Buttner, a lawyer employed by Thiess, and sent to Mr O'Neill at QAL and Mr Field at FFE on 29 April. As Mr Buttner then made clear, this draft had not been approved by all relevant persons within Thiess and FFE. The draft is relevant for its reference to the insurance which was to qualify FFE's liability to QAL under this deed according to the proceeds of the QBE policy. Nothing was included in that draft as to the position between Thiess and FFE.

[33] On 4 May, Mr Cameron emailed to Mr Yovich some suggested changes to that first draft. His changes included a definition of "Insurance Recovery" governing the extent of FFE's liability to QAL. In that definition, the QBE policy was referred to as "the Project Specific PI Policy (as defined in the Contract)".

[34] On the same day Mr Cameron wrote to Mr Yovich a letter which was intended to define his firm's retainer. He described the proposed settlement with Thiess, QAL and the owners as the "Proposed Closeout". Mr Cameron wrote that his understanding was that FFE's "objectives in the entering into a Proposed Closeout" were:

> "(a) to crystallise [FFE's] exposure to claims for damages … in connection with the project …;
>
> (b) to replace all of [FFE's] obligations under the existing contracts with three obligations:
>
> (i) to pay money to QAL …
>
> (ii) to perform certain services, in the nature of repair …
>
> (iii) to provide security in respect of the services obligation …
>
> (c) *to ensure that your exposure to costs or damages in the proceedings now on foot against you in the Supreme Court of Queensland (in which the plaintiff is Thiess) is limited to $500,000 being the amount of the deductible under the policy …*
>
> *The Proposed Closeout is not intended to affect your Thiess indemnity claim, the proceedings commenced against you by Thiess or FFE's own loss claim (except to possibly add to that claim). …"*
>
> [emphasis added]

Elsewhere in that letter the "policy" was described as "the insurance policy … issued in your favour by QBE … in relation to the project". This letter made no reference to the Liberty policy. It may be noted, however, that there was no further deductible under the Liberty policy once its layer was engaged.

[35] Again on that day, Mr Yovich sent to Mr Buttner and another at Thiess the draft deed of settlement as amended by Mr Cameron. Those changes were forwarded to Mr Halpin of Thiess and to Mr Lawson, a partner of Corrs and Ms Beardow (now Mrs Williams), a solicitor employed at that firm.

[36] On 5 May, Mr Cameron sent a further draft to Mr Yovich. In this draft, it was to be agreed that:

> "2.1 The rights and obligations of the parties under or in connection with the Contract, the Consultancy Agreement and [other agreements made in 2001] (collectively "the Project Agreements") shall cease upon this deed coming into effect."

The draft provided that any "Relevant Right", which was defined as any right or alleged right arising under one or more of the "Project Agreements" or in connection with the project or any communication by any of the parties concerning it, should be "released and … cease to exist upon this Deed coming into effect". It further provided that in lieu of the rights and obligations of the parties under or in connection with the Project Agreements, there would be substituted the rights and obligations as set out in this Deed. Absent any qualification of those provisions, such a deed would have put paid to the Proceedings. So Mr Cameron allowed for the continuation of the Proceedings by a draft cl 11, in which they were described as the "QSC proceedings". It is necessary to set out in full Mr Cameron's proposed clause 11.3:

> "11.3 The QSC proceedings shall be limited as follows:
>
> (a) the Contractor may not amend the pleadings or particulars after the date of this Deed in such a way as to add any claim in respect of loss or damage not claimed as at the date of this Deed, but may otherwise amend;
>
> (b) the Contractor shall not enforce any judgment, settlement or order made in connection with the QSC proceedings against the Consultant except to the extent that the Consultant is actually indemnified by QBE *or any excess insurer* in respect of that judgment or settlement;
>
> (c) in the event that, in the opinion of the Contractor, QBE *or any excess insurer* wrongfully refuses or fails to indemnify the Consultant in respect of any judgment, settlement or order made in connection with the QSC proceedings, the Consultant shall, upon written demand from the Contractor, assign to the Contractor any rights that the Consultant may have against QBE *or any excess insurer* in respect of any such judgment, settlement or order;
>
> (d) in the event of such an assignment, the Consultant shall provide reasonable co-operation to the Contractor, at the Contractor's cost, in relation to any assigned rights. The enforcement or attempted

enforcement of any such rights by the Contractor shall be at the Contractor's expense;

(e) to the extent that the amount of any judgment, settlement or order made in connection with the QSC proceedings in favour of the Contractor against the Consultant remains unsatisfied after any indemnification by QBE *or any excess insurer* (including after the Contractor has taken such enforcement action as it wishes against QBE *or any excess insurer* pursuant to the assignment referred to in 11.3(c) above), the Contractor unconditionally releases the Consultant in respect of the unsatisfied amount;

(f) the Consultant may bring such cross claims as it may be advised in the QSC proceedings, provided however that the amounts sought in any such cross claim do not:

(i) arise out of any of the obligations assumed by the Consultant under this Deed; or

(ii) exceed, in the aggregate, the quantum of the claims made by the Contractor in the QSC proceedings;

(g) no party to this Deed may be joined to the QSC proceedings by either the Contractor or the Consultant."

[emphasis added]

As I have emphasised, Mr Cameron's draft referred to both QBE and "any excess insurer". However, in its provisions for payments by FFE to QAL, the draft referred to the QBE policy as the "Project Specific PI Policy (as defined in the Contract)". This indicates that Mr Cameron had not read, or at least understood, the terms as to liability and insurance in the Contract and the Consultancy Agreement.

[37] Later that day, Mr Cameron sent an email addressed not only to Mr Yovich but also to Mr Buttner. This attached two documents. One was a further draft deed of settlement between all of the parties. This draft did not include that cl 11 of his previous draft. However, as Mr Cameron explained, his other document, described as the "QSC proceedings document", was intended to serve that purpose. He wrote:

> "The QSC proceedings" document is intended to be part of a separate Thiess/FFE agreement to accompany the main deed, to *preserve* the existing proceedings." (emphasis added)

This was not identical to the previous cl 11, in that instead of referring specifically to QBE and also to any excess insurer, it referred to "any insurer of the Project Specific PI Policy (as that term was defined in the Contract)". It provided that the compromise of rights and remedies in the proposed deed of settlement would not affect the QSC proceedings, subject to this clause:

"1.3 The QSC proceedings shall be limited as follows:

(a) the Contractor may not amend the pleadings or particulars after the date of this Deed in such a way as to add any claim in respect of loss or damage not claimed as at the date of this Deed, but may otherwise amend;

(b) the Contractor shall not enforce any judgment, settlement or order made in connection with the QSC proceedings against the Consultant, except to the extent that the Consultant is actually indemnified by any insurer of the Project Specific PI Policy (as that term is defined in the Contract) ("**Insurer**") in respect of that judgment or settlement;

(c) in the event that, in the opinion of the Contractor, the Insurer wrongfully refuses or fails to indemnify the Consultant in respect of any judgment, settlement or order made in connection with the QSC proceedings, the Consultant shall, upon written demand from the Contractor, assign to the Contractor any rights that the Consultant may have against the Insurer in respect of any such judgment, settlement or order;

(d) in the event of such an assignment, the Consultant shall provide reasonable co-operation to the Contractor, at the Contractor's cost, in relation to any assigned rights. The enforcement or attempted enforcement of any such rights by the Contractor shall be at the Contractor's expense;

(e) to the extent that the amount of any judgment, settlement or order made in connection with the QSC proceedings in favour of the Contractor against the Consultant remains unsatisfied after any indemnification by the Insurer (including after the Contractor has taken such enforcement action as it wishes against the Insurer pursuant to the assignment referred to in 11.3(c) above), the Contractor unconditionally releases the Consultant in respect of the unsatisfied amount;"

Either of these drafts of 5 May, if agreed, would have had the effect which Thiess seeks from rectification of the document which was executed.

[38] On the following day, 6 May , Mr Buttner responded to that email. In his email to Mr Cameron and Mr Yovich he said that "apart from a couple of relatively minor comments, I believe that Thiess can support the redrafted deed of settlement". He made no reference to the separate document which would preserve the Proceedings.

[39] On 9 May, Mr Cameron emailed Mr Buttner, Mr Halpin and Mr Yovich attaching a further draft of what he described as the main deed (the proposed settlement agreement involving all parties). He there wrote:

> "As agreed the document is structured so as to replace all existing obligations with a fresh set of obligations set out in this document.

> The separate Thiess/FFEM deed will reproduce some of the elements of this deed, but obviously not all of the elements, particularly those parts that arise out of the fact that it will be Thiess performing the bullnose repairs. Large parts of the attached document have been included in order to satisfy QAL that appropriate arrangements are in place for any work that is to be done (by Thiess) on site. In addition, the Thiess/FFEM deed will need to include the *preservation* of the existing Queensland Supreme Court action (as per the draft clause previously supplied), and even though that document will form an essential part of the overall deal between Thiess and FFEM, it will not be referred to in the documents involving QAL or the Owners.
>
> From the FFEM side, the attached draft is still subject to final instructions, although I believe we are close. …" (emphasis added)

This email did not attach any new version of the proposed separate agreement for the "preservation" of the Proceedings.

[40] On 12 May, Mr Buttner sent to Mr Lawson and Ms Beardow those drafts by Mr Cameron. Mr Buttner wrote:

> "The scheme of the deed is that all parties' existing or future rights are extinguished other than in respect of the ongoing work on the bullnose refractory. The intention is that in a separate deed between Thiess and FFE (to be simultaneously executed and have priority over the QAL deed) Thiess' rights against FFE would be *reconfirmed* in respect of the current litigation (see attached proceedings *preservation* clause)." (emphasis added)

[41] On 13 May, Mr McCarthy, a solicitor from Minter Ellison acting for QAL, sent an amended version of QAL's draft settlement deed to Mr Yovich, Mr Buttner and Mr Halpin. That draft contained no provision for preservation of the Proceedings in which, of course, QAL had no interest. Its relevance here is in its reference to insurance, insofar as that was to affect the amount and timing of payments by FFE to QAL. It used the term Project Specific PI Policy, which it defined simply to take its meaning from the Contract. But it referred to QBE as *the* insurer under that policy. On the same day, Mr Buttner emailed Mr Lawson and Ms Beardow asking for advice about that amended draft and also about the draft of the "litigation preservation clause" (i.e. Mr Cameron's draft) which he had sent to them on the previous day.

[42] On 16 May 2005, there was a meeting attended by Mr Buttner, Mr Halpin, Mr Yovich and lawyers for QAL. Mr Buttner made an extensive diary note of that meeting. On the subject of QAL's then draft, which provided in clauses 3.1 through 3.4 that all rights under the 2001 agreements would merge in this deed, he noted this discussion:

> "Words needed to preserve [Thiess] court proceedings. [Thiess] will distribute suggested wording. Clause 7.9 will also be similarly amended."

Clause 7.9 of that draft was in terms that Thiess would refrain from commencing or maintaining legal proceedings against any party to the deed. In order to provide for the preservation of the Proceedings, Corrs amended that draft and sent the proposed amendments to Thiess on 16 May. The draft was amended as follows:

> "7.9 Subject to 7.10, ~~t~~The Contractor shall refrain from commencing or maintaining legal proceedings against any party hereto concerning any matter arising out of or in the connection with the Project Agreements or the Project, save for proceedings to enforce this Deed.
>
> 7.10 The Consultant acknowledges the right of the Contractor to maintain and prosecute the Proceedings.
>
> 7.11 The Consultant and the Contractor agree that the Contractor's rights and remedies against the Consultant, and the Consultant's liability to the Contractor, preserved by this Deed, shall be limited to the extent the Consultant is entitled to claim indemnity under the Project Specific PI Policy."

That was in the context of the term Project Specific PI Policy still being defined in this document according to its meaning in the Contract, although with QBE described as *the* insurer. On 17 May, Mr Buttner forwarded that draft to Mr Yovich and Mr Cameron.

[43] On 17 May Mr Cameron sent to Mr Yovich an amended draft of the settlement deed between all parties, to which I will refer from this point as the Main Deed. Under this document, the Project Specific PI Policy was to be defined not according to its meaning in the Contract, but by a copy being attached to the Main Deed, although no copy was attached to this draft.

[44] On the same day, he sent to Mr Halpin and Mr Buttner, with a copy to Mr Lawson, yet a further draft of the Main Deed. Commenting upon the Corrs draft clause for preservation of the Proceedings, Mr Cameron wrote:

> "As to the substance of the changes, we do not have any difficulty with the "preservation" clauses you have except to say that we think what was your clause 7.11 (limiting recovery to the PI insurance) is not necessary, and can be better dealt with in the side deed. We envisage the side deed including the preservation clause that we suggested last week. The side deed should also make it plain that, as between FFE and Thiess, the side deed prevails to the extent of any inconsistency with the main deed."

In this draft of the Main Deed, the definition of Project Specific PI Policy was amended so that it would mean "the contract of insurance recorded in policy number A07971767PID issued by QBE as set out in schedule X". That is consistent with Mr Cameron's evidence that at this stage, he was of the view that the QBE policy was *the* Project Specific PI Policy according to the Contract. Similarly, in an email on 22 May, Mr Cameron told Mr Yovich that under the proposed side deed, the Proceedings would "limited to the amount ultimately paid by QBE".

[45] There was a telephone conversation between Mr Lawson and Mr Cameron on 17 or 19 May 2005, in which, according to Mr Lawson, he said that "Look, I'd just like to be clear about this that the liability of FFE to pay damages to Thiess in the damages claim that there will be available to – that Thiess will have access to the cover which FFE has under the project specific PI policy as that is defined in the main

contract." He says that Mr Cameron responded "Yes, that's right".[2] Mr Cameron's version of this conversation is supported by his diary note of 19 May. He noted that Mr Lawson said that "Thiess are persuaded with one agreement rather than two" and that Mr Lawson asked "What does FFE want in Side Deed?" Mr Cameron then noted his answer was "(1) Preservation clause (Thiess claim) (2) Thiess/FFE settlement on repair cost." Mr Cameron noted that Mr Lawson then said: "Core provision of the deed is 3.1, rights and obligations under existing agreement cease But QSC action preservation → not enough to preserve the action". After that, the note records Mr Cameron saying "No reason it can't be done ...". Mr Cameron's recollection of that conversation was heavily reliant on the note but I accept his evidence on this point. It was submitted for FFE that there was an important difference between the respective versions of this conversation. There is some difference but it is insignificant. Importantly, on either version the solicitors discussed the preservation of the Thiess proceedings.

Exchanges about the Liberty policy

[46] Then followed some exchanges relating to the Liberty policy, which was relevant also to the payments to be made by FFE directly to QAL under the Main Deed. On 23 May, Corrs sent to Mr McCarthy, as he had requested, a copy of the Liberty policy and they also sent a copy to Mr Cameron.

[47] Mr Cameron's evidence was that this was when he first became aware of the Liberty policy. According to this evidence, he was having a telephone conversation with Mr Yovich, Mr McCarthy and Mr Horsley from Minter Ellison. His recollection, aided by his diary note, is that Mr Horsley said that he wanted the Main Deed changed so that FFE's obligation to pay QAL would be affected by an insurance recovery from either QBE or Liberty. His diary note contains the entry

> "Liberty policy → in fact it is a layer $40m xs $20m … both FFE and Thiess have rights against Liberty [therefore] add Liberty".

Mr Cameron says that he then asked Mr Yovich, or possibly FFE's Mr Alan Edwards "who was an administrative person who helped Ian [Yovich]", to investigate whether FFE had notified Liberty of a claim.

[48] On 24 May Mr Cameron sent a copy of the Liberty policy to Mr Yovich. On the same day, Mr Edwards emailed Mr Yovich, advising that FFE had received from Thiess a copy of the Liberty policy in March 2004. Mr Edwards described it as "the Liberty second level policy". He was correct in that the Liberty policy had been sent in 2004 by Thiess (by Mr Buttner) to Mr Yovich. Mr Edwards attached Mr Buttner's email of 5 March 2004 which was in these terms:

> "Ian,
>
> In case you don't already have a copy, attached is the project specific PI insurance policy taken out with Liberty Mutual Insurance that provides the second layer of PI insurance for $40M (that follows the QBE primary policy of $20M)."

Mr Edwards' email and attachments were forwarded by Mr Yovich to Mr Cameron on the same day. In cross-examination Mr Cameron gave this evidence as to his state of mind upon receiving them:

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[2] Transcript 3–16, 3–17.

> "And you will agree that as soon as you knew of the existence of the Liberty policy that you appreciated that both Thiess and your client regarded it as part of the project specific PI insurance policy taken out for the purposes of this project?—Well, when I read the words in the email.
>
> Yes?—I mean, I'm not sure as to my understanding of the state of mind of – of Thiess or of FFE…
>
> And you had no doubt, though, once you knew of the existence of the policy that it, with the QBE policy, was what had been arranged by Thiess to comply with its obligations under the contracts that you had said that you were familiar with?…Well, if you're asking me to accept as a matter of the definitions in the project contracts that the Liberty policy was the project specific PI policy with sort of capital – initial capital letters, look, I'm not sure that I frankly did that mental exercise at the time. But if you are talking about a sort of, you know, non-defined sense, was it a project specific PI policy in excess of the QBE policy? Then, yes, clearly it was. I didn't – I don't think I did at the time the mental arithmetic to say what does the definition in the contract mean having regard to the Liberty policy. I don't – I'm just not sure that I did that."[3]

In fact Mr Cameron knew of the Liberty policy from the proposed terms of settlement proposed by QAL which he had received from Mr Yovich on 13 April 2005[4] and Mr Cameron conceded in cross-examination that he would have read these terms at the time. Importantly, that passage of his evidence again shows that Mr Cameron had not undertaken the task of construing the relevant provisions as to insurance in the Consultancy Agreement.

[49] At this point, reference should be made to another Liberty policy under which FFE was the insured and which had issued in June 2003. It was not specific to this project. On no view was it within the definition of Project Specific PI Policy in the Contract and the Consultancy Agreement. FFE gave notice to Liberty under that policy of Thiess's claim in June 2003. And it was also the subject of at least a draft advice by Mr Cameron to Mr Edwards in March 2005.[5]

[50] On 25 May, Ms Beardow advised Mr Buttner that FFE had not notified Liberty (of the Thiess claim) but would be doing so and that this would not affect its right to indemnity, referring to s 54 of the *Insurance Contracts Act* 1984 (Cth). Of course this could have been relevant if the Liberty policy was not within the Project Specific PI Policy as defined in the Contract, because of the proposed obligations of FFE under the Main Deed.

[51] On 25 May (at 11.52am) Mr Cameron emailed to Ms Beardow a further draft of a clause to preserve the Proceedings. The draft was little different from that which Mr Cameron had sent on 5 May which I have set out above at [37]. There was no change to cl 1.3(b) and to its reference to "any insurer of the project specific PI policy (as that term is defined in the Contract)". This is significant because this draft was sent by Mr Cameron after the various exchanges about the Liberty policy.

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3 Transcript 9–52.

4 Which I have discussed above at [25].

5 Exhibit 22.

Yet Mr Cameron's evidence was that at all times he remained of the view that the QBE policy was *the* Project Specific PI Policy.

[52] At this time Corrs were drafting the Side Deed between Thiess and FFE in which they did not include a clause to preserve the Proceedings. On 25 May, Ms Beardow sent to Mr Buttner and Mr Halpin a draft Side Deed with a note that Corrs would "comment on Malcom Cameron's suggested preservation clause in a separate email".

[53] On the same day, Mr Lawson and Ms Beardow rang Mr Cameron, who made a diary note of the conversation. He noted their advice that their draft of the Side Deed would be sent to him, and he wrote "no departure from proposition that recovery covered under PI". There was some conflicting evidence as to which of the solicitors said something to that effect. It is unnecessary to resolve that question. More significantly, on no version did anyone specify the available indemnity from the QBE policy as the upper limit of Thiess's rights to be preserved. And on Mr Cameron's version that this was a note of what Mr Lawson then said, he said he thought Mr Lawson was referring to both policies. Mr Cameron's diary note also referred to a discussion as to the Liberty policy and to whether a lack of notification of the claim to that point in time would be a difficulty. But the Liberty policy, like the QBE policy, was apparently not discussed as specifically relevant or irrelevant to the preservation of the Proceedings.

[54] On 26 May, Mr Buttner sent to Mr Yovich a copy of Corrs' draft Side Deed. On the same day, Corrs sent the draft to Mr Cameron.

[55] Again on 26 May (at 1.23pm) Mr McCarthy sent to Corrs and Mr Cameron his latest draft of the Main Deed. This had been amended to specifically refer to the Liberty policy. But it did so in terms which unambiguously referred to the QBE policy as the only policy constituting the "Project Specific PI Policy", which this draft defined but not by reference to the Contract but by annexing a copy of the QBE policy. It also defined "QBE" as "QBE Insurance (Australia) Limited, the insurer under the Project Specific PI Policy". Clause 3.2 of this draft was as follows:

> "3.2 Notwithstanding any other provisions of this Deed:
>
> (a) nothing in clause 3.1 shall affect the rights and obligations of the Contractor and the Consultant in relation to the Project which are the subject of the Proceedings, but only to the extent they relate to the Proceedings;
>
> (b) the parties acknowledge and agree that the continuation of the Proceedings is to be in no way affected by the entry into, or the carrying out of obligations under, this Deed:"

[56] This draft was forwarded by Thiess to Mr Yovich on the same day. It may be noted that had there been no clause about the Proceedings in the Side Deed, the effect of this cl 3.2 of the Main Deed would have been to entirely preserve Thiess's rights in relation to the Proceedings, according to whatever was the proper meaning of the Project Specific PI Policy in the Consultancy Agreement.

[57] This draft of the Main Deed is important because, in my conclusion, it is likely to explain Mr Cameron's amendment of the preservation clause which he made the next day.

[58] Late on 26 May, Mr Yovich emailed others in FFE to advise them of the progress of these documents. He there wrote:

> "Draft deed with Thiess. This one only just came in and needs a review. My first pass, suggests that we'll amend a number of things and include for the proceedings to be limited to actual recovery from the insurer."

The events of 27 May

[59] I come now to the events of 27 May, which is the day upon which FFE is said to have engaged, or commenced to engage, in misleading and deceptive conduct.

[60] At 8.53am, FFE's Mr Edwards emailed to Mr Cameron a draft notification to Liberty, which he described as the "second tier carrier for the project specific PI insurance of the QAL project, as discussed between you and I and Ian Yovich". Mr Cameron's timesheets record that after "reading and consideration" of that email, his next task was "amend[ing] main deed", on which he spent more than an hour.

[61] Next there is a record of his telephone attendance on Mr Lawson, for which there is a diary note by Mr Cameron recording Mr Lawson saying that Minter Ellison had been "summoned to meet owners to explain what is happening". Mr Cameron further noted "Down tools until Monday". Mr Cameron recorded in that same diary note that he "telephoned Mr Yovich and passed on message". His timesheets record a "telephone attendance" on Mr Yovich of no more than five minutes.

[62] Next Mr Cameron recorded two hours of work described as "consider settlement documents" and "continue analysis of draft settlement documents; incl email to and call from I Yovich". That email to Mr Yovich, which was sent at 10.40am, was relevantly as follows:

> "These are my comments on the draft Thiess Side Deed supplied yesterday:
>
> 1. …
>
> 2. …
>
> 3. …
>
> 4. The side deed omits the two matters raised by the document I circulated to Thiess some time ago, namely limiting liability in the existing proceedings to the insurance recovery and limiting the scope of the claims made in those proceedings to what is currently claimed, whilst permitting amendments within that framework.
>
> What I think we should do is send a note to the Thiess lawyers making points 1 to 4 above, and attaching the marked up version that is attached (which includes a slightly amended version of the clause concerning the Proceedings from my earlier document). Please let me have your thoughts."

Two things should be noted about that email. The first is that there was no reference to any relevant distinction between the QBE policy and the Liberty policy: rather, Mr Cameron referred to the need to limit liability "to the insurance recovery". Secondly, his description of his amended version of the preservation clause indicated no intention to change the effect of his earlier draft: rather he described this new draft as only "a slightly amended version".

[63] However, his new preservation clause would have unambiguously limited Thiess's rights to the indemnification of FFE under the QBE policy. Mr Cameron inserted this clause within the then Corrs' draft of the Side Deed. It is convenient to set out here the changes he made to his preceding draft of the clause (sent to Corrs two days earlier):

> "**8. The Proceedings ~~Current proceedings by the Contractor against the Consultant~~**
>
> ~~*[This section to be part of the side agreement between Contractor and Consultant]*~~
>
> 8.1 ~~In the event of any conflict between this clause and the [Main Deed], t~~The provisions of this clause ~~shall~~ apply to the Proceedings.
>
> ~~1.2 In proceedings BS 10669 of 2004 in the Supreme Court of Queensland ("**QSC proceedings**"), the Contractor sues the Consultant on the grounds set out in the statement of claim therein, for the relief specified in the claim therein~~.
>
> ~~1.3 The QSC proceedings shall be limited as follows:~~
>
> 8.2~~(a)~~ The Contractor may not amend the pleadings or particulars after the date of this Side Deed in such a way as to add any ~~cause, action or~~ claim for ~~in respect of~~ loss or damage not ~~alleged or~~ claimed as at the date of this Side Deed, but may otherwise amend.
>
> 8.3~~(b)~~ The Contractor shall not enforce against the Consultant any judgment, settlement or order made in connection with the ~~QSC p~~Proceedings against the Consultant, except to the extent that the Consultant is actually indemnified by ~~any insurer of~~ QBE pursuant to the Project Specific PI Policy ~~(as that term is defined in the Contract) ("**Insurer**")~~ in respect of that judgment or settlement.~~;~~
>
> 8.4 For the purposes of this clause, the Consultant shall be considered indemnified only when, and to the extent that, the amount of the indemnity is:
>
> (d) received by the Consultant in cleared funds; or
>
> (e) paid by QBE at the direction of the consultant.
>
> 8.5~~(c)~~ In the event that, in the opinion of the Contractor, ~~the Insurer~~ QBE wrongfully refuses or fails to indemnify the Consultant in respect of any judgment, settlement or order made in connection with the ~~QSC p~~Proceedings, the

Consultant shall, upon written demand from the Contractor, assign to the Contractor any rights that the Consultant may have against ~~the Insurer~~ QBE in respect of any such judgment, settlement or order.

8.6~~(d)~~ In the event of such an assignment, the Consultant shall provide reasonable co-operation to the Contractor, at the Contractor's cost, in relation to any assigned rights. The enforcement or attempted enforcement of any such rights by the Contractor shall be at the Contractor's expense.'

8.7~~(e)~~ To the extent that the amount of any judgment, settlement or order made in favour of the Contractor against the Consultant in connection with the ~~QSC~~ ~~p~~ Proceedings in favour of the Contractor against the Consultant remains unsatisfied after:

(a) any indemnification by ~~the Insurer~~ QBE; and

(b) ~~(including after)~~ the Contractor has taken such enforcement action as it wishes against ~~the Insurer~~ QBE pursuant to the assignment referred to in ~~1.3(c)~~ 8.4 above~~)~~,

The Contractor unconditionally releases the Consultant in respect of the unsatisfied amount.

8.8~~(f)~~ The Consultant may bring such cross claims as it may be advised in the ~~QSC~~ ~~p~~Proceedings, provided however that the Consultant may not claim loss or damage ~~amounts sought in any such cross claim do not~~:

(~~1~~a) arising ~~e~~ out of any of the obligations assumed by the Consultant Contractor under the Deed or this Side Deed; or

(~~2~~b) that exceeds, in the aggregate, the quantum of the claims made by the Contractor in the ~~QSC~~ ~~p~~ Proceedings.

8.9~~(g)~~ ~~n~~ No party to ~~*[the Main Deed]*~~ Deed may be joined to the ~~QSC~~ ~~p~~ Proceedings by either the Contractor or the Consultant.

~~1.4 For the purposes of this clause, the Consultant shall not be deemed to be indemnified unless and until payment of the indemnity is made and received by the Consultants.~~"

It can be seen that Mr Cameron deleted the definition of Project Specific PI Policy as being according to its definition in the Contract. This would have had the result of engaging the definition of that term in the Main Deed, because the draft Side Deed provided (by cl 1.1) that words defined in the Main Deed should have the same meaning in the Side Deed. As already noted, the draft of the Main Deed, sent by Minter Ellison the previous day, defined the Project Specific PI Policy as the QBE policy.

[64] What made him change his draft at that point? Why were his previous drafts, including that sent to Corrs just two days earlier, in terms which did not limit FFE's liability expressly according to the QBE policy? I do not accept Mr Cameron's evidence that at all times he believed that the QBE policy alone constituted the Project Specific PI Policy according to the Contract and the Consultancy Agreement. Had that been the case, his earlier drafts of the preservation clause (sent on 5 and 25 May) would have been different. They would not have referred to "any insurer" but instead to "the insurer" and probably, as this draft did, specifically to QBE. At least until this point, he had seen fit to leave the definition of what constituted the relevant insurance, and thereby the limit on FFE's liability, to the terms of the Contract and the Consultancy Agreement.

[65] I infer that this change of 27 May is explained by the changes to the Main Deed and its references to insurance, which appeared in the Minter Ellison draft which Mr Cameron had received on the previous day. He was thereby alerted to an apparent inconsistency in language which would exist between the two deeds, if his preservation clause was not amended. He had not construed the Consultancy Agreement and reached a view as to what constituted the Project Specific PI Policy under that document. There is no record of his having done so or his having advised his client on the point. And as already noted, the absence of his own construction appears from his evidence as I have set out at [48].

[66] I find that he then believed that his draft preservation clause was indeed such a thing: that it did no more or less than preserve the rights of Thiess for what they were worth according to the 2001 documents. Had he thought that his clause would, or at least might, diminish Thiess's rights to recover in the Proceedings upon the causes of action then pleaded, he would have proceeded differently. Firstly, he would have explained that issue to his client: he would have explained that this new draft might not be acceptable to Thiess because of the prospect that Thiess would consider that its rights were thereby being diminished rather than preserved. That would have been something which he was bound to explain to his client, because a proposal to limit Thiess's rights to something significantly less than what might have been Thiess's understanding of its position would have raised a substantial issue for negotiation by those concerned with the commercial elements of this settlement. Instead he sent this new draft to his client without adverting to the question, describing it as simply a "slightly amended version".

[67] There is no diary note of his advising Mr Yovich, or anyone else from FFE, as to this specific question. In evidence Mr Cameron claimed that his client wanted him to limit the liability under the Proceedings to the QBE policy. He was asked who gave those instructions for FFE, to which he answered that it was Mr Yovich. (Mr Yovich was not called.) There was then this evidence:

> "And when did he give you those instructions?—Your Honour, I spoke with Mr Yovich that day, the 27th. I had spoken with him earlier that week. When this case came about I was asked to, in effect, answer the same question your Honour just asked me. I don't have a file note of my conversation with Mr Yovich on the 27th. The best I can do is say that I believe that that's when he gave me those instructions, that he and I had a conversation about it on that day. But – but I don't – I don't have a sort of clear, independent recollection of that conversation. I do remember speaking to him I

> think a couple of times that day. So – so I think the answer is – well, the answer is Ian Yovich and I think on that day."

Had Mr Cameron then discussed this matter with Mr Yovich, they would have discussed whether there was any advantage to FFE in proposing such a limit on Thiess's rights, when the extent of FFE's uninsured liability would not be affected. Mr Cameron's evidence was that the possibility of advantage to FFE was discussed between them at some stage, but that he could not say that it was before the deeds were executed. He gave this evidence:

> "I can't – I don't have any precise memory of when I first had conversations with Ian Yovich about the advantages to FFE of limiting the Thiess recovery just to the QBE money. I don't. I have had conversations with him on that subject – well, I had conversations on that subject with him certainly in 2005.
>
> ...
>
> I believe that those conversations I had with Ian Yovich occurred before the deeds were executed, but I'm just – and I'd love to say that that's certainly when they happened, but – but I'm being vague because I'm not willing to sort of overstate it. Certainly in 2005. Whether it was before the deeds were executed or not, I'd love to be able to say more."

He disputed that there was no "commercial utility" in this limitation of Thiess's rights. There was this evidence:

> "And is that an opinion that you say to his Honour that you have now or some – a view that you say that you had in the week commencing 23 May?—I have actually done a little bit of thinking about that, and – to try to work out exactly when I formed that view, and the answer is I'm not sure exactly when I first formed that view. It's a view I have had for a long time, and I think it's a view that I had during the course of that week, but – but – but I can't – I can't sort of hand on heart say that I remember taking that view then and discussing it with Ian Yovich, for example."

I find that there was no discussion between Mr Cameron and Mr Yovich prior to the execution of the deeds, as to any advantage of limiting Thiess's rights to the cover under the QBE policy. There is no diary note or other document which records or evidences such a discussion. This would have been a significant issue for FFE had Mr Yovich or Mr Cameron adverted to it, because of the prospect that Thiess, believing that its existing rights were defined by the cover under the Liberty policy, might decline to agree to the overall settlement of the QAL claims without those rights being preserved in the true sense.

[68] What did Mr Cameron think was Mr Lawson's view of the limit of FFE's liability under the Consultancy Agreement? In his cross-examination, Mr Cameron gave this evidence:

> "I see. I suggest that you knew full well, consequent upon the conversation that occurred on the 25th on your evidence, and you've already accepted that you know that [Mr Lawson] would have

> assumed that PI meant both layers? - - Yes, he probably did think that.
>
> And you knew that at the time? - - Yeah, and the reason I drafted to document the way I did was to make it clear what my client wanted."

Then he gave this evidence:

> "And these things were – what you've just mentioned you had in your mind at the time you were drafting the clause and the covering email on the 27th? - - Well, I – the things I've just mentioned – I mean, I'm not exactly sure what you mean by that other than the fact that there was clearly – at least in my mind possibly – well, at least in my mind there was – there had been confusion about what the phrase "project specific PI insurance" meant, and I deliberately chose a form of words that left no scope for confusion. So I didn't turn my mind to whether others had shared my confusion or not…
>
> You believed that if you explained transparently that your client wanted to create a position in which the limitation would not operate by reference to the Liberty policy, that there's no way Thiess would have a bar of that? - - I didn't have that belief at the time. I mean, if I'd wanted to be opaque about it I could have done something quite different with the drafting. But I mean – I mean, I'm dealing with an external firm of solicitors with people who are experienced looking after their client's interests who are actually acting for Thiess in a piece of litigation that is a significant piece of litigation, and I'm sending them a document that, in words of one syllable, refers to the QBE policy only. There was – there was no – I wasn't trying to hide that. It was there in black and white on the document, and deliberately so."

In the first answer in that last passage, Mr Cameron appeared to contradict his evidence (in the preceding passage) that at the time, he believed Mr Lawson assumed that "PI meant both layers".

[69] A draft of the Side Deed was sent by Mr Cameron to Corrs at about 3.30pm on that day. It was an amendment of the draft which he had sent to Mr Yovich that morning. I infer that the amendments were the result of their subsequent discussions. However, there was no amendment to the preservation clause.

The email of 27 May

[70] In the version which was emailed to Corrs, some parts of the document were distinguished from others by the use of underlining. The entirety of cl 8, the preservation clause, was underlined. In this way those parts of Mr Cameron's draft which had not been in the most recent Corrs draft of the Side Deed were plainly identified. But Thiess's complaint is that the changes from Mr Cameron's previous version of the preservation clause (25 May) were not identified. In particular there was no marking up in the form which I have set out above at [63]. Thiess's case is that this contributed to a representation that there had been no change to the preservation clause from Mr Cameron's previous draft. Another part of Thiess's complaint is as to the terms in which Mr Cameron wrote to Corrs attaching his draft. He wrote as follows:

> "I attach a marked up copy of the side deed that you provided in draft yesterday.
>
> The attachment includes comments at various places that explain most of the proposed changes.
>
> Clause 8 is necessary to protect FFE in circumstances where clause 3.2(a) of the main deed expressly preserves not only the Proceedings but the rights of Thiess sued on therein.
>
> The intent is to allow amendments to the Proceedings to reflect the reality that pleadings rarely remain unaltered from commencement of an action until its conclusion, whilst protecting FFE and its insurers from the introduction of entirely new damages claims."

Mr Cameron's attachment contained no comments as to his preservation clause.

[71] Clause 3.2(a) of the Main Deed, according to the then draft of Minter Ellison, is set out above at [55]. Thus Mr Cameron explained the necessity of his preservation clause in terms of the need to protect FFE from the introduction of new claims against it which might be, in substance, beyond the scope of Thiess's claims then pleaded in the Proceedings. That was a legitimate concern and was at least one purpose for this preservation clause. There was no reference to any other purpose of cl 8, and in particular to diminish Thiess's rights or to resolve any ambiguity under the Consultancy Agreement in that respect.

[72] Thiess argues that it is telling that Mr Cameron did not refer to changes from his previous draft or refer at all to the matter of the relevant insurance. It is suggested that he sought to divert the attention of Thiess and its solicitors from the changes which he had made to his previous draft, by saying what he did say about the Proceedings. Mr Cameron could have drafted cl 8 to have the effect of limiting FFE's liability to the QBE policy but in terms which did not make that so obvious. For example, in the Side Deed he might have simply referred to the Project Specific PI Policy, which would then have had the meaning of that term in the Main Deed (because of cl 1.1 of the Side Deed as drafted by Corrs). Instead his redraft made it apparently clear that Thiess's recovery was to be limited to the QBE policy, by its several specific references to QBE and to that policy. He could not have thought that it was likely that Corrs or their client, including their in-house lawyer Mr Buttner, would be likely to overlook the plain and unambiguous specifications of QBE and its policy. And it was not as if these deeds were about to be executed. There was likely to be a period of days at least before that would occur, in which many persons on the Thiess side of the transaction would have ample time to consider what was, after all, a relatively short document.

[73] What is more likely is that Mr Cameron's covering email did not advert to the amendments to his earlier draft of the preservation clause essentially for the same reason that he did not explain them to his client. In his mind his change was not substantial. I accept that he underlined the whole clause because the version of the document which he had amended (Corrs' draft of the Side Deed) had contained no preservation clause.

After 27 May until execution

[74] The deeds were not executed until the end of the following month and there were several exchanges between the parties and their solicitors as to the precise terms

before then. The preservation clause itself underwent some drafting changes. But none of them affected the unambiguous specification of the QBE policy as the effective limit of Thiess's rights in the Proceedings.

[75] On Monday 30 May, Mr Cameron sent to Mr Yovich his draft response to the proposed Main Deed (received from Minter Ellison on 26 May). Later that day this draft was sent to the other parties. Apparently there was no exchange between Mr Cameron and Mr Yovich about the Side Deed.

[76] On 1 June, Mr Yovich sent to Mr Halpin and Mr Buttner that which Mr Cameron had sent to Corrs on 27 May, including Mr Cameron's covering email. Mr Yovich there said nothing about the preservation clause.

[77] Again on 1 June, Mr Cameron sent to Mr Edwards of FFE, with a copy to Mr Yovich, an amended version of Mr Edwards' draft letter of notification to Liberty. As noted already, there were two relevant policies issued by Liberty: the follow form policy which is the subject of this case and a policy insuring FFE but not specifically for this project. Mr Cameron's draft letter to FFE referred to the follow form policy as "a project specific professional indemnity insurance policy in excess of a primary layer underwritten by QBE Insurance (Australia) Limited". It referred to the circumstances at QAL's plant and stated that there were at least three consequences which had resulted, each of which might result in a claim by FFE. One of them was that FFE had been sued by Thiess in the Proceedings. Another was that FFE had incurred its own losses or expenses in attempting to modify the design of the calciners and in repairing damage to the structure, which had resulted in a claim being made by FFE on QBE pursuant to insuring clause (b) of the QBE policy. Thirdly, there was the claim by QAL against FFE. The draft letter then provided that FFE formally sought indemnity from Liberty pursuant to that policy "to the extent that the QBE policy is insufficient in respect of any aspect of the notified circumstances…". Had Mr Cameron or his client thought that Thiess's rights in the Proceedings, either under the 2001 agreements or the proposed Side Deed, would extend only as far as FFE was indemnified by QBE, there would have been no reason to give Liberty a claim in these terms. In his covering email to Mr Edwards, he said that a certain document (a broker's letter to Liberty in 2003) should be obtained before sending his draft letter. But on the same day, Mr Yovich emailed Mr Cameron: "Why can't we just send it?"

[78] On 2 June there was a teleconference between Mr Lawson, Ms Beardow, Mr Halpin, Mr Buttner and Mr Fackender of Thiess. A note by Mr Buttner records that this was a "long discussion on FFE's changes to Side Deed" and that "Corrs will make changes [and] send to [Thiess] for review". Undoubtedly there was extensive discussion as to the Side Deed. But there was no discussion on the specific matter of the Liberty policy and whether it should define the extent of the preservation of the Proceedings.

[79] On 6 June Mr Lawson and Ms Beardow sent to Mr Buttner and Mr Halpin a further draft of the Side Deed. In their covering email, they said that:

> "In addition to taking up the matters which were discussed in our teleconference in the afternoon of 2 June 2005, we have undertaken a degree of general tidying up."

They drew attention to two matters, one of which was described as follows:

> "The second point is that, in our teleconference on 2 June 2005, we discussed the issue of assignment of rights under the QBE policy and we observed that many policies of insurance expressly forbid assignment by the insured of rights under the policy. Since our teleconference, we have reviewed the QBE Project Specific PI Policy and note that it contains no such prohibition on assignment. It follows that clause 8.5 may ultimately have some work to do."

On its face this demonstrates a view of Thiess's solicitors that the Project Specific PI Policy was the QBE policy. Of course, because the Liberty policy followed the terms of the QBE policy, the question of the assignability of the Liberty Policy should have been no different.

[80] On the same day, Corrs wrote to Mr Cameron enclosing an amended draft of the Side Deed. They had amended the preservation clause, but not its several references to QBE. In relation to the preservation clause, they wrote:

> "Thiess will not agree to restrictions upon the manner in which it conducts the Proceedings going forward. You will, therefore, note the amendments to clause 8. As we understand the commercial issue, FFE is concerned not to be the subject of a fresh cause of action pleaded against it in the Proceedings by Thiess by reason of a fear that it may be unindemnified under the Project Specific PI Policy. Thiess believes this commercial concern is addressed by the fact (addressed in clause 8.2) that Thiess cannot enforce any judgment it obtains against FFE in respect of which FFE is not indemnified under the Project Specific PI Policy. With further reference to clause 8, you will observe the insertion of clause 8.4 (which effectively replicates the obligation upon FFE under the Consultancy Deed)."

Corrs had deleted what had been cl 8.2 of Mr Cameron's draft and inserted a new cl 8.4 as follows:

> "8.4 The Consultant must use its best endeavours to obtain indemnity from QBE with respect to any judgment, settlement or order made in favour of the Contractor in connection with the Proceedings."

Those changes were discussed in a meeting between Mr Cameron, Mr Yovich, Mr Buttner and Mr Halpin on 15 June, at which those on the FFE side resisted the suggested cl 8.4.

[81] By this stage there seems to have been nothing further of commercial substance to be negotiated between QAL, Thiess and FFE. In an email of 15 June from Mr Yovich to others in FFE and to Mr Cameron, Mr Yovich said that he expected that "we will be executing the two deeds either at the end of next week or the beginning of the following week". By the next day the parties were discussing a proposed "execution protocol".

[82] On 20 June, Corrs sent to Mr Cameron a further amended Side Deed. This contained an amendment to cl 8.2 to add to the words "judgment or settlement" the words "or order". It also contained another provision to the effect that FFE was to use its best endeavours to obtain indemnity *from QBE*. Mr Cameron responded that day saying that the new clause did not appear to be objectionable "subject to it

being clarified to ensure that it does not impose on FFE an obligation to litigate any claim against QBE".

[83] On 21 June, Corrs sent yet another version of the Side Deed. Ms Beardow, Mr Lawson and Mr Cameron discussed the then preservation clause, but again the relevance or irrelevance of the Liberty policy was not mentioned.

[84] On 27 June, Mr Cameron wrote to Mr Yovich and others at FFE a letter of advice in relation to the proposed deeds. His letter included the following:

> "2.1 The scheme of the Proposed Closeout is that, upon the Deed coming into effect, any pre-existing rights and obligations of the parties regarding the Project under the agreements referred to in the Deed as the 'Project Agreements' will cease (clause 3.1) and "relevant rights" as broadly defined are released by the parties (clause 3.4). These rights and obligations will be replaced by the rights and obligations set out in the Deed (clause 3.5).
>
> 2.2 The only exception is in relation to those rights and obligations of FFE and Thiess that are currently the subject of proceedings in the Supreme Court of Queensland ("**Proceedings**"). These rights and obligations are not affected by the Deed (clause 3.2).
>
> …
>
> 2.4 FFE's obligations under the Deed
>
> (a) FFE must pay QAL the sum of $1.5million within 7 days of the date of the Deed (clause 4.1(a)). This date is determined in accordance with clause 2.1, namely when all parties have signed, securities returned and provided and the Guarantee is in place.
>
> (b) FFE must make a second payment to QAL (clause 4.1(b)). The amount of this payment depends upon whether, and how much, FFE successfully recovers from QBE Insurance (Australia) Limited ("**QBE**") or Liberty Mutual Insurance Company ("**Liberty**") for FFE's claim pursuant to insuring clause (b) of the *Project Specific PI Policy with QBE and/or Liberty* (clause 4.6)…
>
> 3.3 The Proceedings
>
> (a) Should Thiess be successful in the Proceedings, it agrees to limit its recovery against FFE to the extent that FFE is indemnified *by QBE* under the Project Specific PI Policy in relation to the Proceedings (clause 8.2).
>
> (b) FFE must, subject to being advised that FFE has reasonable prospects of succeeding, use its best endeavours to obtain the indemnity *from QBE* referred to above (clause 8.3).
>
> (c) If FFE is required to commence proceedings *against QBE* to seek to obtain the indemnity, Thiess will pay the costs of

those proceedings and will have control of their conduct (clause 8.4).

(d) There are also a number of clauses in relation to:

(i) when FFE will be considered indemnified for the purpose of clause 8 – i.e. only when the indemnity is actually paid (clause 8.5);

(ii) Thiess' entitlement to require FFE to assign its rights *against QBE* if it does not indemnify FFE (clause 8.6); and

(iii) FFE's obligation to co-operate with Thiess, at Thiess' cost, if FFE is required to assign its rights *against QBE* (clause 8.7).

(e) Thiess releases FFE in respect of any amount that may remain due to it from FFE as a result of the Proceedings. This release takes effect after:

(i) *QBE* has indemnified FFE; or

(ii) Thiess has taken whatever enforcement action *against QBE* it wishes following the assignment of FFE's rights against QBE (clause 8.8)."

[emphasis added]

It can be seen from the italics that although his letter referred to the Proceedings as limited by the cover under the QBE policy, in referring to the main deed, and its provision for FFE's payments to QAL, Mr Cameron referred to "the Project Specific PI Policy with QBE and/or Liberty". Again, this indicates that Mr Cameron had not formed his own view of the insurance requirements of the 2001 agreements.

[85] In response to that letter, Mr Field of FFE emailed Mr Cameron on 28 June with a number of questions. One was in relation to paragraph 3.3 of his letter, as set out above. Mr Field wrote:

> "Item 3.3 – assume the scenario is that Thiess is awarded xx millions via the proceedings (paid by QBE) and that [FFE] is awarded 0 millions via QBE for its claim. We assume that … there is no path for QAL to get at the Thiess proceeds, nor an expectation that they could get an equivalent amount from [FFE], please confirm that this understanding is true."

In other words Mr Field was concerned that the indemnification by QBE of FFE in relation to the Proceedings would engage those provisions of the Main Deed by which FFE was to pay QAL according to its insurance recovery. Relevantly for present purposes, Mr Field referred only to QBE and not to Liberty in relation to the Proceedings.

[86] On the same day Mr Cameron replied to Mr Field, saying in relation to this question:

> "Your understanding is correct. The only obligation of [FFE] to QAL is an obligation to pay money per the formula. Apart from the first AUD$1.5MM, the formula depends on the timing and amount of recovery from QBE under what is called insuring clause (b). That recovery will be a recovery from QBE for [FFE's] own additional loss or expense spent in attempting to achieve contractual compliance… So if [FFE] recovers nothing on that front from QBE, all that it must pay QAL is the second guaranteed AUD $1.5MM after three years. Indemnity extended by QBE in relation to the Thiess claim will *not* be under insuring clause (b) – which relates to "own loss" – but under insuring clause (a) – which relates to third party claims…"

More precisely according the proposed Main Deed, FFE's obligations to QAL were according to its recovery from QBE or Liberty. Mr Cameron's reference only to QBE only indicates that he overlooked the relevance of the Liberty policy.

[87] On 29 June, Ms Beardow forwarded to Mr Cameron a copy of the Side Deed for execution by FFE. The final version of the Main Deed was distributed at about the same time.

[88] On 30 June, Sparke Helmore and Corrs faxed to each other pages from the Main Deed and Side Deed bearing the execution of their clients.

[89] Ultimately the terms of the Side Deed relevantly provided:

> "3.1 The Consultant shall:
>
> (a) …
>
> (b) pay to the Contractor an amount of $2,915,000.00 within 7 days of the date of this Side Deed in full and final settlement of monies owing to the Contractor arising out of the Consultant's obligations under the Consultancy Agreement other than any monies found to be owing pursuant to the Proceedings.
>
> …
>
> 8. The Proceedings
>
> 8.1 The provisions of this clause apply to the Proceedings.
>
> 8.2 The Contractor shall not enforce against the Consultant any judgment, settlement or order made in connection with the Proceedings, except to the extent that the Consultant is indemnified by QBE pursuant to the Project Specific PI Policy in respect of that judgment, settlement or order.
>
> 8.3 The Consultant must, subject to it having legal advice that it has reasonable prospects of doing so, use its best endeavours to obtain indemnity from QBE with respect to any judgment, settlement or order made in favour of the Contractor or in connection with the Proceedings.

8.4 In the event the Consultant is required to bring proceedings against QBE with respect to any judgment, settlement or order made in favour of the Contractor in connection with the Proceedings, the Contractor shall bear the costs of the Proceedings (including any adverse costs order) and shall have the carriage, conduct and control of the Proceedings (including the power to compromise the Proceedings on such terms as it sees fit).

8.5 For the purposes of this clause, the Consultant shall be considered indemnified only when, and to the extent that, the amount of the indemnity is:

(a) received by the Consultant in cleared funds; or

(b) paid by QBE at the direction of the Consultant.

8.6 In the event that QBE refuses or fails to indemnify the Consultant in respect of any judgment, settlement or order made in connection with the Proceedings, the Consultant shall, upon written demand from the Contractor, assign to the Contractor any rights that the Consultant may have against QBE in respect of such judgment, settlement or order.

…

8.8 To the extent that the amount of any judgment, settlement or order made in favour of the Contractor against the Consultant in connection with the Proceedings remains unsatisfied after:

(a) indemnification by QBE; and

(b) the Contractor has taken such enforcement action as it wishes against QBE pursuant to the assignment referred to in clause 8.5 above,

the Contractor unconditionally releases the Consultant in respect of the unsatisfied amount."

The deed provided that words defined in the Main Deed would have the same meaning in the Side Deed. Hence, as is common ground, the term "Project Specific PI Policy" in the Side Deed was effectively defined as the QBE policy.

What was intended?

[90] The question which arises is what each party actually intended to be the effect of the Side Deed upon Thiess's rights in relation to the Proceedings. For FFE it is argued that this is an irrelevant inquiry, on the basis that if the parties intended to agree in the words of this instrument, a mistake as to its effect could not be the basis for rectification. The submission cites *Tucker v Bennett*;[6] *Bacchus Marsh*

6 (1887) 38 Ch D 1.

Concentrated Milk Co Ltd (in liq) v Joseph Nathan & Co Ltd;[7] *Issa v Berisha*;[8] and *Re Estate of Nina Spinks*.[9]

[91] I reject that submission. The authorities prior to 1992 were then analysed by Hodgson J in *Bush v National Australia Bank Ltd.*[10] I respectfully adopt his Honour's analysis of those cases and in particular his reasons for not following the obiter dicta of Higgins J in *Bacchus Marsh* and Powell J in *Issa v Berisha*.[11] Hodgson J concluded that:

> "the preponderance of authority now favours the view that, provided all other requirements of rectification are satisfied, rectification will not be refused merely because the common mistake is as to the legal effect of the words used, rather than as to the actual words used."

Hodgson cited as authority for that approach, amongst others, the decision of the Full Court of this Court in *Winks v WH Heck & Sons Pty Ltd.*[12]

[92] As Hodgson J explained, where the parties intend the instrument to have an effect which is not the result of their deliberately chosen words, there may be two common intentions. The first is to be bound by an instrument with those words. The second is to achieve a certain legal effect by the instrument. It is the second which is relevant to a claim for rectification, at least where that is the "predominant intention". Hodgson J said:[13]

> "In such cases, it will often be the case that each party will have conflicting intentions as to the document. It may well be the case that each party intends to give effect to the document as it is worded, but also intends to enter into a transaction with a particular legal effect, which is not the true legal effect of the document as worded. The problem is not unlike that in the case of a mistake as to the identity of a person with whom one is making a contract: one may intend to contract with a person with a particular name and description, but also intend to contract with the very person who is present; and in subsequent legal proceedings, a decision may have to be made as to which intention should prevail. So it may also be with this type of rectification, with the additional complication that the intention and mistake must be clearly proved. So one needs to be able to say that, although in a sense the parties intended to be bound by a document which included certain words, nevertheless their intention to achieve a legal effect which was not the true legal effect of those words was somehow predominant over that other intention, and clearly predominant."

[93] The argument advanced by FFE has also been rejected by more recent authority: *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd*;[14] *Club Cape Schanck*

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7 (1919) 26 CLR 410 per Higgins J at 451.
8 [1981] 1 NSWLR 261 per Powell J at 264.
9 Unreported, Supreme Court of New South Wales, 22 August 1990 per Needham J.
10 (1992) 35 NSWLR 390 at 406–407.
11 (1992) 35 NSWLR 390 at 406.
12 [1986] 1 Qd R 226 at 234–235 per Kneipp J, 237 per Thomas J and 243 per Shepherdson J.
13 (1992) 35 NSWLR 390 at 407.
14 (1995) 41 NSWLR 329.

Resort Co Ltd v Cape Country Club Pty Ltd;[15] *Mander Pty Ltd v Clements*[16] and *Ryledar Pty Ltd v Euphoric Pty Ltd*.[17] In *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd*, adopting the analysis in Spry *The Principles of Equitable Remedies*, 4th ed (1990), Sheller JA said:[18]

> "In his book *The Principles of Equitable Remedies*, 4th ed (1990) Dr Spry QC (at 597–598), dealing with the case where the parties were aware of the precise terms of the relevant part of the document but misapprehended their effect, distinguished between two positions. He said (at 597):
>
> > "... The first position occurs where the concurrent intention, that is, the intention that the document is desired to effectuate, remains the governing intention. In this event it should not matter that the precise terms of the document have been seen by the parties, and rectification, where otherwise appropriate should be ordered."
>
> The learned author referred to the judgment of Brightman J and continued (at 597-598):
>
> > "... The second position arises where the parties, whatever their previous intention may have been, have ceased to retain that intention as their governing intention and have formed instead an intention to be bound by the precise terms of the document in question, regardless of possible discrepancies between its provisions and prior or other intentions on their part. In this event rectification is not appropriate."
>
> *Maralinga*[19] was treated as an example of the second position. However Dr Spry went on to advert to another complicating factor. He said that different considerations apply where the relevant mistake does not arise through a lack of conformity between a document and the concurrent intention of the parties, but rather arises through an error underlying that intention itself. Where there is no lack of conformity between the document and the concurrent intention, the basis for rectification does not exist. These principles may justify the decision in *Frederick E Rose (London) Ltd v William H Pim Junior & Co Ltd*. An error of law or other error may have related only to the expected consequences of an agreement and not to what the parties have actually agreed."

[94] In the same case McLelland AJA agreed with Sheller JA and said:[20]

> "In general, the remedy of rectification of an instrument is available where it is established by clear and convincing proof that at the time of execution of the instrument the relevant party or parties as the case may be had an actual intention (if more than one party, a common

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15 (2001) 3 VR 526.
16 (2005) 30 WAR 46.
17 (2007) 69 NSWLR 603.
18 (1995) 41 NSWLR 329 at 341.
19 *Maralinga Pty Ltd v Major Enterprises Pty Ltd* (1973) 128 CLR 336.
20 (1995) 41 NSWLR 329 at 345.

> intention) as to the effect which the instrument would have which was inconsistent with the effect which the instrument as executed did have in some clearly identified way. In this context "effect" means the legal and factual operation of the instrument according to its true construction, but does not include legal or factual consequences of the operation of the instrument of a more remote, or collateral, kind (for example, its liability to stamp duty)."

[95] In *Carlenka*, the parties were mistaken as to the stamp duty consequences of their instrument. This was not an error underlying the intended effect of the instrument, but was one as to the operation of the relevant statute.

[96] Similarly in *Club Cape Schanck Resort Co Ltd v Cape Country Club Pty Ltd*, Phillips JA said:[21]

> "Despite the differences in result that appear from case to case (for example, when *Rose v Pim* is contrasted with *Carlenka*), I venture to suggest that the principle upon which rectification depends always remains the same; it depends in every case upon a want of correspondence between the form of the document (that is, in the words actually used) and the common intention of the parties at the time when the document is executed. Where the disconformity is the product of a common mistake, that mistake may be as to what words have been employed in the document or the meaning or effect of such words as appear. But whatever the common mistake, the lack of correspondence must be between the form of the document and the common intention, if rectification is to be available."

What Thiess intended

[97] I go first to the question of what those on the Thiess side thought to constitute the Project Specific PI Policy under the Contract and Consultancy Agreement.

[98] Mr Lawson's evidence was that at all times he believed that it was constituted by QBE and Liberty policies. He says that he simply failed to notice that the preservation clause was limited to the QBE policy. Ms Beardow says that she understood the Liberty policy was in some way so associated with the QBE policy that a reference to the latter would necessarily include a reference to the former. So when she read the specific references to the QBE policy in the many drafts of the preservation clause from 27 May, she understood that to be a reference to both policies. Mr Lawson disclaimed any such view on his part.

[99] Mr Lawson is a highly experienced solicitor in this type of work. But it is conceivable that he would make such an error, overlooking many times the plain words of Mr Cameron's clause. Another possibility is that Mr Lawson then thought that the Project Specific PI Policy was limited to the QBE policy under the Contract, so that he saw nothing awry in Mr Cameron's draft. FFE suggests that there is support for this being the understanding of Mr Lawson from his instructions to counsel to advise in relation to the Proceedings and the QBE policy, which Mr Lawson delivered in December 2004. Counsel were asked to advise on the "sustainability and reasonableness of the causes of action" pleaded in statements of

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[21] (2001) 3 VR 526 at [39].

claim in the Proceedings and in another case commenced by Thiess directly against QBE. In Mr Lawson's observations to counsel, he wrote:

> "In accordance with the condition of the Main Contract, Thiess effected and maintained a Project Specific Professional Indemnity Policy with QBE."

[100] In their memorandum of advice, dated 21 February 2005, counsel referred to the limitation on FFE's liability according to the relevant insurance. They wrote that:

> "119. In our view, the effect of that exception … is that the clause does not exclude liabilities … in respect of which FFE is entitled to claim indemnity under the project specific policy of insurance written by QBE, 'subject to the relevant indemnity being paid in accordance with the policy.'
>
> 120. Thus, in practical terms, FFE's liability to Thiess for breach of, or negligence in the performance of, the consultancy agreement will not be excluded. Rather it will be limited to the amount which FFE recovers from QBE pursuant to the project specific policy of insurance.
>
> 121. And if, contrary to our view, FFE's liability to Thiess for breach of, or negligence in the performance of, the memorandum of understanding were caught by the general exclusion, then the exception in subparagraph (j) would also operate in respect of that liability, so that the liability would remain but be limited to the amount which FFE recovers from QBE pursuant to the project specific policy of insurance."

[101] As mentioned already, the Thiess statement of claim in the Proceedings, which had been filed on 6 December 2004, claimed in excess of $23 million. It is therefore remarkable that Corrs made no reference also to the Liberty policy in their instructions to counsel.

[102] As appears from those instructions, Thiess had commenced other proceedings directly against QBE, making claims on a "first party" basis for its own losses. And it was QBE which was defending the Proceedings on FFE's behalf. It is not difficult then to consider that Mr Lawson was thinking of the QBE policy without specifically adverting to the Liberty policy.

[103] In March 2004, Mr Lawson had written a lengthy letter of advice to Mr Buttner in relation to, amongst other things, Thiess's rights against FFE. There are many references within that letter which, if read in isolation, might indicate an understanding that those rights were limited according to the QBE policy. However, as Mr Lawson explained at the commencement of his letter, he was referring to the QBE policy as a reference also to the Liberty policy. He there wrote:

> "As a preliminary matter, it is noted that, up until 3 March 2004, Thiess had considered its position with respect to professional indemnity insurance coverage solely in terms of professional indemnity contract of insurance number A07971767OID entered into with QBE Insurance (Australia) Limited ("**QBE**") for the period of

> insurance from 31 July 2001 to 30 April 2005 ("**policy**"). On 3 March 2004, it was established that, in addition to the primary cover afforded by the QBE policy, Thiess is insured, on a "follow-form" basis, with Liberty Mutual Insurance Company ("**Liberty**"). The sum insured under the QBE policy is $20 million any one Claim (as defined) and the sum insured under the Liberty policy is $40 million any one Claim (as defined) in excess of $20 million. Thus, the total cover available per Claim, under both the QBE and Liberty policies is $60 million. As the QBE policy provides the primary layer cover, I will, in this letter, refer to the QBE policy but, to the extent that a liability under the insurance cover may exceed $20 million, it should be considered a reference also to the Liberty policy."

[104] One question upon which he advised was, in effect, whether the proposed claims against FFE and the claims for indemnity proposed to be made under insuring clause (b) of the policy would constitute separate claims so as to engage the reinstatement clause. The evident concern behind that question was that if they were treated as one claim it might exceed the amount of the available insurance. Mr Lawson there wrote that:

> "Since the existence and terms of the Liberty policy became known on 3 March 2004, this issue is of far less significance than previously apprehended."

[105] After discussing that question and expressing the view that they would probably be regarded as claims arising out of the one set of circumstances, Mr Lawson wrote:

> "Ultimately, I do not think the answer to this question matters very much for the reason that the combination of cover available under the QBE and Liberty policies in respect of any one Claim is $60 million and this sum exceeds, by a factor in excess of 100%, the anticipated value of the claims by Thiess."

It is clear that Mr Lawson held the view in March 2004 that Thiess's rights against FFE would not be limited to the QBE cover. I find that this opinion did not change. There is nothing which occurred which would have caused him to think differently. In these rounds of drafting and redrafting, he was not considering whether Thiess's rights should be limited to the cover under one policy or instead under both policies. I accept his evidence that at all times he believed that Thiess's rights against FFE were defined by the cover under both policies. Because there had been no discussion, let alone negotiation, about whether the rights to be preserved should be defined by one rather than by both policies, he overlooked the effect of Mr Cameron's redraft. His mind was upon the issues which *were* being debated, such as the proposed limitation on amendments of the Thiess case in the Proceedings, as well as other issues unrelated to the preservation clause.

[106] Ms Beardow did not have the same extensive experience in insurance work. Despite the strong attack on her credibility as she was extensively cross-examined, I accept her evidence that in some way she understood the Liberty policy to be effectively part of the QBE policy.

[107] I find that neither Mr Lawson nor Ms Beardow was conscious of any possible compromise of Thiess's existing rights in relation to the Proceedings by

Mr Cameron's draft of 27 May and succeeding drafts with their express references to the QBE policy. Each believed that there would be no change to the limit on FFE's liability which resulted from these deeds. There was nothing in their instructions from which they should have thought otherwise. And from the outset, the apparent intention, at least of their client, was to quarantine the Proceedings, and the causes of action involved in them, from the effect of this settlement with QAL and the owners.

[108] Mr Buttner's evidence was that at all times he believed that the Project Specific PI Policy under the Contract and Consultancy Agreement included the Liberty policy. He understood that the Liberty policy was distinct from the QBE policy although it followed its terms. It was Mr Buttner who had sent to Mr Yovich in March 2004 a copy of the Liberty policy describing it as:

> "the project specific PI insurance policy taken out with Liberty Mutual Insurance that provides the second layer of PI insurance for $40M (that follows the QBE primary policy of $20M)."

I accept his evidence that he (mistakenly) understood that because the Liberty policy was a follow form policy, then Liberty would be obliged to pay if QBE had indemnified the insured. I accept his evidence that he believed that the Liberty policy was available for the benefit of Thiess in the Proceedings. Again, importantly there was no evidence from this witness that there was any discussion within Thiess or with its solicitors on the specific question of whether the Liberty policy should define Thiess's rights in the Proceedings. And importantly, Mr Buttner had received the advice from Mr Lawson in March 2004 which I have discussed.

[109] Mr Halpin was then employed as a commercial manager. His role was to ensure that the terms of these agreements were satisfactory for Thiess in a commercial sense. By the time he became involved in these negotiations, he had looked at the 2001 agreements. He said that he had done so in 2004 in the course of the preparation of the claims against FFE. His understanding was that the QBE and Liberty policies had been procured to discharge Thiess's obligations to effect the insurance required by those agreements. His understanding, which he said was based upon legal advice, was that "we were to make a claim against the lead insurer and the follow form insurer would be obligated to pay any additional monies over the $20 million; so it would be in an automatic sense."

[110] At the time of these negotiations, Mr Halpin said that he believed that the likely insurance claims were as follows: Thiess had two claims, one against QBE directly for about $6 million and the claim against FFE for about $23 million and there was a claim by FFE against the insurers for their own losses. He said that he had been told by Mr Yovich at a meeting with QAL's representatives that FFE "had a claim of approximately $17 million already lodged" (to which I will return). He said that it was obvious to him at this time that although the full $60 million would not be required, "it had pierced the QBE layer so the role of Liberty was essential".

[111] Mr Halpin was asked whether at this time he had formed a view as to the amount Thiess might recover in the FFE proceedings. He said that his then view was an amount of $9.7 million, and that he came to that view "sometime in early 2005" soon after the filing of the Proceedings. That is supported by the valuation of the claim in that amount in internal accounts of Thiess, under which each contract was valued month by month. I accept that this was Mr Halpin's view of the

proceedings. I also accept, as he said, that this was a conservative estimate. That is supported by the fact that the same monthly accounting records estimated a settlement of the claim at $12.75 million. They also showed a figure of $3 million as an "unvalued" claim which Thiess had under insuring clause (b), i.e. for its own losses and expenses. Thus apart from FFE's claim for its own losses (as distinct from its liability to Thiess), Thiess's contemporaneous records showed a likely requirement for insurance in the range of $12.75 million to $15.75 million.

[112] As to FFE's own claim against QBE, there is a diary note made by Mr Halpin of something said by Mr Yovich on 20 April 2005. The diary note reads as follows:

> "IY – settlement with QAL accepted as a claim by QBE
>
> - $17M claim prepared to settle for $5 - $6M – first proceeds to QAL"

Mr Halpin said that he could not recall precisely what was said by Mr Yovich in this respect. He does recall that Mr Yovich said that FFE had claimed against the insurer for $17 million. He was not able to recall what was said about the range of $5 - $6 million. I infer that Mr Yovich said words to the effect that FFE was prepared to accept a sum in that range from QBE in relation to QAL's claim against FFE and FFE's own losses. Accepting that to be so, on a very conservative view the likely demands upon the insurer, as they would have appeared to Mr Halpin, were still in a range which extended beyond the $20 million layer. Moreover, the negotiations and drafting proceeded without any assurance by FFE that it would limit its other claims against QBE under this policy to something of the order of $5 to $6 million.

[113] I accept Mr Halpin's evidence that he did not consciously agree to limit Thiess's recovery in the Proceedings to whatever remained to be recovered under the QBE policy. There was no advantage to Thiess in so agreeing and there was at least a likely disadvantage.

[114] I accept also Mr Halpin's explanation of his understanding of the relationship between the two policies. He is not a lawyer. He did carefully check the words of the various drafts of the deeds and he was well aware that the preservation clause specified QBE as the insurer. But in his mind this was an effective reference to what he saw as effectively two parts of the relevant insurance.

[115] These were the respective understandings of those on Thiess's side who were involved in this process of negotiation and drafting. It remains to consider those who executed the deeds for Thiess.

[116] The company seal of Thiess was applied to each deed with the signatures of Mr DJ Argent and Mr MC Albrecht. Each was a director and Mr Argent was also the company secretary. Mr Argent gave evidence; Mr Albrecht did not.

[117] From Mr Argent's evidence I find that there was a system within Thiess whereby documents which were being submitted for execution under seal were accompanied by a document called an application for use of common seal ("the Application"). In his affidavit as sworn in September 2009, tendered in his evidence-in-chief,[22] he said that he had no independent recollection of receiving the Application with respect to these deeds but that it was his practice not to execute documents under

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22 Exhibit 13.

the company's seal unless he had received and reviewed such a document "completed by the relevant persons within Thiess". He added that he was not aware of anything which would suggest that he did not follow this usual practice in this case. Further, he said that it was his practice to act in accordance with the recommendation in the Application unless something, whether within that document or otherwise, caused him to seek further information. He does not recall seeking any further information or asking any questions about these deeds. He has some recollection of discussions as to the calciner project over time but not in relation to the terms of the documents which were put before him for execution.

[118] In an affidavit he swore in October 2008, he gave evidence that he did rely upon the recommendation in the Application in this instance. Thus in his more recent affidavit he lacked an independent recollection of receiving the Application, whereas in the earlier affidavit he appeared to have such a recollection. The later affidavit accords with his oral evidence. I am not persuaded that the credibility or reliability of his evidence is affected by any inconsistency between the two affidavits. In any case, upon one view there is not an inconsistency: in saying (in the earlier affidavit) that he relied on the recommendation in the Application, he was supposing that he did so because of his usual practice. I accept his evidence as to the company's practice with respect to the execution of documents under the company's seal and of his practice to act in accordance with the recommendation in the Application unless there was some reason to seek further information.

[119] The Application in this case[23] was signed by Mr Buttner, twice. He signed under these words:

> "The following person who is approved by group counsel to review documents confirms this document complies with all corporate liability limits … other than the exceptions, if any, noted below:
>
> Exceptions:
>
> Nil."

As Mr Argent explained, the practice, by the use of this form, was to have the signature of Thiess's in-house lawyer to the effect that it was appropriate for Thiess to execute the document.

[120] Secondly, Mr Buttner signed on behalf of Mr Halpin under the words:

> "Document examined and approved by line manager".

Again as Mr Argent explained, the practice by the use of this form also required the signature of the "responsible line manager" that it was appropriate for the document to be executed.

[121] The Application also identified the two instruments to be sealed and the parties to them and contained this summary of their description and purpose:

> "Deed of Settlement with QAL to close out QAL Calciners Contract, and Side Deed with FFE Minerals to close out Thiess Consultancy Agreement. The deeds terminate all contractual rights and obligations (other than for certain limited on-going repairs) and provide for a final settlement of all claims (other than the existing

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23 Exhibit 9.

> litigation that Thiess has against FFE). The Deed with QAL also includes as parties the 4 owners of QAL in order to settle whatever claims the owners might otherwise have against Thiess pursuant to side deeds."

[122] Two things, in particular, should be noted about the Application. The first is that the documents and their purpose were described very briefly. There was no explanation of or, indeed, reference to any particular terms. Nor was there any explanation of the relevant commercial considerations and the pre-existing legal positions of the parties. Therefore there was nothing in this document in the nature of a briefing paper so as to acquaint the two directors with information to enable them to make a commercial judgment as to whether Thiess should make agreements in these terms. These documents did not go to a meeting of Thiess's directors. Rather they were sent to these two directors for the purpose of applying the common seal. So the terms of the Application confirm what is otherwise apparent from Mr Argent's evidence, which is that neither he nor Mr Albrecht were the decision makers as to whether such contracts ought to be made.

[123] Secondly, the Application, albeit briefly, described the element of the preservation of Thiess's rights under the Proceedings. It provided that the deeds would terminate all rights and obligations and provide for a final settlement of all claims other than the existing litigation that Thiess has against FFE. There was no hint within that of any diminution in Thiess's rights which were the subject of that litigation. On its face it was an unambiguous representation that that litigation would be unaffected by agreements in the terms of these deeds. Accordingly if, as FFE argues, the decision makers for Thiess were Mr Argent and Mr Albrecht, it should be inferred that their intention was that Thiess's rights in relation to the Proceedings would not be affected by the deeds.

[124] Mr Albrecht was not called. However I infer that his role was limited as was that of Mr Argent. I infer that he, like Mr Argent, intended that the deeds would have the effect summarised in the Application.

[125] It was strongly suggested to Mr Argent in cross-examination that his intention was to have Thiess contract according to the words of the deeds themselves. That must be accepted for otherwise he would not have signed them and been a party to the affixation of the seal. But his intention was that they would have the *effect* as described in the Application and as Mr Halpin and Mr Buttner intended. He relied upon that document and the accuracy of its statement that the deeds would have that effect.

[126] Accordingly, if the relevant decision makers were Mr Argent and Mr Albrecht, I infer that they intended that Thiess's rights in relation to the Proceedings should not be affected by these deeds. But they were not the relevant decision makers. The relevant decision maker was Mr Halpin, whose job it was to make the required business judgment as to the terms upon which Thiess should contract. The fact that he was not authorised to bind the company under its seal is a different matter and is not inconsistent with that finding.

[127] Lastly there was some suggestion in the argument for FFE that another employee of Thiess, a Mr Overall, was a relevant decision maker. That was inspired by this evidence in the cross-examination of Mr Buttner:

> "Sir, you weren't in the position to make the decision, were you? -- No, of course not.
>
> You had no authority whatever to make that decision, correct?-- Correct.
>
> …
>
> -- Ultimately whatever recommendations I'd make would go to Peter Halpin and perhaps the executive manager of the process builder – business unit above him.
>
> And then where would they go? -- That would be it.
>
> Who is the executive manager? -- Now or then?
>
> Then? – David Overall."

That evidence does not establish that Mr Buttner's recommendations went also to Mr Overall. Further, it is clear from Mr Halpin's evidence that he, and not Mr Overall, made the required business judgment.

[128] Thus in my conclusion it was Mr Halpin whose state of mind must be considered upon the rectification claim.[24] I accept Mr Halpin's evidence that he believed that the effect of the deeds was to quarantine the Thiess proceedings from this settlement, so that Thiess's rights against FFE in the Proceedings would be according to the Consultancy Agreement. Undoubtedly he was aware of the references to QBE within the preservation clause. But I accept his explanation for why he understood that to be a reference effectively to both policies. Accordingly, the intention of Thiess, constituted by the intention of Mr Halpin, was that Thiess's rights in the Proceedings would be not diminished but preserved according to the Consultancy Agreement.

[129] The inherent likelihood that this was Thiess's intention is indicated especially by these circumstances. The first is that nothing had been put to Thiess by FFE or its solicitors which manifestly suggested some compromise by Thiess of its rights in the Proceedings. Rather, at all times the negotiations and exchanges about legal drafting had been upon the basis that those rights would be preserved. Secondly, there is no realistic possibility that Thiess decided to give some ground in relation to the Proceedings in order to obtain agreement upon some other term which was of commercial significance. At least by 27 May, the essential commercial terms between the parties to the Main Deed and the Side Deed had been agreed. Thirdly, there is no indication that Thiess had legal advice to the effect that only the QBE policy constituted the Project Specific PI Policy under the Consultancy Agreement. Indeed, Thiess had advice to the contrary from Corrs in 2004, to which I have referred. And as I have found, both the solicitors at Corrs involved in this transaction and Thiess's in-house lawyer had the view that both policies were available for Thiess's recovery in the Proceedings.

What FFE intended

[130] Again, the starting point, of course, is the Side Deed itself. As is common ground, the Side Deed is unambiguous. FFE knew of the Liberty policy and it was specifically referred to in the Main Deed. Moreover the terms of the Side Deed

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24 *George Wimpey UK Ltd v VI Components Ltd* [2005] EWCA Civ 77.

were the subject of several drafts for which FFE had legal assistance. All of this points to a likelihood that FFE meant to agree according to the ultimate terms of the Side Deed.

[131] Did FFE mean to diminish Thiess's rights as claimed in the Proceedings? Alternatively, did it intend to resolve a doubt as to whether Thiess's rights of recovery, under the Consultancy Agreement, were limited to the QBE policy? Or did FFE mean to agree that Thiess's rights as claimed in the Proceedings would not be affected? Thiess must prove that third alternative, and by "clear and convincing proof": *Pukallus v Cameron*;[25] *Commissioner of Stamp Duties (NSW) v Carlenka Pty Ltd*.[26] And "the fact that words used in a contract convey a clear, and ambiguous and unmistakeable meaning or legal effect renders it less likely that the parties were mistaken as to that meaning or effect [and] that they had a common intention which was fundamentally inconsistent with the words they had deliberately employed", as Tobias JA (with whom Mason P and Campbell JA agreed) said in *Ryledar Pty Ltd v Euphoric Pty Ltd*.[27]

[132] In my conclusion FFE's intention was the same as that of Thiess, namely to leave unaffected the claims then made by Thiess in the Proceedings. There are many circumstances which together prove that case. Some have been mentioned already because they are also relevant to the intention of Thiess. At all times the negotiations and exchanges about legal drafting were upon the basis of the preservation of those rights. On many occasions the word "preservation" or "preserved" was used by FFE's solicitor, both in his dealings with Thiess and its representatives and with his own client. In the exchanges between the parties and their legal representatives, there was no specific exchange on the question of whether there was some ambiguity in the Consultancy Agreement, such that the parties should take the opportunity to resolve it by the Side Deed.

[133] As I have found, when Mr Cameron made the critical change to his draft on 27 May, he did so without specific instructions on this point, namely whether Thiess's rights should be limited to the QBE policy irrespective of the then position according to the Consultancy Agreement. Mr Cameron was unable to say that he had discussed with his client any possible advantage to it of limiting Thiess's rights in this way. The impression given by his evidence, particularly that extracted above at [67] is that it was not discussed before the deeds were executed. It is likely that this was not discussed between Mr Cameron and his client because, from the perspective of FFE, as distinct from that of either of its insurers, the point was inconsequential. By cl 44 of the Consultancy Agreement, the liability of FFE to Thiess was only to the extent that FFE was entitled to claim indemnity under the Project Specific Policy and was "subject to the relevant indemnity being paid in accordance with the policy". Similarly the Side Deed provided that FFE would be considered indemnified, and thereby liable to pay Thiess, only when and to the extent that the amount of the indemnity was received by FFE or paid at its direction. FFE apparently thought that it was exposed to an uninsured potential liability of the excess ($500,000) under the QBE policy. That appears to be incorrect because cl 44 of the Consultancy Agreement limited its liability to the amount paid in accordance with the Policy. The present point is, however, that there was no further excess, in the sense of an uninsured component, under the Liberty policy. So there was no

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25 (1982) 180 CLR 447 at 452.

26 (1995) 41 NSWLR 329 at 345.

27 (2007) 69 NSWLR 603 at 638.

prospect that the maintenance of the position according to the Consultancy Agreement would be to the cost of FFE, as distinct from one or both of its insurers. In particular, if there was a doubt as to whether FFE had duly notified Liberty, that contingency could not have resulted in FFE being left with an uninsured liability to Thiess.

[134] Mr Cameron's speculation that FFE might have wanted to avoid having to deal with Liberty is divorced from the facts. FFE was dealing with Liberty in relation to the various losses and claims from this project, both under FFE's own policy with Liberty and under the second layer of the insurance which was specific to this project. And under the Side Deed, Thiess promised to fund and conduct any proceedings against the insurer to recover to secure FFE's indemnity.

[135] The terms of the Main Deed are relevant here, although it was provided in the Side Deed that to the extent of any inconsistency between the two deeds of 2005, the Side Deed should prevail. Against the Thiess case is the identification of the QBE policy only as the Project Specific PI Policy. However, that term was not given its meaning according to the 2001 agreements but rather it was specially defined in the Main Deed. So although the same term (Project Specific PI Policy) was used, the parties did not thereby agree as to what had been the meaning of that term as it was used in the 2001 agreements. And within the Main Deed, cl 3.2 was in general but unambiguous terms which were that the rights and obligations of Thiess and FFE which were the subject of the Proceedings should be "in no way affected". Because the Side Deed, if inconsistent with the Main Deed, must prevail, and because its terms are unambiguous, Thiess did not argue that this term of the Main Deed affected the proper construction of the Side Deed. However, cl 3.2 is not irrelevant in considering what was the subjective intention of the parties.

[136] More generally, the essential commercial terms of the Main Deed are part of the relevant context for the consideration of the present question. The evident purpose of the Main Deed was to discharge all outstanding obligations to QAL. It recited that QAL, on its own behalf and on behalf of the Owners, claimed that Thiess and FFE were legally liable to them for damage, loss, cost and expense arising out of acts, errors or omissions by Thiess and FFE in the conduct or execution of the activities required under the Contract or under the Consultancy Agreement. It further recited that in order to attempt to achieve "acceptance" under the Contract, Thiess and FFE would be required to sustain further loss or expense by the costs to achieve compliance with their responsibilities under the 2001 agreements, defined as "Additional Contract Expense". And it recited that the Owners, QAL, Thiess and FFE had agreed to amend their respective rights and obligations under the Contract and the Consultancy Agreement (and other relevant agreements of 2001) to compensate QAL and the Owners and to reduce the need for the Additional Contract Expense. Accordingly, it was agreed that the obligations of Thiess under the Contract and FFE under the Consultancy Agreement should merge in the Main Deed, and that in substitution there should be the covenants within the Main Deed, which provided for the payment of various sums by FFE to QAL. This was the context in which it was necessary then to quarantine the Proceedings, because in essence what was being settled in 2005 were claims by QAL and the Owners. The position between Thiess and FFE was being affected only insofar as Thiess might have sought something from FFE towards Thiess's liability to QAL and the Owners. The position between Thiess and FFE, in relation to Thiess's own losses as it had claimed in the Proceedings, was intended to be left untouched.

[137] Then there is direct evidence that FFE understood that it was entitled to indemnity, if required, under the Liberty policy for the claims by Thiess in the Proceedings. In particular there is the draft notification to Liberty as settled by Mr Cameron in June 2005. Such a notification to Liberty of the Thiess claim in the Proceedings would have been irrelevant had FFE believed that Thiess's rights under the Consultancy Agreement were limited to the QBE cover or that this would be the effect of the proposed Side Deed.

[138] I am fortified in my conclusion as to FFE's intention by FFE's failure to call any evidence from any of its employees or directors. The only witness of fact in its case was Mr Cameron. Plainly he was not a decision-maker as to the terms upon which FFE should contract. Overall his evidence supports the case for rectification upon the basis of a common mistake because of what it reveals as to the absence of discussions with or advice to his client on the specific point. No explanation was offered for FFE's failure to call, for example, Mr Yovich. I infer that the evidence of Mr Yovich or any other relevant employee or officer of FFE would not have assisted FFE's case,[28] and this enables the inference as to FFE's intention to be more readily drawn.

[139] Thiess must show that there was a common intention which continued so that it was in existence when the Side Deed was executed. But that fact is established. The intention from the outset was to not affect the Proceedings and the extent of Thiess's rights and FFE's liability in relation to those claims according to the 2001 agreements. That was not changed by the negotiation of the terms of the preservation clause in the Side Deed. The exchanges of drafts in relation to amendments within the Proceedings was not inconsistent with this continuing common intention. Rather this was to the end of confining Thiess to effectively what it had claimed. It was for the purpose of preserving the legal status quo rather than changing it. Nor was the common intention affected by the specific provisions for Thiess to fund and control proceedings, if necessary, against the insurer. They were provisions intended to give effect to the rights and obligations according to the 2001 agreements. And once the critical draft and email of 27 May are seen in the context of the facts as I have found them, it cannot be said that this marked a change in the intention of at least one party. In this case, it is unnecessary to consider the legal question of whether some "outward expression of accord" is necessary.[29] As I have discussed, the parties disclosed to each other an intention to leave the Proceedings unaffected.

[140] Nor is there any difficulty in identifying precisely what was intended to be the result of the Side Deed insofar as the Proceedings were concerned. That result would be achieved by rectification of the Side Deed by the specific changes as pleaded by Thiess.

[141] The plaintiff's case for rectification of the Side Deed is that it should be rectified as follows:

> "(a) By inserting the following definitions into cl. 1.2:
>
> "**the insurer**" means either or both of QBE and Liberty.

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28 *Jones v Dunkel* (1959) 101 CLR 298.

29 As discussed in Meagher, Gummow & Lehane's *Equity Doctrines and Remedies* 4th ed at [26030].

"**the Project Specific PI Policy**" has the same meaning as that which it bears in the Contract and the Consultancy Agreement.

(b) By amending cll. 8.1 to 8.8 as indicated below:

8.1 The provisions of this clause apply to the Proceedings.

8.2 The Contractor shall not enforce against the Consultant any judgment, settlement or order made in connection with the Proceedings except to the extent that the Consultant is indemnified by ~~QBE~~ the Insurer pursuant to the Project Specific PI Policy in respect of that judgment, settlement or order.

8.3 The Consultant must, subject to it having legal advice that it has reasonable prospects of doing so, use its best endeavours to obtain indemnity from ~~QBE~~ the Insurer with respect to any judgment, settlement or order made in favour of the Contractor in connection with the Proceedings.

8.4 In the event the Consultant is required to bring proceedings against ~~QBE~~ the Insurer with respect to any judgment, settlement or order made in favour of the Contractor in connection with the Proceedings, the Contractor shall bear the costs of the proceedings (including any adverse costs order) and shall have the carriage conduct and control of the proceedings (including the power to comprise the proceedings on such terms as it sees fit).

8.5 For the purposes of this clause, the Consultant shall be considered indemnified only when, and to the extent that, the amount of the indemnity is:

(a) received by the Consultant in cleared funds; or

(b) paid by ~~QBE~~ the Insurer at the direction of the Consultant.

8.6 In the event that ~~QBE~~ the Insurer refuses or fails to indemnify the Consultant in respect of any judgment, settlement or order made in connection with the Proceedings, the Consultant shall, upon written demand from the Contractor, assign to the Contractor any rights that the Consultant may have against ~~QBE~~ the Insurer in respect of such judgment, settlement or order.

8.7 In the event of such an assignment, the Consultant shall provide reasonable cooperation to the

> Contractor, at the Contractor's in relation to any assigned rights. The enforcement or attempted enforcement of any such rights of the Contractor shall be at the Contractor's expense.
>
> 8.8 To the extent that the amount of any judgment, settlement or order made in favour of the Contractor against the Consultant in connection with the Proceedings remains unsatisfied after:
>
> (a) indemnification by ~~QBE~~ the Insurer; and
>
> (b) the Contract has taken such enforcement action as it wishes against ~~QBE~~ the Insurer pursuant to the assignment referred to in clause 8.5 above,
>
> the Contractor unconditionally releases the Consultant in respect of the unsatisfied amount."

Alternative claims

[142] It is unnecessary then to determine the alternative claims by Thiess. One of those was that there should be the same outcome by the operation of an estoppel by convention. As pleaded, this appeared to add nothing to Thiess's case for rectification on the basis of a common mistake. Thiess pleaded that Thiess and FFE "agreed to adopt as the conventional basis for their relationship" assumptions that the effect of the Side Deed would be as Thiess seeks to have it rectified, so that it would be unconscientious for FFE now to deny the truth of that assumption. Alternatively Thiess pleaded that it made that assumption "as the conventional basis of the relationship" between them and that FFE "knew of, and acquiesced in, Thiess's adoption" of that assumption. After this judgment was reserved, counsel for Thiess drew my attention to the recent decision of the High Court in *Bofinger v Kingsway Group Ltd*.[30] After setting out this passage from *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd*:[31]

> "Estoppel by convention is a form of estoppel founded not on a representation of fact made by a representor and acted on by a representee to his detriment, but on the conduct of relations between the parties on the basis of an agreed or assumed state of facts, which both will be estopped from denying"

the joint judgment in *Bofinger* remarked:[32]

> "The reference to an agreed or assumed state of facts (not of law) is significant."

[143] The other case, apart from the claim for rectification, was upon the basis of an alleged contravention of s 52 of the *Trade Practices Act* by the conduct of FFE, through Mr Cameron, on 27 May 2005. It was alleged that by proffering to Thiess

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30 [2009] HCA 44.

31 (1986) 160 CLR 226 at 244.

32 [2009] HCA 44 at [75].

this draft of the preservation clause under cover of Mr Cameron's email, FFE impliedly represented that:

> "(a) it had no motive or intention in re-drafting the clause other than that which it identified in the explanations in the attachment or in the specific statement of its intent quoted in [the email]; and
>
> (b) it did not propose to resile from the pre-existing consensus [that Thiess' rights in the Proceedings would be preserved]."[33]

Under this alternative case, Thiess alleged that FFE did intend to make a substantial amendment by this draft of the preservation clause and did intend to limit Thiess's rights to the QBE policy only. It was alleged that this intention was held by Mr Cameron and Mr Yovich, as to be inferred from FFE's pleaded traverses of Thiess's pleaded case for rectification for a common mistake. It was further pleaded by Thiess that it had suffered or was likely to suffer loss or damage by that conduct in contravention of s 52 in that Thiess did not identify the effect of the proposed preservation clause and lost the opportunity of ensuring that, in effect, its rights would be preserved fully according to the 2001 agreements. The relief claimed was an order pursuant to s 87 of the Act that the Side Deed be rectified in the same way.

[144] That claim would have failed at least because it was dependent upon FFE, and in particular Mr Cameron and Mr Yovich, having motives or intentions contrary to what I have found to be the case. On my findings neither FFE (through Mr Yovich or otherwise) nor Mr Cameron meant to diminish rather than preserve Thiess's rights in relation to the Proceedings.

[145] For the purposes of this claim, and also for an alternative claim for rectification on the basis of a unilateral mistake by Thiess, each side called evidence from an independent solicitor as to the proper practice of solicitors in the process of drafting and re-drafting of such documents. There was also evidence on the subject from Mr Lawson, Ms Beardow and Mr Cameron. Insofar as the independent solicitors were concerned, there was a particular contest as to whether, in circumstances such as these, what is regarded as proper professional practice required a solicitor to identify, by underlining or the like, any changes from that solicitor's previous draft of a clause. As discussed, part of Thiess's complaint was that Mr Cameron did not identify the changes to his previous preservation clause. Rather Mr Cameron underlined the whole clause. And his email did not draw attention to the changes within it. On the view of the solicitor called by Thiess, Mr Perrett, a careful and competent solicitor of good repute would direct his or her opponent's attention specifically to such a change within his previous draft of the clause. On the view of the solicitor called by FFE, Mr Price, that was not required, because a competent solicitor in receipt of Mr Cameron's email would not rely simply on the covering email but would read its attachment, the draft Side Deed, and that it would be sufficient for him to mark the whole of the proposed clause 8 as Mr Cameron did. Mr Perrett practices principally in Brisbane and Mr Price in Sydney. Their evidence referred to the relevant professional rules in each State. I could see no substantial difference between those rules or in the practice between the States. Each of Mr Perrett and Mr Price was attempting to assess what was reasonably required of Mr Cameron in the circumstances. The limitation upon this exercise, in each case, was that it required certain assumptions to be made as to the circumstances.

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33 Statement of claim , para 56.

Understandably it was difficult for each of them to be fully acquainted with the extensive factual context. To reach that point, each would have been required to observe the entirety of this trial and to read all of the exhibits. But in case it should become relevant, I should make some observations as to the extent to which Mr Cameron should have identified the change to his preservation clause.

[146] His change on 27 May was, on any view, a substantial change from the effect of previous drafts. It was a clause which would have a result which was quite different from that which the parties and their solicitors had been discussing and for which drafts had been exchanged. Mr Cameron was proposing a markedly different commercial element to the overall settlement. In these circumstances, Corrs could have expected that Mr Cameron would draw attention to this change. He did not do so within his draft of the Side Deed or within the email. The reason why he did not do so was that he was not conscious of the effect of this change. But for the purposes of s 52, it is unnecessary that there be an intention to mislead or deceive.

Conclusion

[147] It will be ordered that the document described as "Contractor's and Consultant's Side Deed" made between the plaintiff and the defendant in about July 2005 be rectified in the manner claimed in paragraph 1 of the prayer for relief in the further amended statement of claim. I will hear the parties as to further orders including as to costs.