SUPREME COURT OF QUEENSLAND

CITATION:	*Australian Laboratory Services Pty Ltd v HRL Limited* [2012] QSC 236
PARTIES:	**AUSTRALIAN LABORATORY SERVICES PTY LTD ACN 009 936 029** (plaintiff) **v** **HRL LIMITED ACN 061 930 756** (defendant)
FILE NO/S:	11180 of 2011
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	13 August 2012
JUDGE:	Ann Lyons J
ORDER:	**I will hear from counsel as to the terms of the order and as to costs.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – OTHER CASES – Where applicant pursuant to a written agreement purchased a number of properties which allegedly, at the date of signing and Closing, in breach of the warranties set out in the agreement held and were not free from environmental contamination – Where applicant seeks an order requiring the respondent to perform its contractual obligation and jointly engage an environmental consultant to prepare a report – Where the intention of the parties as manifested by both the express and implied terms of the contract was to do all such things as necessary to enable to other party to have the benefit of the contract – Where the respondent argues that a condition to the appointment of the environmental consultant, confirming that the applicant and the environmental consultant have a continuing commercial relationship outside the terms of the agreement and that the relationship is not a conflict of interest, is unreasonable and inappropriate – Whether the duty to cooperate would have been implied in the circumstances.

EQUITY – GENERAL PRINCIPLES – RULES AND MAXIMS OF EQUITY – CLEAN HANDS – Where applicant pursuant to a written agreement purchased a number of properties which allegedly, at the date of signing and Closing, in breach of the warranties set out in the agreement held and were not free from environmental contamination – Where applicant seeks an order requiring the respondent to perform its contractual obligation and jointly engage an environmental consultant to prepare a report – Where the agreement between the parties included a clause which requires the parties to work together in good faith to engage an environmental consultant to conduct an assessment of environmental issues – Whether communications between the applicant and the environmental consultant without the knowledge of the respondent means that the applicant is not coming to equity with clean hands.

PROCEDURE – COURTS AND JUDGES GENERALLY – JUDGES – DISQUALIFICATION FOR INTEREST OR BIAS – IN GENERAL – ORDINARY RULE – Where applicant pursuant to a written agreement purchased a number of properties which allegedly, at the date of signing and Closing, in breach of the warranties set out in the agreement held and were not free from environmental contamination – Where applicant seeks an order requiring the respondent to perform its contractual obligation and jointly engage an environmental consultant to prepare a report – Where the agreement between the parties included a clause which requires the parties to work together in good faith to engage an environmental consultant to conduct an assessment of environmental issues – Where the applicant and the environmental consultant are parties to ongoing litigation in Victoria and have engaged in negotiations in the absence of the respondent – Whether a fair minded observer might entertain a reasonable apprehension of bias on the part of the environmental consultant – Whether in relation to the appointment of independent experts the test of apprehended bias is one of 'actual partiality' rather than 'the appearance of impartiality'.

1144 Nepean Highway v Abnote Australasia Pty Ltd [2009] VSCA 308
Ceneavenue v Martin [2008] SASC 158
Dering v the Earl of Winchelsea (1787) 28 ER 1184
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337
FAI Insurances v Pioneer Concrete (1987) 15 NSWLR 552
Goddard v Midland Railway Company (1891) 8 TLR 126
McGrath v McGrath [2012] NSWSC 578
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144CLR 596

Spry, ICF The Principles of Equitable Remedies: Specific Performance, Injunction, Rectification and Equitable Damages 8th ed Thompson Reuters Australia Limited, 2010

COUNSEL: DJS Jackson QC with MJ Luchich for the plaintiff
S Robertson for the defendant

SOLICITORS: Minter Ellison Lawyers for the plaintiff
Maddocks Lawyers for the defendant

ANN LYONS J:

Background

[1] On 19 September 2007 the plaintiff, Australian Laboratory Services Pty Ltd (**ALS**) agreed to purchase the defendant HRL Limited's (**HRL**) shares in ACIRL Limited (**ACIRL**) for $76,756,000 pursuant to a Share Sale Deed (**SSD**).[1] The purchase included a number of business properties in Queensland and New South Wales. The Closing date under the SSD was 17 October 2007.

[2] The agreement included seller's warranties in relation to the environmental condition of those sites and contained a number of clauses which outlined provisions in relation to the conduct of environmental assessments and the making of any claims. In particular, clause 8.13(b)(i) required the parties to work together in good faith to engage an environmental consultant to conduct an assessment of environmental issues.

[3] URS Australia Pty Ltd (**URS**) was engaged to conduct that assessment and, at a cost of almost $1 million to the parties, has produced a series of eight reports which identify environmental issues.

[4] ALS commenced the present proceedings on 2 December 2011,[2] claiming the sum of $7,779,252.53 pursuant to a written indemnity or, alternatively, damages for breach of contract in the same amount, alleging that, as at the date of signing and on Closing, in breach of the warranties set out in the SSD, dangerous materials were held but not safely stored at a number of sites and that those sites were not free from all environmental contamination. It is also alleged that dangerous effluence had been discharged from a number of the sites. It is alleged that as a consequence of those breaches of warranties ALS has suffered loss and damage by way of performing investigations and the cost of remediation work in excess of $7 million.

[5] HRL filed a Notice of Intention to Defend and Defence on 3 January 2012.[3] Pursuant to paragraph 22A of the Amended Defence,[4] the defendant has pleaded that in answer to the whole of the Claim, if there is a Claim that otherwise complies with the SSD, the defendant is only liable for loss that arises out of environmental issues that are identified in the environmental assessment report at Closing and that

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1 Exhibit TEM-1 to Affidavit of TE Mullen sworn 1 May 2012 (Vol 1) pp 1-61.
2 Claim and Statement of Claim filed 2 December 2011.
3 Notice of Intention to Defend filed 3 December 2011.
4 Amended Defence of the Defendant filed 26 April 2012.

there is no such report identifying what environmental issues existed at the various properties at Closing.

The present application

[6] The present interlocutory application[5] filed on 27 April 2012 essentially seeks an order requiring HRL to perform its contractual obligation and jointly engage an environmental consultant to prepare a report in accordance with the terms of the SSD. The specific order that ALS seeks is an order that, pursuant to clause 18.13(b)(i) of the SSD, HRL and ALS engage URS to prepare a report to identify which of the environmental issues identified by URS, in its reports dated 15 April 2008, 22 May 2009, 4 September 2009, 13 October 2009, 22 February 2011, 21 March 2011, 22 March 2011 and 6 May 2011 with respect to the subject properties, existed at Closing.

[7] At the hearing of the application on 13 August 2012, the plaintiff sought leave to amend the application to include as a term of the order a paragraph indicating that the engagement by URS would be on the terms set out in Exhibit CLD-28 to the affidavit of Christopher Lee Douglas sworn 10 August 2012[6] and that the report identify whether:

> "(a) the properties referred to in paragraph 7 of the Further Amended statement of claim were 'free from all environmental contamination, including without limitation, any patent or latent contamination of the Environment soil, sub-soil, ground water or surface waters within or adjacent to such premises' as at 17 October 2007; and
>
> (b) materials, 'including without limitation, effluence leachate, emissions or hazardous materials generated on or emitted from any of' the properties referred to in paragraph 7 of the Further Amended Statement of Claim by 17 October 2007 'have caused or will cause in whole or in part any contamination of the Environment'."[7]

[8] Significantly and contentiously, the Terms of Engagement which are proposed now contain, as Clause 4(1)(a), a clause which provides that both ALS and HRL confirm that URS has a "continuing commercial relationship outside the terms of this Agreement and that relationship is not a conflict of interest".

The terms of the SSD

[9] The terms of the SSD[8] included "Seller Warranties" at Clause 8.2 whereby HRL represented and warranted to ALS that each Seller Warranty was true and correct as at the "Signing Date" and would remain true and correct at any time up until "Closing".

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5 Application filed on behalf of the Plaintiff filed 27 April 2012.
6 Affidavit of CL Douglas sworn 10 August 2012 filed by leave 13 August 2012.
7 Draft Order provided by the Applicant.
8 Above n 1.

[10] Schedule 1 contained the Seller warranties. Those warranties included warranties about compliance with environmental laws and warranties that the business properties were free from contamination. In Clause 17.8 the Seller warranted as follows:

> "**17.8 Environment Laws**
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> (a) (**Dangerous materials**): The Sale Group does not hold on the Business Properties or otherwise control any deposit, dump, tank or container of any dangerous, noxious or poisonous waste, fuel, fluid, solvent, chemical or effluent, except for any fuel, fluid or chemical used in any industrial process of the Sale Group which is properly and safely stored, identified, labelled and maintained in compliance with best industrial standard and any applicable Environmental Law.
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> (b) **(Dangerous effluents):** The Sale Group does not discharge from its land any dangerous, noxious, poisonous, toxic, hazardous or deleterious matter, liquid or gas, whether by way of effluent, emissions or in any other manner other than in accordance with applicable laws.
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> (c) **(Contamination):**
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> (i) The Business Properties are free from all environmental contamination, including without limitation, any patent or latent contamination of the Environment soil, sub-soil, ground water or surface waters within or adjacent to such premises; and
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> (ii) no materials, including without limitation, effluence leachate, emissions or hazardous materials generated on or emitted from any of the Business Properties have caused or will cause, in whole or in part, any contamination of the Environment";"[9]

[11] Furthermore, clause 8.13(b) in the Chapter on Representations and Indemnities provided as follows in relation to the Business Properties:

> "In relation to the Business Properties other than the Exiting Business Properties:
>
> (i) As soon as practicable and at the latest within 3 months of the Closing Date, the Seller and the Buyer will work together in good faith to arrange for environmental assessments to be conducted at the joint cost of the Seller and Buyer, by an environmental consultant agreed by the parties, or failing agreement, by an environmental consultant appointed by the President from time to time of the Institution of Engineers Australia;

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9 Ibid at p 36.

(ii) In the event that an environmental assessment reveals:

A. …

B. that an environmental issue does exist at the relevant Business Property:

1. If the Seller elects, the Buyer must allow the Seller or procure that the Seller is allowed, to carry out remediation work to ensure that there will be no Third Party Claim in relation to the environmental issues at the Business Property; and

2. If there is a Claim under paragraph 17.8 of the Seller Warranties which otherwise complies with this deed, the Seller will only be liable in respect of such Claim for Loss that arises from environmental issues that is identified in the environmental assessments as having been existing as at Closing."[10]

[12] "Business property" was defined in Chapter 1 as meaning "each freehold or leasehold property or premises specified in Schedule 4, and all those properties and premises collectively."[11]

[13] Clause 8.11 of the SSD allowed ALS promptly, but no later than 20 business days after receipt of "actual knowledge" of anything that, in its reasonable opinion, "may give rise to any Claim" under the SSD, to deliver a Claim Certificate to HRL.[12] Clause 8.11 further provided that if the consultation process provided for following delivery of a Claim Certificate does not resolve the Claim then either party may (under clause 8.1l(e)) submit the dispute to a Court of competent jurisdiction.[13]

[14] Clause 8.6(a) of the SSD provided that HRL was not liable for any Claim by ALS except where the following occurred:

1. ALS has given HRL a Claim Certificate required under and within the time limit specified in clause 8.11 (clause 8.6(a)(i));[14]
2. ALS has given written notice to HRL specifying details of the Claim within the period of 5 years beginning with the Closing Date (clause 8. 6(a)(iii)B);[15]
3. where ALS has given written notice HRL within the period set out in clause 8.6(a)(iii), and within 6 months of HRL receiving that notice, the Claim has been referred to a Court of competent jurisdiction by ALS commencing and serving any legal action or proceeding against HRL in relation to the Claim (clause 8.6(a)(iv)C).[16]

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10 Ibid at pp 25-26 (emphasis added).
11 Ibid at p 5.
12 Ibid at p 22.
13 Ibid at p 23.
14 Ibid at p 19.
15 Ibid at pp 19-20.
16 Ibid at pp 19-20.

[15] By clause 8.6(b) of the SSD, HRL is not liable for any claim by ALS, to the extent the Claim is alleged to involve a breach of paragraph 17.8 of the Seller warranties, except where ALS has complied with the provisions of clause 8.13 which relates to the joint appointment of the environmental consultant to conduct environmental assessments.

The history of the environmental reports

[16] An environmental consultant was appointed pursuant to clause 8.13(b)(i) of the SSD in November 2007. URS was the environmental consultant appointed.

[17] URS produced eight reports or environmental assessments which were paid for jointly by the two parties at a cost of almost $496,393.58 to each party.

[18] Two of the reports, namely those titled "Final Report, Phase II Environmental Site Assessment, ACIRL NSW and Qld; dated 22 May 2009" (**May 2009 Report**) and "Final Report, Phase I1 Environmental Site Assessment, ACIRL Emerald; dated 13 October 2010" (**October 2010 report**), identified environmental issues (contamination) at the following business properties:

1. Acirl Street, Riverview, Queensland (**Riverview Property**);
2. Junction Street, Telarah, New South Wales (**Telarah Property**);
3. Darling Street, Carrington, New South Wales (**Carrington Property**);
4. Industrial Close, Muswellbrook, New South Wales (**Muswellbrook Property**); and
5. Foundry Road, Emerald, Queensland (**Emerald Property**).

[19] URS also recommended remedial action at the five properties in its report entitled "'Final Report, Post Phase II ESA, ACIRL Emerald" dated 22 March 2011 (**March 2011 Report**). The report entitled "Site Management and Remedial Cost Estimates Report" dated 6 May 2011 and issued on 9 May 2011 (**May 2011 Report**) confirmed that the Five Properties contained concentrations of contaminants of concern and required remediation and provided a cost estimate for the performance of the remediation at those properties.

[20] On 23 June 2009 ALS gave a claim certificate to HRL. The certificate was rejected by the solicitors for HRL as not being a valid claim certificate, because it considered that its obligation was confined in terms of clause 8.13(b)(ii)B2 of the SSD.

History of the proceedings

[21] On 27 April 2012 the plaintiff filed the present application. The matter was initially heard on 9 May 2012. The plaintiff applied for leave to amend its Reply to the Amended Defence of the Defendant and the matter was transferred to the civil list.

[22] An Amended Reply was filed on 29 May 2012, with a further Amended Reply filed on 6 June 2012. On 6 June 2012 the matter came on for hearing before Margaret Wilson J. At the hearing, counsel for HRL indicated to the Court that there was agreement to the joint appointment of URS by the parties provided the terms of the appointment could be agreed. Counsel for HRL also indicated to the Court that it was prepared to offer an undertaking to negotiate in good faith with the plaintiff and with URS with a view to agreeing terms pursuant to which URS would be jointly appointed to prepare a report that identifies which of (and the extent to which) the

environmental issues identified by URS in its reports dated 15 April 2008, 4 September 2009, 22 February 2011 as well as the May 2009 Report, the October 2010 Report, the March 2011 Report and the May 2011 Report.

[23] The matter was then adjourned until 26 June 2012 to allow the parties time to discuss the terms of the engagement with URS before any formal order of the court was made binding on URS. It was clear therefore that the only issue raised at that hearing was the question of the reasonableness of the terms of the engagement of URS.

[24] As at 26 June 2012 URS had failed to agree on the terms of the joint appointment and was not willing to provide the additional services sought by the parties. Accordingly, the matter was adjourned to a date to be fixed.

[25] Since 26 June 2012 there have been extensive negotiations between the parties and URS with no resolution. On 27 July 2012 HRL, however, had received a letter from the plaintiff's solicitors indicating that URS had now agreed to undertake the services on the basis of terms and conditions which were enclosed in that letter.[17]

[26] Schedule 1 to the general conditions which were enclosed in that 27 July letter then listed, at Item 3(a)1, the five properties at Riverview, Telarah, Carrington, Muswellbrook and Emerald. The Schedule also provided at item 3(a)2 that the report was to be prepared by 24 August 2012 and it was to identify, by reference to the environmental issues identified by URS in its eight previous reports, whether:

1. the properties were free from environmental contamination including without limitation, any patent or latent contamination of the Environment soil, sub-soil, ground water or surface waters as at 17 October 2007; and
2. materials including without limitation, effluence leachate, emissions or hazardous materials generated on or emitted from any of the properties by 17 October 2007 have caused or will cause in whole or in part any contamination of the Environment.

[27] The proposed report also required URS to identify any assumptions made in preparing its report (and the basis of those assumptions) and to identify any facts (and the basis of those facts) and to identify any reasons for its conclusions in the report.

[28] On 6 August 2012 the solicitors for HRL wrote to the solicitors for ALS, querying the fact that URS had now agreed to undertake the services and stating "our client is very concerned as to whether URS is capable of acting as an '*independent and objective consultant' and 'maintaining its independence from [ALS] and [HRL]'* as will be expressly required in the event that the Proposed Terms are executed."[18] The letter continued:

> "Frankly, our client does not understand how URS could regard it as appropriate to conduct negotiations regarding a proposed '*joint appointment*' in the absence of (and without the knowledge of) one of the parties to the proposed joint appointment. This is particularly the case in circumstances where ALS, HRL and URS had previously

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17 Exhibit CLD-16 to Affidavit of CL Douglas sworn 10 August 2012 (Above n 6).

18 Exhibit CLD-18 to Affidavit of CL Douglas sworn 10 August 2012 (Above n 6) at 5.

> participated in a joint telephone conference with a view to reaching agreement on the terms of a further '*joint appointment*' of URS and in circumstances where there is ongoing litigation between ALS and HRL (including litigation regarding whether or not URS should be engaged to produce a further report.)."[19]

[29] In a letter sent to both ALS and HRL on 9 August 2012,[20] URS indicated that all previous offers, proposals and negotiations were withdrawn and that, if orders were made by the Queensland Supreme Court that URS must provide services to ALS and HRL, URS would only provide those services pursuant to an attached agreement for the provision of consulting services. It was indicated that although URS had previously agreed to make amendments no such amendments would be entertained at the time of the writing of the letter.

[30] The letter of 9 August also referred to the fact that a subpoena had been requested by HRL in relation to a discussion which took place between the managing director of URS and the managing director of ALS. The letter from URS continued "[a]s discussed on 7 August 2012, that discussion was in relation to an unrelated matter, which is not relevant to this matter."

[31] The agreement for the provision of consulting services enclosed in the 9 August 2012 letter significantly included as clause 4.1(a), under the heading General Obligations, a provision which required the clients to "acknowledge that the Consultant and ALS have a continuing commercial relationship outside the terms of this Agreement and that relationship is not a conflict of interest".[21]

HRL's opposition to the present application.

[32] The submissions of the defendant indicate that one of the reasons why URS originally indicated it was not willing to provide the additional services was that there was ongoing litigation between ALS and URS in the Victorian Supreme Court. Counsel for the defendant argues that, in the absence of full and proper explanations as to why URS and ALS considered it appropriate to engage in negotiations in relation to the joint appointment in the absence of the defendant without its knowledge and full particulars, a fair minded observer might consequently entertain a reasonable apprehension of bias on the part of URS. It is argued that the apprehension of bias is a sufficient and proper basis for the Court to refuse to exercise a discretion to make the order sought by the plaintiff.

[33] Counsel for the defendant also submits that the plaintiff is in breach of clause 8.13(b)(i) of the SSD, which requires the parties to work together in good faith to arrange for environmental assessments. In this regard it was argued that because the plaintiff had arranged for environmental assessments independently they therefore had not worked together in good faith, pursuant to that clause. The defendant indicates that it does not know what other matters are sitting behind the issues between ALS and HRL and is unaware of the nature and extent and the content of the discussions between URS and ALS.

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19 Ibid at 6.

20 Exibit CLD-28 to Affidavit of CL Douglas sworn 10 August 2012 (Above n 6).

21 Ibid.

[34] The defendant argues that the plaintiff is in fact seeking an order enforcing clause 8.13(b)(i) of the SSD and therefore the order is necessarily an application for final relief. The defendant argues that the two issues the Court needs to consider are first whether the defendant has breached or anticipatorily breached clause 8.13(b)(i) and secondly whether, in the exercise of its equitable jurisdiction, the Court should make the order.

[35] The defendant denies that it has breached the SSD and argues that this is not an occasion for the Court to grant equitable relief. It is further argued that, even if the Court was satisfied that there was a breach or anticipatory breach of the SSD, the Court should not make the order because if the order was made it would require the defendant to engage a person who is ostensibly biased and, further, ALS has come to Court with 'unclean hands' because it seeks to enforce an obligation of which it itself is in breach.

The 'unclean hands' argument

[36] Counsel for the defendant essentially argues that the fact that communications have taken place between URS and ALS without the knowledge of the defendant means that the plaintiff is not coming to equity with clean hands. Counsel for the defendant relies on the fact that during the hearing on 6 June 2012 HRL indicated through Counsel it was prepared to give an undertaking to undertake negotiations in good faith with ALS and with URS with a view to agreeing on terms. Counsel for HRL argues that there are continuing obligations pursuant to clause 8.13(b)(i) for both ALS and HRL to work together in good faith.

[37] Counsel for HRL contends that ALS has breached that obligation by its conduct since the last return date. Whilst the defendant accepts that *FAI Insurances v Pioneer Concrete*[22] indicated that general "naughtiness" was insufficient and that the alleged wrongful conduct must have "an immediate and necessary relation to the equity sued for",[23] particular reliance is placed on the decision of *Goddard v Midland Railway Company*,[24] where the Court declined to enforce a restrictive covenant arising under a common building scheme where the plaintiff was in serious breach of the same covenant sued upon.

[38] It is necessary to turn to the conduct of ALS since the last hearing. The affidavit of Mathew Stulic sworn 12 August 2012 sets out his dealings with legal counsel for URS.[25] That affidavit attaches his file note, which records Mr Stulic's record of what Simon Barrett, legal counsel for URS, informed him:

> "• He said that there is 'another matter between URS and ALS sitting behind this'. I asked him what the matter was - he said 'commercial in confidence'. He said the 'other matter' between ALS and URS needed to be resolved before URS could consider taking on this further engagement. He said that other matter between URS and ALS was resolved and following its resolution he received a telephone phone call from Chris Douglas of Minter Ellison asking him to send the terms URS

22 (1987) 15 NSWLR 552 at 552.
23 *Dering v the Earl of Winchelsea* (1787) 28 ER 1184 at 1185.
24 (1891) 8 TLR 126.
25 Affidavit of MP Stulic sworn 12 August 2012 filed by leave 13 August 2012.

would be prepared to sign up to. He said he didn't have the exact date, but thinks Chris Douglas called him on or about 25 July 2012.

- I asked him whether he was involved in the discussions which resolved the 'other matter' between URS and ALS. He said he wasn't. He said that the discussions took place as he understood it between the MD of ALS and the MD of URS. He then 'got the all clear' from the MD of URS that they could take on this engagement. He said he doesn't know what those discussions were, they just filtered down to him."[26]

[39] The affidavit of Paul Napier, legal counsel for ALS, sworn 13 August 2012[27] indicates that there are currently proceedings commenced by URS against the Port of Melbourne Corporation in the Supreme Court of Victoria. In those proceedings URS sought and was granted leave to join ALS as a party. URS pleads that ALS is a concurrent wrongdoer as contemplated by Part IVAA of the *Wrongs Act 1958* (Vic).

[40] Mr Napier swears that the discussions between the ALS representatives and URS representatives have resolved URS's objection to its continued retainer by ALS and HRL in the current proceeding to the extent that objection had as its basis the Victorian litigation. He further swore that those discussions were conducted on a without prejudice basis.

[41] The affidavits of Christopher Douglas, a solicitor employed by the firm acting for ALS, sworn on 10 August[28] and 13 August 2012[29] set out his dealings with URS. Mr Douglas swears that he was informed by legal counsel for URS on 25 June 2012 that there was another matter affecting URS's willingness to provide the services sought and that the other matter involved a claim in Victoria involving URS and ALS. Mr Douglas swears that he was later informed by Paul Napier that one of the parties in the other matter was the Port of Melbourne Corporation and that that corporation was a client of the Melbourne office of the solicitors for ALS. Accordingly, Mr Douglas swears that he is not aware of the details of the other matter and that, so far as that other matter affects URS's willingness to undertake the further services sought in relation to this matter, that is something which has been dealt with directly between ALS and URS.

[42] Counsel for HRL argues that there are continuing obligations pursuant to clause 8.13(b)(i) for both ALS and HRL to work together in good faith in relation to the environmental reports. The essence of HRL's argument would seem to be that any contact with URS by ALS to progress the preparation of the environmental reports had to be done jointly and that any contact apart from a joint contact would be in breach of the obligation of good faith.

[43] I am not, however, satisfied that any contact between URS and ALS would be in breach of the continuing obligations in clause 8.13(b)(i). That obligation is "to work together in good faith to arrange for environmental assessments to be conducted at

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26 Exhibit MPS-1 to Affidavit of MP Stulic sworn 12 August 2012 filed by leave 13 August 2012 (Above n 25).

27 Affidavit of PM Napier affirmed 13 August 2012 filed by leave 13 August 2012.

28 Above n 6.

29 Affidavit of CL Douglas sworn 13 August 2012 filed by leave 13 August 2012

the joint cost of the Seller and the Buyer, by an environmental consultant agreed by the parties". Significantly, the seller and the buyer had in fact already arranged for assessments to be conducted by URS and had jointly paid the significant costs to date. I do not consider that the contact with URS by ALS was to arrange for those environmental assessments to be prepared but rather the contact was to remove objections to URS's continuing involvement due to issues which lay behind the scenes and which were entirely unrelated to the present matters. Notably, URS and ALS have a continuing commercial relationship involving many matters beyond the scope of the present issues. In my view ALS was not in fact actually unilaterally progressing the environmental reports but, rather, was involved in trying to remove obstacles to URS's continued involvement.

[44] Furthermore I cannot see how the involvement of HRL in the resolution of issues between ALS and URS would have meant that ALS and HRL were working "in good faith to arrange for environmental issues to be conducted", as clause 8.13(b)(i) requires.

Is URS ostensibly biased?

[45] The defendant argues that clause 8.13(b)(i) contemplates that the assessments will be conducted by a consultant who is independent of the parties and that the evidence presently available raises a reasonable apprehension of bias on the part of URS. In this regard it is argued that there is a relationship between URS and ALS which is a relationship beyond the connection with the SSD and, whilst that relationship might be innocuous, in the absence of full disclosure a fair-minded observer would apprehend that URS might not bring an impartial mind to the resolution of the questions.

[46] In this regard, the defendant argues that it is clear that at 25 June 2012 URS was not willing to provide the services and then between 25 June 2012 and 27 July 2012 there were discussions between the parties in the absence of the defendant which resolved those objections. On 27 July, the plaintiff's solicitors advised that URS had reversed its position. The defendant argued there is an unexplained inconsistency in the positions taken by URS.

[47] The test of apprehended bias was examined in detail in the High Court decision of *Ebner v Official Trustee in Bankruptcy*,[30] as follows:

> "The apprehension of bias principle admits of the possibility of human frailty. Its application is as diverse as human frailty. Its application requires two steps.
>
> First, it requires the identification of what is said might lead a judge (or juror) to decide a case other than on its legal and factual merits.
>
> The second step is no less important. There must be an articulation of the logical connection between the matter and the feared deviation from the course of deciding the case on its merits. The bare assertion that a judge (or juror) has an "interest" in litigation, or an interest in a party to it, will be of no assistance until the nature of the interest, and

30 (2000) 205 CLR 337.

> the asserted connection with the possibility of departure form impartial decision-making, is articulated. Only then can the reasonableness of the asserted apprehended bias be assessed."[31]

[48] However, in relation to the appointment of independent experts, "actual partiality" rather than "the appearance of partiality" has been held to be the test in a number of cases. In this regard Debelle J, in the Supreme Court of South Australia in *Ceneavenue v Martin*,[32] made the following observations:

> "In *Macro* Robert Walker J expressed the view that actual partiality rather than the appearance of partiality is the crucial test. He justified that conclusion in this way:
>
> > Otherwise auditors (like architects and actuaries) who have a long-standing professional relationship with one party (or persons associated with one party) to a contract might be unduly inhibited, in continuing to discharge their professional duty to their client, by too high an insistence on avoiding even an impression of partiality.
>
> With respect, there seems to be much to commend that view. The task of the valuer is not infrequently assigned to a person such as an auditor or accountant who has a professional or other association with one of the parties. To apply the test of the appearance of partiality could, therefore, have a real potential to invalidate the valuation made by such a person. In *Beevers* at [300], Dodds-Streeton J adopted a different view from that of Robert Walker J. She said:
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> > [300] Given the sometimes fine distinction between an appearance of partiality and a finding of partiality on the balance of probabilities, I am not persuaded that the parties would intend to be bound by a valuation attended by a credible appearance, or soundly based apprehension, of partiality. It is not necessary, however, to determine that question in the present case, because I conclude, on the balance of probabilities, that although Mr Ryan was not guilty of collusion, dishonesty or conscious partiality, he did not perform the valuation with the degree of independent skill and judgment and impartiality required of an expert acting between two parties.
>
> Those remarks suggest that an appearance of partiality will invalidate the valuation. It is clear that her Honour was not expressing a concluded view. On this appeal, neither party addressed this question in their submissions. It is undesirable, therefore, to express a concluded view on this aspect of the question of impartiality."[33]

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31 Ibid at [8].
32 [2008] SASC 158.
33 Ibid at [71].

[49] In this regard Pembroke J, in the recent decision of the New South Wales Supreme Court of *McGrath v McGrath,*[34] examined the relevant issues in the following way:

> "Apprehended bias is altogether different. In truth, it constitutes the real juridical basis for the defendant's resistance to the remedy of specific performance. The defendant said that he was concerned about "whether any valuation by Mr Collins would be carried out in a truly independent way." His counsel submitted that the engagement of Mr Collins would be "in breach of an implied term ... that the valuation be made honestly and impartially". These are statements of apprehension. The fulcrum of the defendant's concern is the unilateral contact that Mr Collins had with the plaintiff and his solicitor in February 2011, contact which I will shortly explain. As I said, it occurred in connection with Mr Collins' attempt to negotiate his terms of engagement. Stretching the defendant's case to its limit, there is an apprehension that Mr Collins' valuation, if and when he is appointed, and if and when it is completed, will not have been made impartially and will be affected by a bias towards the plaintiff. The practical apprehension must be that Mr Collins will not decide the question of valuation on its merits and that the result might favour the plaintiff.
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> Not only does this contention have no factual foundation (to which I will come) but it confronts several legal difficulties. The first is that the test for apprehension of bias requires articulation of the supposed rational connection between the relevant conduct and the possibility in the mind of a reasonable observer that the decision-maker might be diverted from deciding the question on its merits: *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2001) 205 CLR 337 at [6] - [8] and [30]. That legal standard has not been met in this case. No plausible argument has been advanced that articulates the necessary logical connection between the conduct of Mr Collins and "the feared deviation from the course of deciding the case on its merits": *Ebner* at [8]. The bare identification of a unilateral communication between Mr Collins and the plaintiff or his solicitor in connection with the negotiation of his terms of engagement, even together with Mr Collins' later email of 21 September, do not rationally suffice to answer that question: *Ebner* at [30].
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> The second difficulty is that the principle of apprehended bias will rarely, if ever, have a role to play in relation to independent experts. In *Ebner*, the plurality confined the discussion of the application of the principle of apprehended bias to "a judge (or other judicial officer or juror)": at [6] - [8]. In *Macro v Thompson (No 3)* [1977] 2 BCLR 36, Robert Walker J (as he then was) expressed the view that actual partiality rather than the appearance of partiality is the crucial test for independent experts. In *Ceneavenue Pty Ltd v Martin* at [71], Debelle J said that there seems much to commend this view. In *Candoora No 19 Pty Ltd v Freixenet Australasia Pty Ltd (No 2)*

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34 [2012] NSWSC 578.

> [2008] VSC 478 at [25], Hargrave J referred with apparent approval to the finding in *Macro* that actual partiality, rather than the appearance of partiality, was necessary in order to set aside a contractual determination. In *Kenros Nominees Pty Ltd v Tipperary Group Pty Ltd* [2009] VSC 524, Hollingworth J also appears to have approved this reasoning, observing at [95]:
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> > 'The plaintiffs cannot point to any case in which an injunction has been granted to prevent a valuation by a person acting as expert, or even where an actual valuation has been set aside, on the basis of apparent bias. *All of the cases to which the parties referred deal with the setting aside of a valuation after it has been performed, on the basis of actual bias*."[35]

[50] I agree with the proposition that with independent experts the principle of apprehended bias will rarely have a role to play. Accordingly in the present case, without any evidence of actual partiality and without any evidence of the connection between the actual conduct which occurred and the feared deviation, I am not satisfied that there is any substance to the argument that URS would be actually biased.

The nature of the relief sought by the plaintiff

[51] ALS seeks a mandatory injunction compelling HRL to join with ALS to engage URS to produce a report to answer a specific question as to whether environmental issues existed at the business properties at Closing.

[52] ALS argues that Clause 8.13 of the SSD did not place any limit on the number of reports or environmental assessments that the parties could commission to ensure compliance with the clause. Furthermore it is argued that the existence of environmental issues at Closing underpins an important part of the Seller warranties and HRL's liability under the indemnity it gave ALS. Accordingly the mechanism of the appointment of the consultant to conduct the assessment is how the parties agreed that that liability would be determined.

[53] I consider that clause 8.13 of the SSD requires HRL's continued co-operation in relation to the appointment of the environmental consultant to complete the reports required by the SSD. In my view, even if there is not an express term, the duty to cooperate would in fact have been implied in the circumstances of the current case. In *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*[36] the High Court held that whilst there is a general duty to cooperate in the doing of acts necessary for the performance of the contract where the acts in question are not essential to the performance of the contract, the correct interpretation of the contract depends on the intention of the parties. In particular, Mason J held:

> "Was the respondent's rejection of the appellant's offer to take a lease of the vacant space in the building a breach of contract? This is the next question to be considered. Clause 1 (d), which required the approval of the respondent purchaser to leases after the date of

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35 Ibid at [17] - [19].

36 (1979) 144 CLR 596.

execution of the contract, provided that its approval should not be capriciously or arbitrarily withheld. This sub-clause dealt with the grant of leases before the respondent became the owner, when the appellant was granting leases of parts of the building, subject to the approval of the respondent.

But it is common ground that the contract imposed an implied obligation on each party to do all that was reasonably necessary to secure performance of the contract. As Lord Blackburn said in *Mackay v. Dick*:

> "as a general rule… where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect.'

It is not to be thought that this rule of construction is confined to the imposition of an obligation on one contracting party to co-operate in doing all that is necessary to be done for the performance by the other party of his obligations under the contract. As Griffith C.J. said in *Butt v. M'Donald*:

> 'It is a general rule applicable to every contract that each party agrees, by implication, to do all such things as are necessary on his part to enable the other party to have the benefit of the contract.'

It is easy to imply a duty to co-operate in the doing of acts which are necessary to the performance by the parties or by one of the parties of fundamental obligations under the contract. It is not quite so easy to make the implication when the acts in question are necessary to entitle the other contracting party to a benefit under the contract but are not essential to the performance of that party's obligations and are not fundamental to the contract. Then the question arises whether the contract imposes a duty to co-operate on the first party or whether it leaves him at liberty to decide for himself whether the acts shall be done, even if the consequence of his decision is to disentitle the other party to a benefit. In such a case, the correct interpretation of the contract depends, as it seems to me, not so much on the application of the general rule of construction as on the intention of the parties as manifested by the contract itself."[37])

[54] I consider that the intention of the parties, as manifested by both the express and implied terms of the contact, was to do all such things as are necessary to enable the other party to have the benefit of the contract.

[55] I consider that HRL was therefore under a continuing obligation in relation to the requirement to do all things necessary in relation to the engagement of the

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37 Ibid at 607-608.

environmental consultant to prepare the environmental assessments and to answer the questions which were required to be obtained pursuant to the SSD.

[56] In my view, HRL has failed in that continuing obligation. It is clear that the parties have each paid $496,393.58 to date for the environmental assessments. It is also clear, however, that a vital assessment contemplated by the SSD in relation to what environmental issues existed at Closing has still not been obtained. URS has given an estimate of $15,000 to $20,000 for the further report and has indicated that such a report can be obtained in space of weeks. Given that the reports to date do not address the issue as to what environmental issues existed at Closing and as HRL has taken the view that the determination of all liability hinges on such a report, I do not consider that it can be sensibly argued that a further report is not required in the circumstances.

[57] URS has now agreed that it will accept an appointment and has indicated the terms of such an appointment which are now agreeable to them. That was communicated to HRL by letter on 27 July 2012,[38] but HRL argued it would not enter into such an agreement on the basis of a concern about an apprehension of bias on the part of URS. As I have indicated, I do not consider there is any evidence of actual bias, which is the relevant test,

[58] Furthermore I do not consider that the continued opposition to the appointment of URS pursuant to the terms of the Agreement when the basis of the communications between ALS and URS was explained both orally and in writing by the legal practitioners for the relevant partiers was reasonable in the circumstances. I consider full and proper explanations were offered.

[59] The history of negotiations between the parties is set out in the submissions of Counsel for the plaintiff. Having considered that background and the refusal to jointly engage URS following the letter of 27 July 2012, even after those explanations were offered, satisfies me that HRL is in breach of the terms of Clause 8.13 of the SSD.

[60] The next question which arises is whether the Court should grant the injunction sought so as to compel HRL to enter into the agreement with ALS and URS in the terms proposed. In his text on equitable remedies,[39] Spry states "Hence, although prima facie a prohibitory or mandatory injunction, as may be necessary, may issue for the enforcement of contractual rights and it is prima facie sufficient that the plaintiff is able to show a continuing or impending breach on the part of the defendant, it must be accepted that the court may, in its discretion, according to well established principles, confine the plaintiff to such rights to damages or other remedies as he may have."[40]

[61] The 2009 Victorian Court of Appeal decision of *1144 Nepean Highway v Abnote Australasia Pty Ltd* (***Nepean Highway***)[41] involved the granting of an injunction to compel a landlord to execute an agreement appointing an expert. It was held that by adopting the particular form of the contract, the parties had agreed that they

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38 Above n 17.

39 Spry, ICF The Principles of Equitable Remedies: Specific Performance, Injunctions, Rectification and Equitable Damages 8th ed Thompson Reuters Australia Limited, 2010.

40 Ibid, p 574.

41 [2009] VSCA 308.

would be bound by the selection of the expert by the President of the Law Society, provided that the expert's terms were not unreasonable. It was held that the requirement that the terms of the appointment be reasonable arose by necessary implication from the silence of the agreement. The Court held:

> "29. The silence of the agreement on the question of the expert's terms gives rise to a necessary implication that his appointment will be on terms which are reasonable having regard to the qualifications he has, the function he is to perform, the expertise he is to bring to his task and the responsibility which he is to undertake. Without such a term, this agreement would be unworkable. The fact that, on the evidence, the content of such a term can be readily ascertained lends weight to a conclusion that it should be implied and answers any contention that it is uncertain. The fact that the agreement is silent as to the expert's terms indicates the necessity for the implication of the term suggested. It is reasonable and equitable. It is necessary for the effective operation of the agreement. On the evidence, it is so obvious that it 'goes without saying'. It is capable of being clearly expressed and it contradicts no express term of the contract.
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> …
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> "32. The evidence before Pagone J was convincing that terms of the type sought by Mr Nunns were probably universally required by persons prepared to act as experts in the resolution of disputes of the nature with which this case is concerned. Not only did Dr Croft and Mr Heaton seek similar terms, but terms to like or similar effect were to be found in a number of draft agreements exhibited to an affidavit filed by the tenant. These draft agreements, designed for use by experts such as those with which we are presently concerned, were published by organisations such as the Australian Commercial Dispute Centre, the London Court of International Arbitration, the Academy of Experts (London) and the Rail Industry Dispute Resolution (UK). No evidence contradicting that affidavit was filed and counsel for the landlord conceded, in argument, that he was unable to put forward any examples of experts being retained on other than terms similar to those sought by Mr Nunns."[42]

[62] Similarly, in this case there is silence as to the terms of the appointment of the environmental consultant. The further affidavit of Mr Douglas sworn 13 August 2012[43] attaches an email from legal counsel for URS confirming that "URS can agree to undertake the work in question provided that it is done so under the terms

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42 Ibid at [29]-[32].

43 Above n 29.

as attached to our 9 August 2012 letter."[44] That Reply was in response to an email as follows:

> "Can you please confirm that URS' current position is that it will undertake the further work, on the terms attached to your letter of 9 august 2012, in the event that:
> (a) The Court orders URS to do so; or
> (b) If the Court orders that the terms and conditions attached to your letter of 9 August 2012 are reasonable."[45]

[63] In oral argument on 13 August 2012, Counsel for HRL argued for the first time that condition 4(1)(a) in the terms of agreement attached to the letter of 9 August is "unreasonable and otherwise inappropriate"[46] and that accordingly HRL refuses to be party to those terms of agreement. In particular, Counsel argued that the decision in *Nepean Highway* indicated that the terms sought to be included in that case were "universally required". I note, however, that the report of the case indicates the terms were "probably universally required" and the Court also indicated that Counsel in that case had been "unable to put forward any examples of experts being retained on other than terms similar to those sought by Mr Nunns".[47] The Court considered that the terms of engagement were on any view of the evidence reasonable.

[64] I accept that there is no evidence before me that a clause such as that sought by URS at clause 4(1)(a) is typical. It may or may not appear in some terms of engagement but I do not consider that such a term is common or 'typical'. The defendant argues therefore that because the term is not 'typical' it is thereby necessarily not a 'reasonable term'. I do not accept that proposition. Many terms in the circumstances of a particular case could indeed be unique but also reasonable in the circumstances.

[65] In the present case Counsel for HRL has not indicated why Clause 4(1)(a) is unreasonable. I accept that he has established that the term is not typical. I do not consider, however, that there can be any real argument that the first part of the clause is in any way unreasonable. It simply states that ALS and HRL "acknowledge that the Consultant (URS) and ALS have a continuing commercial relationship outside the terms of this Agreement". I do not understand why that statement of fact is in any way contentious or why HRL cannot acknowledge that as a fact.

[66] It is clear that ALS is a testing laboratory. That much is indeed obvious by its name. Furthermore it is clear that the reports which have already been prepared by URS recite many instances of samples taken by URS being delivered to ALS's laboratory for analysis.[48] The evidence also indicates that in the eight reports which have been prepared to date HRL have not objected to the fact that ALS will test the samples sent by URS. HRL have known about that arrangement since at least early 2008 and have not objected to that commercial relationship.

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44 Exhibit CLD-2 to Affidavit of CL Douglas (Above n 29).
45 Exhibit CLD-1 to Affidavit of DL Douglas, (Above n 29).
46 T1-44 line 13
47 Above n 42 at [32].
48 See, for example, the May 2009 Report at 3.3.3 and 4 September 2009 Report at 5. 4.

[67] The evidence before me in this case also indicates that HRL is aware of the litigation involving ALS and URS in the Victorian Supreme Court whereby ALS has been joined as a concurrent wrongdoer by URS in litigation involving the Port of Melbourne Corporation. That must be further evidence of the fact that HRL indeed 'knows' that there is a continuing commercial relationship between the parties In my view clause 4(1)(a) simply requires HRL to acknowledge what they have actually accepted as a fact to date.

[68] The real contention must arise in relation to the final words of the clause which provide "and that relationship is not a conflict of interest." In this regard, Counsel for the plaintiff has made it clear that the acknowledgment is limited and relates to the final report only as follows;

> "So the proposition is that the parties - the parties have a continuing commercial relationship outside the terms of the agreement. This agreement is only about the narrow appointment for the purpose of the report, this final report, and that relationship is not a conflict of interest.
>
> Now, what is important to take first in mind is what is an acknowledgment that there isn't a conflict of interest. It is an acknowledgment that by virtue of an engagement there isn't a breach of fiduciary obligation. Now, there is no suggestion that as between our learned friend's client, HRL and URS there is some other engagement of URS that might create ant kind of relevant conflict. The conflict would be between, on the one hand, this engagement which is ....to prepare a report that expressly has to be-and it is acknowledged has to be honest and independent.
>
> That's one engagement. The other engagement, what would create a conflict of interest is, that URS engages ALS in carrying out testing services. Would the continuing nature of doing that cause any conflict with this engagement? Would there be any breach of confidentiality involved in that? One would expect not. There is no reason to anticipate that would be so"[49]

[69] Counsel for the plaintiff also drew my attention to correspondence from the solicitors for ALS to HRL dated 21 March 2012,[50] which set out the history of communications with respect to URS and the issue of a conflict of interest. In particular, in that letter specific reference was made by the solicitors for ALS to a letter from URS dated 14 August 2009 in which URS "sought to have both our clients indicate that no actual conflict existed which arose or any perceived conflict was waived in respect of our clients request to have URS carry out, under a separate contract, additional works." The letter also noted that in its response dated 31 August 2009 the then solicitors for HRL clearly indicated that they wished to continue with the continued engagement of URS. The letter from the solicitors for ALS concluded;

> "So notwithstanding receipt of the 14 August 2009 letter from URS, your client proceeded, jointly with our client, to engage URS to undertake Final

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49 T1-65, lines 40-57, to T1-66, lines 1-6.

50 Above n 1 (Vol 2) at p 445.

> Report Addendum for the Phase II Environmental Site Assessment dated 4 September 2009(and subsequent reports).
>
> It is difficult to identify a basis for concern on your client's behalf given the above background and our client's position remains that there is simply no basis to assert that some conflict of interest arises by reason of the 14 August 2009 correspondence that precludes URS from further involvement in conducting environmental assessments as proposed by our client."[51]

[70] That is further evidence therefore that HRL has been well aware of the continuing commercial relationship between ALS and URS and has not objected to that relationship. In terms of the specific objection to the clause 4(1)(a) which is now made, Counsel for HRL simply indicated that "I don't have instructions to accept that as a proposition of fact, but if the order sort (sic) by my learned friend is made, my client would be ordered to make that acknowledgment".[52] Counsel also indicated "My client doesn't want to sign up to that".[53] When specifically asked what the 'disadvantage' to the defendant was, Counsel replied:

> "If the order was made it would be forced to acknowledge the nonexistence of a conflict of interest in circumstances where in point of fact it doesn't acknowledge that."[54]

[71] In my view, the defendant has not established why, in the circumstances of this case, such a clause as the one proposed is in fact unreasonable. He argues, essentially, that it 'might' affect his client in some way. I have not been shown any particular prejudice to the defendant if such a clause was inserted or how it could possibly affect the defendant.

[72] Counsel for HRL has also indicated that clause 4(1)(a) is the only basis for his objection that there is an unreasonable term in the Agreement.

[73] In *Nepean Highway*, the Court held that:

> "By imposing an injunction on the landlord, Pagone J ensured that the dispute resolution procedure would be carried out to its conclusion. It was an appropriate exercise of the court's equitable auxiliary jurisdiction in aid of legal rights."[55]

[74] There is no doubt that "a court of equity must exercise its discretion according to established principles, so that relief is refused if in all circumstances it would be unjust for the court to intervene."[56] In the present case I consider that it is an appropriate exercise of the Court's equitable jurisdiction to ensure the continued engagement of URS to complete the task the SSD contemplated, which is to answer the questions posed in relation to the environmental issue which existed at Closing.

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51 Ibid at p 446.
52 T1-54 at lines 30-33.
53 T1-55 at line 19.
54 T1-55 at lines 36-39.
55 Above n 42 at [39].
56 Above n 39 at p 574.

[75] I consider that the terms proposed have not been shown by the defendant to be unreasonable and that, in the circumstances of this case, the justice of the case requires the engagement of URS by ALS and HRL jointly on those terms. In my view the proposed clause is reasonable in the circumstances and it is also necessary for the effective operation of the agreement.

[76] There will therefore be an order in terms set out in Exhibit CLD-28 to the affidavit of Christopher Lee Douglas sworn 10 August 2012 and that the report identify whether –

> (a) the properties referred to in paragraph 7 of the Further Amended statement of claim were 'free from all environmental contamination, including without limitation, any patent or latent contamination of the Environment soil, sub-soil, ground water or surface waters within or adjacent to such premises' as at 17 October 2007; and
>
> (b) materials, 'including without limitation, effluence leachate, emissions or hazardous materials generated on or emitted from any of' the properties referred to in paragraph 7 of the Further Amended Statement of Claim by 17 October 2007 'have caused or will cause in whole or in part any contamination of the Environment'

[77] I will hear from counsel as to the exact terms of the order and as to costs.