SUPREME COURT OF QUEENSLAND

CITATION:	*Welch v Hanlon Trading Ltd (1570357)* [2015] QSC 75
PARTIES:	**ROGER THOMAS WELCH** (plaintiff) v **HANLON TRADING LIMITED (1570357)** (defendant)
FILE NO/S:	BS1035/14
DIVISION:	Trial
PROCEEDING:	Application
DELIVERED ON:	16 April 2015
DELIVERED AT:	Brisbane
HEARING DATE:	13 October 2014
JUDGE:	Jackson J
ORDER:	**The order of the court is that the separate questions and their answers are as follows:**

In relation to the written contract between the plaintiff and the defendant dated 11 July 2013 for the sale of the vessel 'Allegro':

1. Is it a requirement of the conducting of any 'Pre-Purchase Inspection or Survey Report' by the Buyer under Special Condition 4(1) that both of the following need to be identified:

(i) the 'agreed defects'; and

(ii) the cost of fixing, and in the alternative diminution in value of the vessel brought about by, the 'agreed defects'?

Answer: No

2. If the answer to question 1 is 'no', is it a requirement of the conducting of any 'Pre-Purchase Inspection or Survey Report' by the Buyer under Special Condition 4(1) that it identify the 'agreed defects' within the meaning of that expression as it is used in Special Condition 4(2)

or 4(3)?

Answer: No

3. If the answer to questions (1) and (2) are both 'no', are the 'agreed defects' within the meaning of that expression as it is used in Special Condition 4(2) or 4(3) those defects which:

(i) have been identified in or as a result of the Pre-Purchase Inspection or Survey report; and

(ii) the Seller and Buyer have between them mutually agreed are a defect for the purposes of Special Condition 4(2) or 4(3)?

Answer: Yes

4. Is it a requirement for the operation of Special Condition 4(2) that the Seller and Buyer agree that the costs of rectifying the 'agreed defects' are less than $5,000?

Answer: No

5. Is it a requirement for the operation of Special Condition 4(3) that the Buyer and Seller agree that the costs of rectifying the 'agreed defects' are more than $5,000?

Answer: No

6. Does the word 'settlement' as it appears in Special Condition 4(4) mean:

(i) the settlement referred to in par 4(3)(b) of the Special Conditions; or

(ii) the settlement of the contract?

Answer: the settlement referred to in par 4(3)(b) of the Special Conditions.

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the parties contracted for the sale of a luxury sailing yacht – where the parties disagreed on the operation of the Pre-Purchase Inspection

Special Conditions of the contract – where the parties sought a determination of separate questions by the Court – where the Court applies a businesslike interpretation for commercial contracts

Baldwin v Icon Energy Ltd [2015] QSC 12, applied
Electricity Generation Corp v Woodside Energy Ltd (2014) 251 CLR 640; [2014] HCA 7, applied
UI International P/L v Interworks Architects P/L & Ors [2008] 2 Qd R 158; [2007] QCA 402, applied

COUNSEL: R Derrington QC and D Chesterman for the plaintiff
D O'Brien QC for the defendant

SOLICITORS: OMB Solicitors for the plaintiff
Landers & Rogers Solicitors for the defendant

[1] **Jackson J**: The plaintiff claims a declaration that the plaintiff validly terminated a contract to purchase a yacht, an order for the return of the deposit paid under the contract or an award of damages in the same amount and interest. The defendant denies that the contract was validly terminated by the plaintiff.

[2] The defendant alleges that following default by the plaintiff in completing the contract, the defendant re-sold the yacht for a lesser amount than the purchase price under the contract. The defendant counterclaims the difference as a liquidated sum due under the contract or as damages for breach of contract and interest.

[3] The "Allegro" is a 20 metre luxury sailing yacht. She is a "Warren 66" model built in 2006 by Azzura Yachts. From a copy of a photograph in evidence, she appears to be rigged as a sloop. Before the events the subject of this proceeding, she was owned by the defendant.

[4] By a written contract styled "Purchase and Sale Agreement", the defendant as the "Seller" agreed to sell the Allegro as "the Vessel", together with her gear and equipment, to the plaintiff as the "Buyer", and the plaintiff agreed to purchase the Vessel from the defendant, for the purchase price of $1,600,000 ("the contract").

[5] The deposit paid was $160,000. The settlement date and place were 1 August 2013 at the Gold Coast.

[6] Clause 4 of the Standard Conditions of Contract provided as follows:

> "4. PRE-PURCHASE INSPECTION
>
> 4.1 Clause 4 applies if Pre-purchase Inspection Date in Item J of the Reference Schedule is completed.
>
> 4.2 This Agreement is conditional upon the Buyer obtaining reports on the Vessel from parties engaged by the buyer and being satisfied with the reports on or before the date specified in item J under the heading Pre-Purchase Inspection Date.

4.3 If the Buyer is not satisfied with the reports, the Buyer may terminate this Agreement by 5:00 pm on the Pre-Purchase Inspection Date by giving written notice to the Broker. The Buyer is obliged to act reasonably in all circumstances.

4.4 If the Buyer does not terminate this Agreement under this clause by 5:00 pm on the Pre-Purchase Inspection Date, the Buyer is taken to have been satisfied with the Vessel and this Agreement becomes unconditional in this respect.

4.5 If the Buyer terminates this Agreement under this clause 4.5 the Seller may request and it will be at the Buyer's discretion; to provide a copy of the defects or damages uncovered on the inspection reports to the Seller. If the Buyer agrees to provide such copies of these reports to the Seller, he must give the Seller a copy of these reports within two (2) business days of the Seller's or Broker's request.

4.6 If any defect or damage is uncovered on any Pre-Purchase Inspection the buyer with the agreement of the Seller may re-negotiate the Sale Price or conditions so as to take into account the cost of rectification or part thereof of the defects or damage.

4.7 Costs of any Pre-Purchase Inspections or lifting of the vessel are to be met by the Buyer."

[7] The "Pre-Purchase Inspection Date" stated in the Reference Schedule was 19 July 2013.

[8] Although cl 4 of the Standard Conditions was not deleted, "Appendix 2 – Special Conditions" to the contract contained a special condition ("clause 4") which also dealt with the subject of a Pre-Purchase Inspection as follows:

"Clause 4 – Pre-Purchase Inspection

(1) The Buyer has the option of conducting a Pre-Purchase Inspection or Survey Reports on or before the date mentioned in Point J of the Reference Schedule.

(2) If as a result of the Pre-Purchase Inspection or Survey Report agreed defects (fair wear and tear excluded) of less than AUD $5,000.00 are identified, the Buyer is deemed to have accepted the Vessel.

(3) If as a result of the Pre-Purchase Inspection or Survey Report agreed defects (fair wear and tear excluded) of more than AUD $5,000.00 are identified, the Seller will either:

(a) adjust the purchase price by the excess over AUD $5,000.00;

(b) negotiate a settlement with the Buyer acceptable to both parties who shall always act in good faith in regard to remedying the defect remedy.

(4) If settlement cannot be reached, then the Agreement can be terminated by either party and the Buyer's deposit shall be refunded."

[9] Four relevant clauses of the "Standard Conditions" of the contract appeared in clauses 17 to 20 as follows:

"17. APPLICABLE LAW

The laws of Queensland govern this Agreement. Any proceedings under it may be commenced in an appropriate court in the State of Queensland and each party unconditionally submits to the jurisdiction of that court.

18. ENTIRE AGREEMENT

Subject to the provisions of the Agreement, this document comprises the entire agreement between the parties concerning the sale of the Vessel, and no further or other covenants, agreements, conditions, or restrictions will be implied or held to arise between the parties by reason of any promise, representation or undertaking given by either party.

19. COMPOSITION OF AGREEMENT

This Agreement consists of:

(a) Reference Schedule;

(b) Standard Conditions;

(c) Special Conditions; and

(d) Vessel Specification Form.

20. INCONSISTENCIES

If this Agreement has any inconsistencies, the following descending order or precedence will apply to resolve such inconsistencies:

(a) Special Conditions;

(b) Reference Schedule;

(c) Vessel Specification Form; and

(d) Standard Conditions."

[10] The Standard Conditions provided for a trial run of the Vessel. The "Trial Run Date" in Item I of the Reference Schedule was completed. It stated that the date was "15 June 2013 (completed)". That was consistent with cl 5 of the Special Conditions which provided that cls 5.1-5.5 (both inclusive) were deleted from the Standard Conditions and that the Buyer advised that he was satisfied with the Trial Run conducted on 15 June 2013.

[11] On 12 July 2013, Toby Blundell of Navsafe Marine Pty Ltd, a marine surveyor, inspected the Allegro for the purpose of preparing a report. His written report dated 12 July 2013 was released on 13 July 2013. It is styled "Vessel Assessment Report – Pre-Purchase- Allegro" ("the report").

[12] The report identified 12 items that the surveyor considered required further investigation or repair.

[13] On 18 July 2013, the solicitors for the plaintiff wrote to the solicitors for the defendant stating that there were not less than 11 items in the report which were considered to be high risk matters requiring further investigation or repair and that the defects would no doubt exceed AUD $5,000. They requested advice whether the defendant agreed to the plaintiff conducting a further specialised survey. They further requested that the defendant agree that the defects identified were high risk defects all of which required remedy. They contended that the defendant was unable to adjust the purchase price by the excess over $5,000 under cl 4(3)(a) of the Special Conditions, because the report did not quantify a cost to fix the defects.

[14] On 22 July 2013, the defendants agent's solicitors (I will refer to them as the defendant's solicitors) responded, rejecting that either the items appearing in the report under the heading "Summary of Defects" or the 12 items identified in the plaintiff solicitors' letter were high risk items. They stated that the defendant did not agree that all the items were agreed defects for the purposes of cl 4(3). However, they accepted that three of the items would be fixed prior to completion and that the condition of the rudder was a defect. They proposed that the sum of $4,315 were costs that could be allowed under the contract. They did not agree that the costs of repairing the alleged defects exceeded $5,000. They disputed that the defendant was not entitled or was unable to adjust the purchase price by any excess over $5,000.

[15] On 26 July 2013, the plaintiff's solicitors wrote to the defendant's solicitors asking whether the defendant was willing to agree that the defects identified and listed by the plaintiff were defects and giving notice that unless that agreement was forthcoming the plaintiff would assume no agreement regarding the defects could be reached.

[16] On 29 July 2013, the defendant's solicitors wrote to the plaintiff's solicitors stating that the defendant agreed that the 12 items were defects but considered that four of them were fair wear and tear. Three of the remaining items were said to have been remedied or fixed. Four others were answered by saying that there was a current relevant registration or certificate. The final item was said to be the required extent of repair to the rudder.

[17] On 30 July 2013, the plaintiff's solicitors wrote to the defendant's solicitors stating that because the defendant solicitors' letter of 29 July 2013 did not agree that four of the items were defects, but instead treated them as fair wear and tear, the parties were unable to agree on the defects. They stated that the plaintiff therefore elected to terminate the contract. They relied on cl 4(4) of the Special Conditions as conferring the right to elect to terminate the contract and demanded refund of the deposit.

[18] On 31 July 2013, the defendant's solicitors wrote to the plaintiff's solicitors rejecting the purported termination and asserting that there was to be a reduction in the purchase price of the Allegro of $16,366.50, pursuant to par 4(3)(a) of the Special Conditions, as the cost of rectifying agreed defects in excess of AUD $5,000.

Order for determination of separate questions

[19] The parties agreed that the determination of separate questions would likely resolve or assist in the resolution of the claim and counterclaim in the proceeding. On 22 July 2014, I made an order for the determination of two separate questions as to the construction of clauses of the contract before any trial.

[20] At the hearing of the separate questions, the parties by agreement proposed that the questions of construction to be decided should be revised and added to. There was a single affidavit tendered in evidence which exhibited the relevant documents. Other facts which were relied upon are alleged and admitted in the pleadings. Neither party sought to adduce extrinsic evidence as to the surrounding circumstances in which the contract was made. I proceed on the basis that the six questions considered below are those to be determined.

First question as originally framed

[21] As originally framed, the first question was:

> "In relation to the written contract between the plaintiff and the defendant dated 11 July 2013 for the sale of the vessel 'Allegro':
>
> (a) does the operation of Special Condition 4 negate the operation of Standard Condition 4?"

[22] At the hearing, the parties did not dispute that the question should be answered "yes". It became unnecessary to answer it. However, the following questions proceed on the footing that cl 4 displaces the operation of the standard condition and it is only the operation of cl 4 that is in question, so it is appropriate to record the parties' position.

Revised first question

[23] At the hearing, the parties proposed a new first question, as follows:

> "In relation to the written contract between the plaintiff and the defendant dated 11 July 2013 for the sale of the vessel 'Allegro':
>
> (1) Is it a requirement of the conducting of any 'Pre-Purchase Inspection or Survey Report' by the Buyer under Special Condition 4(1) that both of the following need to be identified:
>
> (i) the 'agreed defects'; and
>
> (ii) the cost of fixing, and in the alternative the diminution in value of the vessel brought about by, the 'agreed defects'?"

[24] The proper approach to a question of construction of this kind was recently restated by the High Court in *Electricity Generation Corporation v Woodside Energy Ltd*[1] as follows:

> "…this court has reaffirmed the objective approach to be adopted in determining the rights and liabilities of parties to a contract. The meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean. That approach is not unfamiliar. As reaffirmed, it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract. Appreciation of the commercial purpose or objects is facilitated by an understanding 'of the genesis of the transaction, the background, the context [and] the market in which the parties are operating'. As Arden LJ observed in *Re Golden Key Ltd (in rec)*, unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption 'that the parties … intended to produce a commercial result'. A commercial contract is to be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'."[2] (footnotes omitted)

[25] The text of cl 4(1) does not expressly require that any report identify agreed defects, or the cost of fixing them, or the diminution in value of the vessel brought about by them. The text of cls 4(2) and 4(3) refers to "agreed defects". The agreed defects in cl 4(2) are "of less than AUD $5,000" whereas in cl 4(3) they are "of more than AUD $5,000". In each case, the agreed defects are to be identified "as a result of" the report.

[26] The defendant submits that, in the context of cl 4(2), (and this applies to cl 4(3) as well), the adjective "agreed" in "agreed defects" means the defects that are not fair wear and tear. That meaning is said to stem from the parenthetical phrase "(fair wear and tear excluded)" which follows the word "defects" in each of those subclauses. I accept that the exclusion of "fair wear and tear" serves to define the relevant defects by excluding defects caused by "fair wear and tear". However, that will not sensibly explain the use of "agreed", as a matter of ordinary meaning. On the defendant's submission, the meaning of "agreed defects (fair wear and tear excluded)" would be the same if the word "agreed" were deleted. In effect, the defendant submits that the word "agreed" does no more than point to the exclusion of "fair wear and tear" as an agreed exclusion from the ordinary meaning of "defect".

[27] The adjective "agreed" in the phrase "agreed defects" would ordinarily mean that the defects have been settled by common consent of the relevant parties.[3] It has nothing to do with the scope of what is a "defect", on the ordinary meaning of that

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1 (2014) 251 CLR 640.
2 (2014) 251 CLR 640, 656 [35].
3 Shorter Oxford English Dictionary, 6 ed, vol 1, p 45, definition "agreed".

word.[4] Starting from that point, I can discern no contextual reason why "agreed" should have the defendant's preferred meaning.

[28] The defendant submits that there is no work for the parenthetical phrase "(fair wear and tear excluded)" to do if cl 4(2) requires the parties to agree upon the defects as a result of the report. In my view, that is not correct. The exclusion of fair wear and tear serves to define the scope of what is a defect for the purposes of cl 4(2) and cl 4(3).

[29] The defendant's real point seems to be that if "agreed" has its ordinary meaning, either party may refuse to agree that a relevant item is or is not a defect or a defect from fair wear and tear. So they may, but that does not mean that the word "agreed" has no work to do on the proper construction of the phrase "agreed defects". The defendant submits that if agreement is required, there is no constraint upon either party refusing to agree upon the defects, and that is a construction to be avoided. However, an agreement to negotiate to resolve a subsidiary question that arises under an existing contract may be enforceable. The illuminating recent analysis of Philip McMurdo J in *Baldwin v Icon Energy Ltd*[5] relieves me of any need to undertake a similar exercise for the purposes of this case. Depending on the circumstances in a particular case, either a good faith obligation or a reasonableness obligation may be implied to constrain a party's unfettered right to act purely in self-interest.

[30] It is unnecessary to decide questions about any such obligations to decide the revised first question as to the scope of the operation of cl 4(1). That is because the operation of cl 4(1) turns on what constitutes "conducting a Pre-Purchase Inspection or Survey Reports". Although the phrase is clumsy, in my view it does not cause any significant difficulty. Because the context is a pre-purchase inspection or survey of a large luxury yacht, cl 4(1) clearly enough contemplates a process of inspection or survey followed by a report by the relevant date.

[31] Clause 4(2) first introduces the term "agreed defects" and refers to those defects being "identified". The purpose of the subclause is to provide for circumstances in which the Buyer is deemed to have accepted the Vessel notwithstanding that some defects are identified. Because of the conditional phrase "[i]f as a result of the Pre-Purchase Inspection or Survey Report", cl 4(2) only operates if the relevant defects are identified as a result of the report. The relevant defects have two characteristics. First, they are defects which are "agreed defects (fair wear and tear excluded)". Secondly, they are defects which are "of less than AUD $5,000".

[32] In the ordinary course of events, a report produced under cl 4(1) may identify defects. But at the time when the report is produced nothing requires that they must have been agreed between the parties. Nothing in the text or context of cl 4(1) requires that the Seller participate in the Buyer conducting a Pre-Purchase Inspection or Survey. A report produced after conducting such an inspection or survey might result in the identification of defects, but neither the report itself nor any defects identified in it is required to be the product of any agreement before the report is produced.

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4 Shorter Oxford English Dictionary, 6 ed, vol 1, p 627, definition "defect".

5 [2015] QSC 12, [31]-[49].

[33] Under cls 4(2), 4(3) and 4(4), agreed defects of less than or more than $5,000 are to result either in acceptance of the vessel (if less than $5,000), or adjustment of the purchase price, or a settlement acceptable to both parties, or, if settlement cannot be reached, a right to terminate. The Seller and the Buyer, as the parties to the contract, are required to make the agreement as to the "agreed defects". Because the relevant agreement under cl 4(2) or 4(3) is one that must be made in relation to defects identified "as a result of the Pre-Purchase Inspection or Survey Report", it is not a requirement of "conducting the Pre-Purchase Inspection or Survey Report" within the meaning of cl 4(1) that the report itself identify the "agreed defects".

[34] Part of the revised first question inquires whether the report itself must identify "agreed defects" as a requirement of conducting a "Pre-Purchase Inspection or Survey Report" under cl 4(1). In my view, such a requirement is neither textually supported in cl 4(1), nor is it a logical requirement, having regard to either the balance of cl 4 or the rest of the contract.

[35] It follows, in my view, that the answer to the revised first question is "no".

Revised second question

[36] At the hearing, the parties proposed a revised second question as follows:

> "(2) If the answer to question 1 is 'no', is it a requirement of the conducting of any 'Pre-Purchase Inspection or Survey Report' by the Buyer under Special Condition 4(1) that it identify the 'agreed defects' within the meaning of that expression as it is used in Special Condition 4(2) or 4(3)?"

[37] The revised second question overlaps with part of the revised first question. It is apparent from what I have already said as to the operation of cls 4(1), 4(2) and 4(3) in answer to the revised first question that, in my view, it is not required that a report produced under cl 4(1) identify "agreed defects".

[38] Accordingly, in my view, the answer to the revised second question is "no".

Additional third question

[39] At the hearing, the parties proposed an additional third question as follows:

> "(3) If the answer to questions (1) and (2) are both 'no', are the 'agreed defects' within the meaning of that expression as it is used in Special Condition 4(2) or 4(3) those defects which:
>
> (i) have been identified in or as a result of the Pre-Purchase Inspection or Survey report; and
>
> (ii) the Seller and Buyer have between them mutually agreed are a defect for the purposes of Special Condition 4(2) or 4(3)?"

[40] In my view, it follows from what I have already said in answer to the revised first and revised second questions that the general answer to the third question is in the affirmative. However, there are some qualifications.

[41] Clauses 4(2) and 4(3) are engaged upon the stated condition that agreed defects are identified as a result of the Pre-Purchase Inspection or Survey Report. However, it does not matter, in my view, whether the report specifically identifies a defect which becomes an agreed defect or whether a defect is identified and agreed as a result of the report although the defect is not identified in it. For example, the report could identify a subject matter as needing further inquiry which, after inquiry, the parties agree is a defect, although the report had not gone so far.

[42] A more difficult question is whether it is necessary that the parties must agree that the agreed defects are of less than $5,000 or more than $5,000, for the purpose of cl 4(2) or 4(3) before either cl 4(2) or cl 4(3) is engaged. In my view, it would be enough that the parties agree as to what are the defects, that those defects are not wear and tear, and that they are of less than $5,000 for cl 4(2) to operate. Alternatively, if they agree that the agreed defects are of more than $5,000, cl 4(3) would operate.

[43] With those qualifications, in my view, the answer to the additional third question is "yes".

Additional fourth question

[44] At the hearing, the parties proposed an additional fourth question, as follows:

> "(4) Is it a requirement for the operation of Special Condition 4(2) that the Seller and Buyer agree that the costs of rectifying the 'agreed defects' are less than $5,000.00?"

[45] There are two propositions within this question. The first is whether for the purposes of cl 4(2) the text "agreed defects … of less than AUD $5,000 are identified" refers to defects that will cost less than AUD $5,000 to rectify. In my view, it does. When cls 4(2) and 4(3) refer to defects "of" a certain amount, the thing connoted might be the cost to remedy the defect, meaning to rectify it, or it might be the effect of the defect on the value of the Vessel. Clause 4(2) deems the Buyer to have accepted the Vessel, where the defects are of less than $5000. For that purpose, either the cost of rectification or the decrease in value of the Vessel, if they might lead to different results, is a possible alternative. It seems unlikely, as a matter of impression, that a defect that would cost less than $5,000 to rectify in a luxury yacht otherwise agreed to be sold for $1.6M would decrease the value of the yacht by more than $5,000.

[46] The context of cl 4(3) assists. Under that provision, where there are agreed defects of more than $5,000, the outcome is to be either the adjustment of the purchase price "by the excess over" that amount or a negotiation "in regard to remedying the defect remedy [sic]".

[47] In my view, the preferable alternative is that "agreed defects of less than AUD $5,000" are defects which it will cost less than that sum to rectify or remedy.

[48] The reasonable cost to rectify or to remedy a defect does not depend on agreement. It is an amount which can be ascertained objectively. Where there is a market for the supply of the relevant work and materials, it is an amount that can be ascertained

by contract, quotation or opinion as to the market value. This is an everyday exercise in the assessment of damages for breach of contract.[6]

[49] The operation of cls 4(2) and 4(3) turns on the amount of the cost of rectifying or remedying agreed defects. Below the threshold of $5,000, there is to be no adjustment of purchase price or any rectification or remedy of the defect. The Buyer takes that commercial risk. Above that sum, the Seller may either adjust the purchase price or negotiate a settlement with the Buyer in regard to remedying the defect.

[50] The context of cls 4(2) and 4(3) includes that the date of the agreement was 11 July 2013, the date for the report was on or before 19 July 2013, and the date for settlement was 1 August 2013. The possibility existed that the parties might not be able to agree upon the defects. The possibility also existed that one party might have the view that the value of the cost of rectifying or remedying the agreed defects would be more than $5,000 but the other party might have the view that it would be less. What was to happen in the event that the parties were unable to agree on either of those questions, as in this case?

[51] It has not been difficult to reach the conclusion that the proper construction of cls 4(2) and 4(3) requires that the word "agreed" in the phrase "agreed defects" requires that the defects be agreed. It is more difficult to decide whether agreement must be reached on both what constitutes the defects and upon the value of the defects.

[52] The difficulty lies within the longer phrases "agreed defects (fair wear and tear excluded) of less than AUD $5,000" and "agreed defects (fair wear and tear excluded) of more than AUD $5,000", in cls 4(2) and 4(3). Taking cl 4(2) first, does the adjective "agreed" qualify "of less than AUD $5,000" as well as the adjacent noun "defects"?

[53] I put to one side, because the separate questions do not raise it, whether "agreed" qualifies both "defects" and "(fair wear and tear excluded)", other than to observe that the purpose of the exclusion is to define what is not a defect. In a business sense, there does not seem to be any reason why the parties must agree upon the line to be drawn between what is a defect and what is not a defect, but not that they must agree on the line to be drawn between a defect caused by fair wear and tear and one that is not.

[54] If it had been intended to require that the value of the cost of repair or remedy must also be agreed, that could have been achieved in cl 4(2) by substituting "agreed" for "identified" and deleting "agreed" where it appears before "defects" in the subclause. However, the existence of a clearer possible alternative does not in general help greatly in wrestling with the proper construction of an existing intractable text.

[55] The purpose of distinguishing between defects of less than $5,000 and those of more than $5,000 appears from the different rights and obligations that flow from the distinction. Under cl 4(2), if the amount is less than $5,000, the Buyer is deemed to have accepted the Vessel. Under cl 4(3), if it is more than $5,000, the

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6 See *UI International Pty Ltd v Interworks Architects Pty Ltd* [2008] 2 Qd R 158, 178-179 [56].

Seller has the right to elect either to adjust the purchase price by the excess or to attempt to negotiate a settlement with the Buyer.

[56] There is no simple grammatical or syntactical solution to the question whether or not "agreed" is intended to qualify both the adjacent noun "defects" and the prepositional phrase "of less than AUD $5,000" in cl 4(2). Either outcome is possible.

[57] However, in my view, the purpose of cl 4(2) makes it less likely that the parties intended to make it a requirement for the operation of that subclause that they agree not only on what are the defects but also that they are "of less than $5,000". If there is no disagreement about that, the Buyer is taken to have accepted the Vessel without any abatement in price. It seems unlikely that their intention would be that if they agreed the defects, but not that they were of less than $5,000, the Buyer should be in a stronger position, even though the objectively ascertainable value of the agreed defects is less than $5,000.

[58] Although the answer is not free from doubt, in my view, the better textual and more business-like reading of cls 4(2) and 4(3) is that those subclauses are engaged when parties agree that relevant items are defects and not fair wear and tear. At that point there are agreed defects. It is not required that they must agree that the cost of rectifying or remedying the defect is less or more than $5,000. An ordinary meaning of the text is that the defects must be agreed and they must be of an amount less than or more than $5,000. But the amount does not depend on agreement.

[59] Accordingly, in my view, the answer to question four is "no".

Additional fifth question

[60] At the hearing the parties proposed an additional fifth question as follows:

> "(5) Is it a requirement for the operation of Special Condition 4(3) that the Buyer and Seller agree that the costs of rectifying the 'agreed defects' are more than $5,000.00?"

[61] Although they operate differently in outcome, in my view, the meaning of cl 4(2) and 4(3) in this respect is not different. For the foregoing reasons, in my view, the answer to the additional fifth question is "no".

Additional sixth question

[62] At the hearing, the parties proposed an additional sixth question as follows:

> "(6) Does the word 'settlement' as it appears in Special Condition 4(4) mean:
>
> (i) the settlement referred to in par 4(3)(b) of the Special Conditions; or
> (ii) the settlement of the contract?"

[63] A logical jumping-off point is that cl 4(4) does not operate independently of the balance of cl 4 as a stand-alone provision. That conclusion follows from its effect, in addition to the structure of cl 4. If the settlement referred to in cl 4(4) were nothing more than the settlement of the sale and purchase of the vessel, then cl 4(4)

could have an unexpected operation. Settlement of the contract may not be reached for many reasons. For example, it may not be reached because of a breach of contract on the Buyer's part. It would be unexpected and not business-like that the parties would expressly agree that if settlement is not reached for that reason the Buyer is entitled to return of the deposit. In my view, it follows that "settlement" in cl 4(4) does not merely refer, in general, to the settlement of the contract, outside the operation of cl 4.

[64] There is an assumption in the way in which the sixth question is formulated. It is that alternatives (i) and (ii) exhaust the universe of possibilities as to the meaning of "settlement" in cl 4(4). However, there is another possible meaning.

[65] In accordance with the discussion above as to the earlier questions, when cl 4(1) is engaged and a report is produced, the next step is whether as a result of that report agreed defects are identified. If the parties do not identify agreed defects, the outcome could be described as one where "settlement cannot be reached". In failing to reach that agreement, either of the parties may breach an implied contractual obligation to act in good faith or to act reasonably. Alternatively, it might be that there is no breach of any obligation in failing to reach agreement. Are these cases where "settlement cannot be reached" within the meaning of cl 4(4)?

[66] Because of my answers to the additional fourth question and the additional fifth question, failure to reach agreement on whether the agreed defects are of less than or more than $5,000 does not need to be considered in answer to this question.

[67] Also, there is no difficulty where agreed defects of more than $5,000 are identified, and the Seller does not adjust the purchase price by the excess over $5,000. In that case, par 4(3)(b) expressly provides for a negotiation towards a settlement in regard to remedying the defect. That is a clear situation where an expressly contemplated "settlement" may not be reached for the purpose of cl 4(4).

[68] The narrowest view is that cl 4(4) only provides for the case where a "settlement" contemplated by cl 4(3)(b) cannot be reached, following a negotiation towards such a settlement in regard to remedying the defect. There is textual support for that view in the use of the word "settlement" in both par 4(3)(b) and cl 4(4), whereas cls 4(1) and 4(2) refer to agreed defects. On the other hand, the structure of cl 4(4), as a separate subclause, rather than as a paragraph of cl 4(3), could support the opposite conclusion.

[69] Clause 4(3) operates to give the Seller alternative rights when agreed defects of more than $5,000 are identified. The Seller may adjust the purchase price, by reducing it. Alternatively, the Seller may negotiate with the Buyer in regard to remedying the defect. If the Seller chooses the second alternative, and the negotiation is unsuccessful, cl 4(4) provides that either party may terminate. The Seller cannot revert to adjusting the purchase price. In that case, cl 4(4) places the risk of failing to reach a settlement upon both parties. Either party may terminate but, if they do, the Buyer gets the return of his deposit.

[70] With some diffidence, I have come to the view that the preferable answer to the sixth question is that the "settlement" referred to in Special Condition 4(4) is the settlement referred to in par 4(3)(b).

[71] This view leaves the inability of the parties to make an agreement under cl 4(2) or 4(3) as to the agreed defects, or as to whether they are of more than or less than $5,000, as matters that must be dealt with by any implied obligations of parties who agree upon conditions that may require their further agreement. As well, it leaves any dispute as to the amount of the adjustment of the purchase price by the seller under cl 4(3)(a) as a matter that must be dealt with either by a similar implied obligation or the limit upon a party's right to act in their own self-interest in the exercise of a contractual power. The scope for disagreement is a matter of some concern, in having regard to the commercial inconvenience that may attend one construction or another as to the operation of cl 4(4), in the search for the business-like interpretation.

[72] Nevertheless, in my view, the sixth additional question should be answered that the "settlement" referred to in Special Condition 4(4) is the settlement referred to in par 4(3)(b).

[73] I will hear the parties as to the further orders to be made in the proceeding, including the costs of the hearing of the separate questions.