SUPREME COURT OF QUEENSLAND

CITATION:	*Browning v ACN 149 351 413 Pty Ltd (in liq) (formerly known as Enviren Constructions Pty Ltd)* [2016] QCA 169
PARTIES:	**RUSSELL JOHN BROWNING** (appellant) **v** **ACN 149 351 413 PTY LTD (IN LIQUIDATION) (FORMERLY KNOWN AS ENVIREN CONSTRUCTIONS PTY LTD ACN 149 351 413)** (respondent)
FILE NO:	Appeal No 12345 of 2015 DC No 2573 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2015] QDC 269
DELIVERED ON:	21 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2016
JUDGES:	Gotterson and Morrison JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. The appellant pay the respondent's costs of and incidental to the appeal.**
CATCHWORDS:	CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – where the appellant and a company with which he was then associated (the respondent) entered a deed with Queensland Building Services Authority ("the Authority") in order for the respondent to obtain a licence – where, as a condition of obtaining the licence, the appellant covenanted that in the event the company was wound up he would pay the respondent, on demand, an amount defined in the deed – where the deed prohibited the appellant from varying the burden of any covenant or obligation under the deed without, in effect, the Authority's approval – where, under a share sale agreement to which the Authority was not a party, the respondent agreed to forbear from suing the appellant – where the share sale agreement obliged the parties to procure any third party consent or take any steps necessary to give effect to it – where no such steps were taken – where the respondent was wound

up and sued for the amount the appellant promised to pay under the deed – where summary judgment granted – whether upon the proper construction of the agreements the respondent was precluded from suing for the defined amount – whether summary judgment ought to have been granted

Queensland Building and Construction Commission Act 1991 (Qld), s 31(2)(c)
Queensland Building Services Authority Act 1991 (Qld), s 31(2)(c)
Uniform Civil Procedure Rules 1999 (Qld), r 292

Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd (1986) 160 CLR 226; [1986] HCA 14, cited
Legione v Hateley (1983) 152 CLR 406; [1983] HCA 11, cited
Mirvac Queensland Pty Ltd v Horne [2009] QSC 269, cited
Moratic Pty Ltd v Gordon [2007] NSWSC 5, cited
Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 89 ALJR 990; (2015) 325 ALR 188; [2015] HCA 37, cited

COUNSEL:	K N Wilson QC for the appellant N H Ferrett for the respondent
SOLICITORS:	Morgan Conley Solicitors for the appellant Broadley Rees Hogan for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Applegarth J and with the reasons given by his Honour.

[2] **MORRISON JA:** I have had the advantage of reading the reasons prepared by Applegarth J. I agree with those reasons and the order his Honour proposes.

[3] **APPLEGARTH J:** The appellant, Mr Browning, was a director of the respondent ("the Company") which carried on business providing residential and civil construction works, such as the supply and installation of solar energy systems. The Company had to be licensed to do so. Part of the statutory licensing regime requires an applicant for a contractor's licence to satisfy relevant financial requirements. These include a requirement that applicants and licensees have sufficient net tangible assets. If an entity does not have sufficient net tangible assets in its own right, then the requirements provide that an independent review report or audit report can be provided, and the applicant or licensee can rely upon a Deed of Covenant and Assurance from a related entity.

[4] This is what happened in this case. Mr Browning as Covenantor entered into a Deed of Covenant and Assurance on or about 19 December 2012. The other parties to the Deed were the Company as Licensee and the Queensland Building Services Authority ("QBSA"). The Deed recited that Mr Browning had requested the Company to apply for the licence and the Company had agreed to do so in consideration of, and conditional upon, the execution of the Deed by him. By cl 2(a) of the Deed, Mr Browning covenanted that if the winding-up of the Company began, then, upon a written

demand by the Company, he would pay the "Defined Amount" to the Company. The "Defined Amount" was $400,000.

[5] The Company continued to have financial difficulties. Mr Browning sold his shares in it and ceased to be a director. The Company was wound up. It sued him for $400,000 and obtained summary judgment. He appeals against that judgment.

Background

[6] Clause 2(c) of the Deed provided:

> "The Covenantor:
>
> …
>
> (c) **covenants not to** assign or **vary the burden** of any covenant or obligation (present or contingent) existing upon it under this Deed." (emphasis added)

[7] Likewise, the Company covenanted that it would not consent to Mr Browning assigning or varying the burden of any covenant or obligation (present or contingent) which he may bear under the Deed. Clause 4 of the Deed prohibited the Deed from being revoked or released except as expressly permitted by the Deed. One such circumstance was if the authority gave written notice that the Company had satisfied the financial requirements for licensing in a manner other than by reliance on the Deed. Another was if revocation was effected by a further Deed by all the parties to the Deed.

[8] The "Defined Amount" is the amount assured by the Covenantor "as stated in the Independent Review Report or Audit Report" provided to the authority from time to time. On 18 January 2013 the Company's accountants provided the QBSA with an Independent Review Report stating that the "Defined Amount" was $400,000.

[9] At about the time the Deed was entered into the Company was experiencing financial difficulties. Mr Browning was eager to exit the business and his fellow director, Mr Brown, who had also injected funds into the Company to keep it trading, felt the same way. An agreement was negotiated for the sale of all of the shares in the Company. This was effected by a Share Sale Agreement made on 1 July 2013. Mr Browning, who held 60 ordinary shares in the Company as trustee for the R J Browning Trust, and a company associated with Mr Brown which held 60 ordinary shares in the Company on trust, sold their shares for $120. The recital to the Share Sale Agreement stated that the Company owed Mr Browning and Mr Brown in excess of $500,000 on account of unpaid wages, employee entitlements and loans made to the Company between February 2011 and June 2013.

[10] Clause 2.5(a) of the Share Sale Agreement provided for Mr Browning and Mr Brown to each agree to forever forbear from enforcing any claims that they had or may have against the Company for unpaid wages, employee entitlements or loans made to the Company up to the amount of $500,000. Clause 2.5(b) provided for the Company to agree to "forever forbear from enforcing all Claims it has or may have against Brown and/or Browning, whether present or in the future".

[11] Clause 2.6 of the Share Sale Agreement contained the following indemnity clause:

> "**2.6 Indemnity**
>
> (a) The Buyer and the Company shall indemnify, and keep indemnified, Brown and Browning and each of the Sellers against any and all Claims against them arising as a result of

> their involvement, either directly or indirectly, with the Company as office holder, shareholder, employee, agent or any other capacity whatsoever."

[12] Importantly, for present purposes cl 4.1 provided as follows:

> "**4.1 Third Party Obligations**
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> If the consent of any third party is required to give effect [sic] this agreement or if the Company would be in breach of any term of any agreement that they have with any third party as a result of this agreement then the Sellers and the Company shall such [sic] procure such consents or permits or take such other steps to ensure that the Company is not in breach of any such obligations by the Completion Date."

[13] The Company's financial affairs did not improve. Its licence was not renewed. On 18 March 2015 an order was made that it be wound up. On 14 May 2015 the liquidators of the Company caused a letter to be sent to Mr Browning demanding that he pay $400,000, being the "Defined Amount" under the Deed. He did not do so and proceedings were commenced in the District Court on 29 June 2015. After a defence was filed, the Company brought an application for summary judgment. Apart from proof of the "Defined Amount" (which had not been admitted in the defence) the application turned on issues of contractual construction.

[14] If the construction contended for by the Company was correct then subsidiary arguments in relation to an alleged set-off in respect of the indemnity and an estoppel argument based upon a representation alleged to have been conveyed by the terms of the agreement fell away. The primary judge reserved his decision. In essence, his Honour concluded that the forbearance and indemnity provisions contained in cl 2.5 and cl 2.6 of the Share Sale Agreement purported to vary the defined burden of the Deed. They were ineffective to do so because, amongst other things, Mr Browning had agreed in cl 2(c) of the Deed not to "vary the burden of any covenant or obligation (present or contingent) existing upon [him] under [the] Deed". The Company had agreed in cl 3(c) of the Deed not to consent to Mr Browning varying the burden of any covenant.

[15] The primary judge was conscious of the terms of r 292 of the *Uniform Civil Procedure Rules* 1999 (Qld) and the authorities governing the circumstances in which summary judgment should be given. However, the point of construction having been determined against Mr Browning, the primary judge concluded that he had no real prospect of successfully defending the claim and there was no need for a trial. Judgment was given in the sum of $400,000, together with interest.

[16] In this appeal Mr Browning contends that summary judgment should not have been ordered for three reasons. The first turns on the question of construction and is that the proper construction of the documents necessitated a trial of the action. The second contention relates to an alleged equitable set-off based on the indemnity clause. The third relates to an alleged estoppel. A further argument raised in written submissions that the primary judge should have concluded that there was a need for a trial to investigate the correctness of the $400,000 figure was not pursued.

The original point of construction

[17] Mr Browning's submissions accept that the fact that the application depended upon questions of construction was not, of itself, a reason to decline to order summary

judgment, provided the effect of the documents was unambiguous. In some circumstances it will be appropriate to decide the proper interpretation of a contract or of a statute upon an application for summary judgment.[1]

[18] Mr Browning submits that the questions of construction were not straightforward and should not have been decided in a summary way, even with the benefit of a reserved decision. He submits that the Share Sale Agreement did not constitute or amount to a revocation of the earlier Deed so as to infringe the prohibition in cl 4.1. However, the Company's case before the primary judge did not depend upon the Share Sale Agreement constituting an unauthorised revocation. Instead, the Company's case relied upon the covenants given by Mr Browning and by the Company in cl 2(c) and cl 3(c) by which each agreed with the QBSA not to vary the burden of any covenant or obligation (present or contingent) given by Mr Browning under the Deed. Mr Browning submits that there was nothing in the Deed that precluded the Company "from giving forbearance or an indemnity". However, this submission overlooks the covenants to not vary the burden of any covenant or obligation, present or contingent. The learned primary judge considered those provisions and correctly concluded that the forbearance and indemnity provisions contained in cl 2.5 and cl 2.6 of the Share Sale Agreement were clear attempts to vary the defined burden of the Deed.

[19] It was not necessary for the primary judge to conclude that entry into the Share Sale Agreement amounted to a breach of the Deed, and he did not do so. A reason for this is that, having regard to the Share Sale Agreement as a whole, the forbearance provided for in cl 2.5(b) and the indemnity provided for in cl 2.6 required either the consent of a third party or other steps to be taken by the Sellers and the Company to ensure that the Company would not be in breach of its obligation sunder the Deed.

[20] Clause 4.1 in the Share Sale Agreement was effective to prevent entry into the Share Sale Agreement being a breach of the covenants of the Deed.

[21] The Deed was a tripartite agreement and both the Company and the QBSA had the benefit of Mr Browning's covenants, including his covenant not to vary the burden of any covenant he gave. The QBSA also had the benefit of the Company's covenant not to consent to vary the burden of any covenant or obligation (present or contingent) under the Deed. Were it not for cl 4.1 of the Share Sale Agreement, the agreement under cl 2.5(b) of the Share Sale Agreement to forbear from enforcing a claim the Company had or may have against Mr Browning would be a breach of the terms of the Deed. As a result of cl 4.1, either the consent of the QBSA was required or the parties to the Share Sale Agreement had to take such other steps to ensure that the Company would not be in breach of its obligations under the Deed.

[22] In short, if Mr Browning and the Company were to avoid being in breach of the terms of the Deed by which they promised to not vary, and to not consent to Mr Browning varying, the burden of his covenants under the Deed, then they required the consent of the QBSA[2] or they had to take some other steps to ensure that they were not in breach of their obligations. Without the third party consent or the steps contemplated by cl 4.1 of the Share Sale Agreement, the agreement to forbear from enforcing all claims against Mr Browning was ineffective. So too was the promise to indemnify pursuant to cl 2.6.

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1 *Mirvac Queensland Pty Ltd v Horne* [2009] QSC 269 at [20] – [23] and the cases cited therein.

2 Referred to below as "the authority" to describe it and its successor the Queensland Building and Construction Commission.

A new point of construction

[23] On the appeal the appellant advanced a new construction argument, not argued before the primary judge. It is that although on its literal reading the obligation in cl 2(a) to pay the Defined Amount continues, including after the date when the Company becomes unlicensed, it should not be read that way. By some process of implication the covenant ceases to apply at some point in time, for example, after the Company loses its licence or the director who gives the covenant ceases to be a director and sells any interest he or she has in the Company.

[24] This argument derives no support from the terms of the Deed or its apparent purpose. It requires words to be read into cl 2(a) which would deprive the Company and the authority of the benefit of the promise to pay the amount when it is most needed. That is when a winding up begins, and the Defined Amount is needed to pay creditors, who are likely to include consumers.

[25] The purpose of the Deed is derived from the *Queensland Building Services Authority Act* 1991 (Qld).[3] A company is entitled to a contractor's licence if the authority is satisfied, among other things, that the applicant satisfies the relevant financial requirements stated in the board's policies.[4]

[26] The Financial Requirements for Licencing of the authority stipulated at cl 2.4 that applicants and licensees have sufficient net tangible assets required for the level of allowable annual turnover, as set out in Table 1 annexed to that document. If an entity does not have sufficient net tangible assets in its own right, an independent review report or audit report could be provided, and the applicant or licensee could rely upon a Deed from a related entity.

[27] In this case the Company's net tangible assets were such that cl 2.4.5 of the financial requirements for licensing necessitated a Deed of Covenant and Assurance.

[28] The Deed could not be revoked or released, at least not without the authority giving written notice that the licensee had satisfied the financial requirements for licensing other than reliance by it on the Deed (cl 4.2) or by a further deed by all the parties to the Deed (cl 4.3). The Covenantor covenanted to not assign or vary the covenant to pay under cl 2(a).

[29] The purpose of the Deed was to have the Covenantor provide a promise of financial backing which could not be varied without the authority's agreement, and to pay the Defined Amount if and when the Company's winding up began.

[30] By then the Company's licence may have not been renewed or may have been cancelled or suspended because of its financial affairs. To read into cl 2(a), or somewhere else in the Deed, the kind of temporal limitation for which the appellant contends would deprive the Deed of the commercial purpose of providing a pool of funds for the Company and its creditors in the event the Company was wound up.

[31] The interpretation for which the appellant contends makes no commercial sense, and would lead to absurd and inconvenient results. A Covenantor could avoid his or her obligation to pay by:

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3 This Act was replaced by the *Queensland Building and Construction Commission Act* 1991 (Qld).

4 *Queensland Building Services Authority Act* 1991 (Qld), s 31(2)(c); *Queensland Building and Construction Commission Act* 1991 (Qld), s 31(2)(c).

(a) surrendering the Company's licence; or

(b) selling shares in the Company to a purchaser which lacks the net tangible assets to maintain the licence or which conducts the affairs of the Company so that it loses its licence.

[32] As against the appellant's interpretation, and on the ordinary meaning of cl 2(a), a Covenantor who wishes to bring his or her obligation to pay the Defined Amount to an end can seek to do so in accordance with cl 4.2 or cl 4.3 of the Deed. One way would be to have the licensee meet the authority's financial requirements without the benefit of the Deed. Another would be to sell the Company to a purchaser which could do so, if necessary by providing a Deed of Covenant and Assurance by a new director, leading to a further deed by all the parties to the existing Deed which revokes it (cl 4.3).

[33] Mr Browning's new construction argument would defeat the benefit which the Covenant in cl 2(a) is intended to give to the authority, in ensuring that a Company has sufficient net tangible assets, or if it does not, that its net tangible assets are supplemented by an obligation to pay the Defined Amount when it is most needed.

[34] The parties should be taken to have intended a commercial result.[5] The new construction argument does not produce such a result. The Deed should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".[6] Mr Browning's new argument would lead to the odd, inconvenient and uncommercial result of depriving the Company and its creditors of the benefit of his promise when it needed it the most: when the Company failed financially, lost its licence and was wound up.

[35] Against the background of the protection which the regulator's financial requirements and the Deed were intended to achieve, namely payment of the Defined Amount in the event the Company was wound up, it should not be assumed that reasonable parties in the position of the three parties to the Deed would have understood Mr Browning's promise to pay as subject to some unwritten temporal limitation. They would not have understood it as providing for the benefit of the promise to pay to be lost when the Company became unlicensed. They would have understood it as providing members of the public with that financial benefit if and when the Company became unlicensed. To imply, as Mr Browning's argument seeks, an unwritten temporal limitation on cl 2(a), is unjustified, having regard to the clear and unqualified language of the clause, the terms of the Deed as a whole and the purpose and objects secured by the Deed. There is no need for a trial to dispose of such an unmeritorious argument.

Conclusion – points of construction

[36] The issues of contractual construction were correctly determined in favour of the Company and against Mr Browning. The Deed and the Share Sale Agreement had to be construed. The agreements were not ambiguous and the questions of construction did not necessitate a trial of the action. Nothing in the affidavit of Mr Browning which was relied upon before the primary judge required a different construction to be placed upon the agreements. The issue of construction which the primary judge decided simply would have been decided at a trial by reference to the same, unambiguous contractual documents.

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5 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 325 ALR 188 at 197 [46] – 198 [51].

6 Ibid.

The indemnity

[37] Mr Browning complains that the primary judge did not consider his argument that the indemnity provided under the Share Sale Agreement gave rise to an equitable set-off for the full amount of the Company's claim. However, the same argument which rendered the forbearance clause ineffective rendered the indemnity clause ineffective. According to Mr Browning's submissions before the primary judge, the effect of the indemnity was that, even if the Company was entitled to recover against Mr Browning pursuant to the Deed, it owed him the same amount of money under the indemnity. But if this was the effect of the indemnity then it varied the burden of Mr Browning's promise to pay the Defined Amount. Such a variation of the burden was one which would place the Company in breach if the Company granted the indemnity. As a result, the QBSA's consent or other steps were required for the Company to grant both the forbearance given in cl 2.5 and the indemnity granted in cl 2.6.

[38] The primary judge considered both the forbearance and indemnity provisions contained in cl 2.5 and cl 2.6 of the Share Sale Agreement. He correctly characterised them as attempts to vary the defined burden of the Deed. They clearly are and any argument to the contrary is without merit. The forbearance and indemnity provisions were ineffective in the absence of the consent of the QBSA, or Mr Browning or the Company taking some other steps to ensure that they were not in breach of their obligations under the Deed (such as procuring revocation or release of the Deed under cl 4).

[39] Because the indemnity provision was ineffective in the circumstances to confer an indemnity, the question of set-off did not arise. It was unnecessary for the primary judge to consider whether the indemnity provision, if effective and enforceable, would have given rise to an equitable set-off.

Estoppel

[40] The estoppel by representation argument before the primary judge, like the same estoppel argument before this Court, turns on the proper interpretation of the Share Sale Agreement. According to Mr Browning's submissions to the primary judge, "by the Share Sale Deed [sic], the plaintiff represented to the defendant that it would not make any claims it may have against the defendant." Similarly, in his argument on appeal the relevant representation is said to have been conveyed by the Company executing the Share Sale Agreement. The estoppel does not rest upon a representation about any other state of affairs or a representation about what the Share Sale Agreement meant or how it would operate. Mr Browning submits that by executing the Share Sale Agreement, containing cl 2.5, the Company represented to him that it would not claim or seek to recover any amount from him or bring a claim such as the present action. However, any such argument depends upon viewing cl 2.5 in isolation and erroneously interpreting the effect of the Share Sale Agreement. It requires one to view cl 2.5 without regard to cl 4.1 of the Share Sale Agreement which, in turn, directs attention to whether an agreement containing a clause such as cl 2.5 would constitute a breach of an agreement entered into with a third party such as the authority.

[41] The primary judge's conclusion on the proper construction of the agreements was effective to dispose of the estoppel argument. The estoppel argument depended upon a representation alleged to be conveyed by entry by the Company into the Share Sale Agreement, not some extrinsic representation. The Share Sale Agreement, properly interpreted, did not convey the representation which was argued before the primary

judge. The primary judge did not, expressly, dispose of the estoppel argument after reaching the conclusion which he did about the two agreements. Any error in not doing so is of no consequence because the basis for the contended estoppel by representation or promissory estoppel is not established.

[42] On the hearing of the appeal, Mr Browning advanced an additional estoppel argument which was not advanced before the primary judge. The argument was one based upon an estoppel by convention. Such a form of estoppel is not founded on a representation. It is based on the conduct of relations between parties.[7] To establish a common law estoppel or estoppel by convention, a plaintiff must establish (1) that it has adopted an assumption as to the terms of its legal relationship with the defendant; (2) that the defendant has adopted the same assumption; (3) that both parties have conducted their relationship on the basis of that mutual assumption; (4) that each party knew or intended that the other act on that basis; and (5) the departure from the assumption will occasion detriment to the plaintiff.[8]

[43] Mr Browning's argument is that by executing the Share Sale Agreement he and the Company thereafter conducted their relations on an agreed or assumed state of affairs, which included that the Company would not bring a claim such as the present action against him. However, Mr Browning led no evidence before the primary judge about how the parties conducted their relationship after entry into the Share Sale Agreement. His evidence was confined to events leading up to the agreement. At its highest, his evidence permitted an inference that he understood that the Company had agreed not to make any claims against him and had granted an indemnity. His submissions do not advert to any evidence which might be led at trial so as to satisfy the elements of an estoppel by convention. The evidence in fact undermines the proposition that the Company assumed that the Deed of Covenant and Assurance could not be relied upon and acted on that basis. After the Share Sale Agreement was entered into, the Company, through its accountant, submitted an independent review report which included a statement of Mr Browning's statement of financial position as at 31 October 2013. The certified independent review report was dated 13 January 2014 and nominated Mr Browning as the Covenantor. The Company sought the inclusion of a Defined Amount of $397,749, based upon the financial position as at 31 October 2013, in respect of Mr Browning's covenant. This is clear evidence that the Company continued to assume that Mr Browning's covenant was available to it.

[44] The conduct of the Company in 2014 is consistent with a correct understanding of the effect of the Deed and the Share Sale Agreement. Briefly stated, unless and until the authority, as a party to the Deed revoked it in accordance with cl 4.2 or cl 4.3 of the Deed, it remained effective. The consent of the authority had not been obtained to entry into or performance of the Share Sale Agreement. Neither the Company nor anyone else had taken the steps required to ensure that it would not be in breach of the terms of the Deed in granting the forbearance which cl 2.5(a) of the Share Sale Agreement contemplated or in granting the indemnity which cl 2.6 of the Share Sale Agreement contemplated. The authority was entitled to assume that the terms of the Deed were being honoured.

[45] Representations made by the Company to the authority were to the effect that the Deed continued to operate so that the Company could call upon Mr Browning to pay

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7 *Con-Stan Industries of Australia Pty Ltd v Norwich Winterthur Insurance (Australia) Ltd* (1986) 160 CLR 226 at 244 – 245.

8 *Legione v Hateley* (1983) 152 CLR 406 at 430 – 432 as summarised in *Moratic Pty Ltd v Gordon* [2007] NSWSC 5 at [32].

the Defined Amount. The Company, in early 2014, was simply seeking a minor adjustment in the Defined Amount from $400,000 to $397,749.

[46] The absence of any evidentiary support for the claimed estoppel and the existence of evidence which is contrary to it is noteworthy. The new category of estoppel argued for on appeal was not contended for before the primary judge. No application was made to adduce evidence to this Court from either Mr Browning or individuals who conducted the Company to provide an evidentiary basis for the new argument. The Company's 2014 submission indicated that it had the benefit of a Deed of Assurance from Mr Browning and included a statement of his financial position, so as to suggest that it could claim against Mr Browning on the Deed if it needed to. Its conduct is inconsistent with a shared assumption between it and Mr Browning that the burden upon Mr Browning of the covenant he gave had been varied.

[47] To the extent it is appropriate to deal with an estoppel argument which was raised for the first time on appeal, the argument lacks any real prospects of success.

Something peculiar?

[48] Mr Browning submits that the application for summary judgment should have been rejected on grounds that turned on the peculiar facts of the case. The rhetorical question is asked as to why an unlicensed company in liquidation should be permitted to sue for an amount effectively given as security by a former director of that company for the grant of a licence. The answer is that the director promised to pay and did not do so. Next, the rhetorical question is asked as to why the amount of that obligation in mid-2015 should be based on a "Defined Amount" which was quantified a few years earlier by reference to financial figures from the fourth quarter of 2012. The answer is that this was the "Defined Amount". There is submitted to be something odd and inconsistent with the purpose of the legislation to hold liable someone who is no longer a director or shareholder of the Company where there is no evidence about the claims that have been made against the Company. However, this is an irrelevant argument. There is no suggestion that the Company was wound up voluntarily, whilst solvent and with an abundance of assets. If it had been, and if it has "a surplus after the payment in full of all of its unsecured creditors", then the Company is required by cl 3(a) of the Deed to account to Mr Browning for any part of the Defined Amount which is paid to it.

[49] The purpose of the Deed was to provide funds to the Company, and indirectly to its creditors, in the event it was wound up. The likelihood is that the Company was wound up because of its inability to pay creditors. The Share Sale Agreement was the result of the Company's financial difficulties. Mr Browning was concerned about being sued by creditors. The Deed was clearly intended to protect unsecured creditors in the event the Company was wound up. Precisely which creditors had claims against the Company when it came to be wound up is irrelevant.

[50] Mr Browning became a party to the Deed in circumstances in which its front page clearly warned him that by signing it he became responsible for payment of what could be a significant amount of money if the Company had an application for winding up made against it. The Deed stated that he had to receive legal advice before signing it. The Deed was accompanied by a statement by Mr Browning's solicitor that he had explained its provisions to him. The subsequent winding-up of the Company triggered the demand and the obligation to pay about which Mr Browning was warned.

[51] Mr Browning entered into the Deed in December 2012 and made the unqualified promise in cl 2(a) to pay the Defined Amount so that the Company could obtain a licence which was essential for it to trade. He sold his shares in a company that had the benefit of a licence. In December 2012 he promised the regulatory authority that he would not vary the burden of the covenant which he gave to pay the Defined Amount. He did not seek the authority's consent to enter or perform the Share Sale Agreement which had that effect. He did not take any other steps to obtain a release of his promise to pay, or to obtain the authority's agreement for him to vary the burden that he had assumed under the Deed.

[52] Having promised to pay the Defined Amount in order to allow the company of which he was a director and shareholder to be licensed, it would be peculiar if he could escape that obligation when the Company fell into financial difficulties and lost its licence. His new argument is that the Deed should be construed so as to relieve him of his obligation to pay if and when the Company loses its licence. On this argument, a Deed which was intended to protect unsecured creditors as part of the regulation of the building industry would deprive unsecured creditors of the benefit of Mr Browning's promise when they need the money the most. Like the arguments which were made to the primary judge, this argument has no real prospect of success.

[53] The primary judge was entitled to find that the matters required by r 292 were satisfied, and to enter summary judgment. I propose the following orders:

1. The appeal is dismissed.

2. The appellant pay the respondent's costs of and incidental to the appeal.