

SUPREME COURT OF QUEENSLAND

CITATION: *Yara Nipro P/L v Interfert Australia P/L* [2010] QCA 128

PARTIES: **INTERFERT AUSTRALIA PTY LTD**
ACN 112 758 666
(defendant/appellant/cross respondent)
v
YARA NIPRO PTY LTD
ACN 066 700 276
(plaintiff/respondent/cross appellant)
v
COSIMO UBALDINO
(third party/not party to the appeal)

FILE NO/S: Appeal No 12074 of 2009
Appeal No 2349 of 2010
SC No 8849 of 2008

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 28 May 2010

DELIVERED AT: Brisbane

HEARING DATE: 19 April 2010

JUDGES: Muir and Fraser JJA and Ann Lyons J
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDERS: **1. Dismiss the appeal in Appeal No 12074 of 2009.**
2. Allow the cross appeal in Appeal No 12074 of 2009, set aside the orders made by the trial judge on 30 September 2009 dismissing the plaintiff's claim and giving judgment for the defendant on the counterclaim for \$77,058.65 and the order made by the trial judge on 5 February 2010 ordering the plaintiff to pay the defendant's costs upon the claim and counterclaim, and instead order that:
a) The defendant is to pay the plaintiff an amount to be fixed by the Court;
b) The defendant is to pay the plaintiff's costs of the claim, to be assessed on the standard basis;
c) Unless the Court is earlier notified that the parties have agreed upon the appropriate orders, each party has leave to make one concise submission in writing

within 7 days of the date of delivery of this judgment as to the amount to be fixed by the Court under paragraph (a) to reflect the Court's reasons in that respect and as to the costs of the counterclaim.

- 3. The appellant/cross respondent is to pay the respondent/cross appellant's costs of the appeal and cross appeal in Appeal No 12074 of 2009, to be assessed on the standard basis.**
- 4. The appeal in Appeal No 2349 of 2010 against the order refusing leave to appeal made by the trial judge on 5 March 2010 is dismissed with costs to be assessed on the standard basis.**

CATCHWORDS: CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – OTHER MATTERS – where the appellant contracted to sell the respondent prilled urea – where the appellant failed to make any prilled urea available for collection by the respondent prior to the termination of the contract in September 2008 – where the respondent claimed damages for breach of contract – where the appellant alleged that the third party's failure to supply the prilled urea had caused its failure to supply the respondent – where the trial judge found the appellant liable for breach of contract – where the appellant argued that the relevant force majeure event was the third party's non-supply to the appellant – where the appellant argued that the event left it without any prilled urea to supply to the respondent resulting in its non-performance – where the appellant argued that the trial judge erred in failing to hold that it was irrelevant that an alternative source of supply was possibly available to it – whether the trial judge erred in rejecting the appellant's defence that the force majeure clause relieved it of liability for breach of contract – whether the trial judge erred in his construction of the force majeure clause

DAMAGES – MEASURE AND REMOTENESS OF DAMAGES IN ACTIONS FOR BREACH OF CONTRACT – PARTICULAR CONTRACTS – where the trial judge assessed damages for breach of contract at \$840,048.69, set off against the appellant's counterclaim, resulting in a net judgment in the appellant's favour of \$77,058.65 – where the appellant and respondent accepted that the respondent's costs should be measured by the difference between the contract price and prices paid by the respondent for granular urea in substitution for the prilled urea the appellant was to supply under the contract – where the respondent argued that the relevant purchases were those between October and December 2008 after the termination of the contract – where the appellant argued that the relevant purchases were those between 11 February 2008 and July 2008 – where the price

per tonne of granular urea rose from about \$500 to \$900 between those periods – whether the trial judge erred in his assessment of damages and the time at which the respondent suffered its loss – whether the trial judge erred in allowing as the cost of substitute urea, the granulated urea purchased between February and July 2008, rather than the granulated urea purchased between October and December 2008 after the contract was terminated

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – APPEAL - PRACTICE AND PROCEDURE – QUEENSLAND – WHEN APPEAL LIES – BY LEAVE OF COURT – COSTS ORDERS – where the trial judge ordered that the respondent pay the appellant’s costs upon the claim and counterclaim – where the trial judge refused the respondent’s application for leave to appeal against the cost order – whether the discretion of the trial judge to refuse leave to appeal miscarried

Sale of Goods Act 1896 (Qld), s 14(1), s 30, s 31(1)

Sale of Goods Act 1895 (SA), s 50, s 50(2)

Supreme Court Act 1995 (Qld), s 253

Uniform Civil Procedure Rules 1999 (Qld), r 681(1),
r 684(1), r 684(2)

A B Donald Limited v Corey & Co [1916] NZLR 228, cited

AGL Sales (Qld) P/L v Dawson Sales P/L & Ors [2009] QCA 262, cited

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 238 CLR 570; [2008] HCA 57, cited

Alltrans Express Ltd v CVA Holdings Ltd [1984] 1 WLR 394; [1984] 1 All ER 685, cited

Australand Corporation (Qld) Pty Ltd v Johnson & Ors [2007] QSC 128, cited

Australian Broadcasting Commission v Australasian Performing Right Association Ltd (1973) 129 CLR 99; [1973] HCA 36, cited

Barameda Enterprises Pty Ltd v O’Connor [1988] 1 Qd R 359, cited

BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2) [2009] QSC 64, cited

Blackburn Bobbin Co Ltd v T W Allen & Sons Ltd (1918) 1 KB 540, cited

Brown v Muller (1872) LR 7 Ex 319, cited

Darlington Futures Ltd v Delco Australia Pty Ltd (1986) 161 CLR 500; [1986] HCA 82, cited

Electronic Industries Ltd v David Jones Ltd (1954) 91 CLR 288; [1954] HCA 69, cited

Emanuel Management Pty Ltd (in liquidation) & Ors v Foster’s Brewing Group Ltd & Ors [2003] QSC 484, cited

Fairclough Dodd & Jones Ltd v JH Vantol Ltd [1957] 1 WLR 136, cited

Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, cited

Francis v Lyon (1907) 4 CLR 1023; [1907] HCA 12, cited
Gates v City Mutual Life Assurance Society Ltd (1986)
 160 CLR 1; [1986] HCA 3, cited
Hadley v Baxendale (1854) 156 ER 145, cited
Hanak v Green [1958] 2 QB 9, cited
Hickman v Haynes (1875) LR 10 CP 598, cited
Hoecheong Products Limited v Cargill Limited [1995]
 1 WLR 404, cited
House v King (1936) 55 CLR 499; [1936] HCA 40, cited
*Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales)
 Pty Ltd* (2006) 236 ALR 115; [2006] FCA 1324, cited
Intertradex SA v Lesieur-Tourteaux SARL [1978] 2 Lloyd's
 Rep 509, cited
Johnson v Agnew [1980] AC 367, followed
*Johnson Matthey Bankers Ltd v State Trading Corporation of
 India Ltd* [1984] 1 Lloyd's Rep 427, cited
Johnson v Perez (1988) 166 CLR 351; [1988] HCA 64, cited
Morrison v Hudson & Anor [2006] Qd R 465; [\[2006\] QCA
 170](#), cited
Ogle v Earl Vane (1868) LR 3 QB 272, followed
Ogle v Earl Vane (1867) LR 2 QB 275, cited
P J van der Zijden Wildhandel NV v Tucker [1975] 2 Lloyd's
 Rep 240, cited
Radford v De Froberville [1977] 1 WLR 1262, cited
Re Voss, Ex parte Llansamlet Tin Plate Company (1873) LR
 16 Eq 155, distinguished
Roper v Johnson (1873) LR 8 CP 167, cited
Tennants (Lancashire) Ltd v C S Wilson & Co Ltd [1917] AC
 495, cited
Todrell Pty Ltd v Finch (No 2) [2008] 2 Qd R 95; [\[2007\]
 QSC 386](#), cited
Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR
 165; [2004] HCA 52, cited
Toprak v Finagrain [1979] 2 Lloyd's Rep 98, cited
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9,
 cited
Wenham v Ella (1972) 127 CLR 454; [1972] HCA 43, cited
Yara Nipro P/L v Interfert Australia P/L & Anor [\[2009\] QSC
 314](#), cited
Yara Nipro Pty Ltd v Interfert Australia Pty Ltd (No. 2)
[\[2010\] QSC 19](#), cited

COUNSEL: B O'Donnell QC, with N Ferrett, for the appellant
 P Morrison QC, with G Handran, for the respondent

 SOLICITORS: McKays Solicitors for the appellant
 Hemming and Hart Lawyers for the respondent

- [1] **MUIR JA:** I agree with the reasons of Fraser JA but as my conclusions on the damages question differ from those of the learned primary judge, I will add some brief reasons of my own.

- [2] As Fraser JA explained in his reasons, until the contract was terminated in September 2008, the parties proceeded on the basis that the obligations to deliver and to take the contracted quantity of prilled urea remained. The contractual obligations in respect of delivery and acceptance of delivery remained intact except in relation to the delivery date. The primary judge held that, “There was no agreed variation of the date by which [Interfert] was to deliver or the period during which [Nipro] was to take delivery”. There was no challenge to that finding.
- [3] However, even though there was no agreement as to a new delivery date, Interfert was released from its obligation to tender performance at the time provided for in the contract and the parties became bound to give and accept performance within a reasonable time.¹
- [4] It follows from the foregoing, that any purchases of urea made by Nipro to meet its internal requirements during the life of the contract had no contractual relevance. Nipro could not recover damages for any failure on the part of Interfert to deliver the contracted quantity of urea. The obligation and right to deliver it remained and the time for delivery had been extended. Once these matters are appreciated, it becomes apparent that in order to put Nipro in the position it would have been in had Interfert performed the contract,² damages cannot be assessed by reference to Nipro’s purchases of urea while there remained an obligation on Interfert to supply and on Nipro to accept the contracted urea. Nipro’s loss arose from the necessity for it to replace the contracted quantity of urea after the contract terminated.
- [5] It was held in *Johnson v Agnew*³ that in circumstances such as those under consideration here, damages are assessed “as at the date when (otherwise than by [the innocent party’s] default) the contract is lost”. That conclusion broadly accords with *Ogle v Earl Vane*,⁴ in which the “the date was fixed by reference to the time when the innocent party, acting reasonably, went into the market”.⁵ A passage from the reasons of Lord Wilberforce in *Johnson v Agnew*, which included the first quotation in this paragraph, was quoted in the joint reasons in *Agricultural and Rural Finance Pty Ltd v Gardiner*,⁶ but in the context of a discussion about forbearance and waiver rather than damages.
- [6] Counsel for Interfert, quite properly, did not challenge the correctness of the principle stated in *Ogle v Earl Vane* and endorsed in *Johnson v Agnew*, merely its application to the facts. The principle has long been referred to with approval or applied.⁷
- [7] There was no issue on the appeal as to the appropriateness of calculating Nipro’s loss by reference, inter alia, to the \$3,537,974.80 cost of purchasing replacement urea if it was decided that Nipro’s damages were to be assessed other than by reference to what the primary judge identified as “substitute urea”.

¹ c.f. *Electronic Industries Ltd v David Jones Ltd* (1954) 91 CLR 288 at 295.

² *Gates v City Mutual Life Assurance Society Ltd* (1986) 160 CLR 1 at 11-12; and *Wenham v Ella* (1972) 127 CLR 454 at 460, 471.

³ [1980] AC 367 at 401.

⁴ (1868) LR 3 QB 272.

⁵ *Johnson v Agnew* (*supra*) at 401.

⁶ (2008) 238 CLR 570 at 596.

⁷ See e.g. *A B Donald Limited v Corey & Co* [1916] NZLR 228; *Johnson Matthey Bankers Ltd v State Trading Corporation of India Ltd* [1984] 1 Lloyd’s Rep 427; *Ex parte Llansamlet Tin Plate Company* (1873) LR 16 Eq 155; Harvey McGregor, *McGregor on Damages*, (16th Ed, 1997), at para 835 and H. G. Beale (ed), *Chitty on Contracts: Volume 2 Specific Contracts*, (28th Ed, 1999), at para 43-391.

- [8] **FRASER JA:** The respondent (“Nipro”) manufactures liquid fertilizers. In the course of that business it uses about 10,000 to 12,000 tonnes of urea each year. It obtains that urea from Australian manufacturers and from several importers. The appellant (“Interfert”) is one such importer and supplier of urea.
- [9] In December 2007 Interfert contracted to sell to Nipro 4,000 tonnes of prilled urea originating from Russia or Ukraine. The prilled urea was to be available for collection in Interfert’s rented warehouse at Geelong on 11 February 2008 and during the following 180 day period. The price was AUD \$440 per tonne plus GST if paid within seven days from 11 February 2008, with specified weekly escalations, representing interest at 9.5 per cent per annum, for later payments made during the 180 day period. That provision reflected previous contracts under which Nipro would collect products from Interfert as and when Nipro needed them in its manufacturing business. Interfert failed to make any prilled urea available for collection by Nipro before Nipro terminated the contract in September 2008.
- [10] In proceedings in the trial division Nipro claimed damages for breach of contract. Nipro also claimed damages under the *Trade Practices Act 1974* (Cth) but the trial judge rejected that claim and it is no longer in issue. Most of the amount of Nipro’s claimed loss represented the difference between the contract price and the cost of 4,000 tonnes of granulated urea which Nipro purchased between October and December 2008. (Both granulated urea and prilled urea were suitable for Nipro’s purposes, although the latter, which came in bags rather than in a bulk form, cost Nipro a little more in freight and handling.) After setting off Interfert’s admitted counterclaim for \$907,061.00 for the unpaid prices of Nipro’s purchases from Interfert of granulated urea between February and September 2008, Nipro sought judgment in its favour of about \$1 million. Interfert defended the claim and it joined a third party, alleging that the third party’s failure to supply Interfert with prilled urea had caused Interfert’s failure to supply prilled urea to Nipro.
- [11] The trial judge held that Interfert was liable for breach of contract and assessed damages at \$840,048.69; that amount was set off against Interfert’s admitted counterclaim, resulting in a net judgment in Interfert’s favour of \$77,058.65 (including interest).⁸ Judgment was given in Interfert’s favour against the third party. Nipro was ordered to pay Interfert’s costs upon the claim and counterclaim.⁹ The trial judge refused Nipro’s application for leave to appeal against the cost order.¹⁰
- [12] The question in Interfert’s appeal is whether the trial judge erred in rejecting its defence that a force majeure clause in the contract relieved it of liability because its failure to supply the prilled urea resulted from the third party’s failure to supply Interfert. The question in Nipro’s cross appeal is whether the trial judge erred in allowing as the cost of substitute urea, the \$2,548,053.60 Nipro paid for 4,000 tonnes of the granulated urea in purchases between February and July 2008,¹¹ rather than the \$3,537,975.20 Nipro paid for 4,000 tonnes of granulated urea in its purchases between October and December 2008 after it had terminated the contract in September. I will discuss those questions after I have first summarised the relevant factual background.

⁸ *Yara Nipro P/L v Interfert Australia P/L & Anor* [2009] QSC 314.

⁹ *Yara Nipro Pty Ltd v Interfert Australia Pty Ltd (No 2)* [2010] QSC 19.

¹⁰ Transcript, 5 March 2010.

¹¹ *Yara Nipro P/L v Interfert Australia P/L & Anor* [2009] QSC 314 at [66].

Factual background

- [13] Except where indicated otherwise, the following summary of the facts is taken from unchallenged findings of fact made by the trial judge.
- [14] Between July and October 2007 Interfert's Mr Evans informed Nipro's Mr Hammond that a broker, Mr James-Martin, was organising the importation of about 12,000 tonnes of prilled urea from Russia. In October 2007 Interfert made a contract with the third party under which the third party was to supply Interfert with about 12,500 metric tonnes of prilled urea to be shipped to Geelong, Victoria. Shipping was to commence within 45 days from the third party's receipt of a letter of credit provided to its nominated bank. By 7 December 2007 the third party had expressed satisfaction with the terms of a proposed letter of credit and Interfert expected that the prilled urea would arrive in Geelong in early February 2008.
- [15] A proposed contract for the supply of 2,000 tonnes by Interfert to Nipro was discussed between those parties in November and early December 2007. The contract was signed on 12 December 2007. Whilst Interfert had made it clear to Nipro in pre-contract communications that it intended to acquire the prilled urea from someone else, that topic was not mentioned in the contract. In late December 2007 Interfert and Nipro agreed to increase the contract quantity to 4,000 tonnes. Nipro paid the required deposit of 10 per cent of the purchase price.
- [16] During January 2008 it became clear to Interfert that the third party would not supply the prilled urea in time for Interfert to supply it to Nipro by the contract delivery date of 11 February 2008. According to Mr Evans' evidence-in-chief, on 22 January 2008 he told Mr Hammond that the shipment was six weeks away from delivery. Mr Evans gave evidence that he asked Mr Hammond whether Nipro had a requirement during that period for urea and Mr Hammond responded that he would need two or three hundred tonnes, which Interfert subsequently supplied. The trial judge did not refer to that conversation but Mr Evans' evidence was not challenged in cross-examination or contradicted by Mr Hammond in his evidence. There is no reason to doubt the accuracy of Mr Evans' evidence, which he gave with reference to a contemporaneous note. It is also consistent with the trial judge's findings about later events. Mr Evans' evidence should be accepted, as Nipro submitted.
- [17] The trial judge referred to a similar communication, in an email of 4 February 2008 from Mr Evans to Mr Hammond. In this email Mr Evans conveyed that it was estimated that the prilled urea would arrive in Geelong at the end of March. He also wrote that:
- “In regards to Urea to get you through, I thought we left it you were going to put a price forward. What I was thinking is our next vessel week 1 pricing comes to USD\$525 week 1. How about we work on AUD\$580 per tonne on the tonnes you need to get you through until the Prilled Urea arrives end of March?”
- [18] Mr Hammond responded on the following day, indicating that he would work out an idea for Nipro's urea requirements until April. Subsequently Nipro made a series of purchases of granulated urea from Interfert at the price of \$580 per tonne.
- [19] In February and March 2008 Interfert continued to pursue the third party for performance of its contract and at the same time reported to Nipro that there were

continuing delays in the expected shipment of the prilled urea. On 3 April 2008 Mr Evans sent to Mr Hammond an extract from the text of an email which Interfert had received from the third party. That text suggested that the third party's shipment would arrive in mid June. Mr Evans commented that it would more likely arrive at the end of June. Mr Hammond thanked Mr Evans for the information and mentioned that he had organised 500 tonnes of urea for April and May but might need some more for June. During May and June the same pattern of conduct continued, with Interfert pressing for performance by the third party, Interfert keeping Nipro advised of continuing delays, and Nipro continuing to buy urea as required for its manufacturing needs pending arrival of the expected shipment of the prilled urea. On about 9 May 2008 Mr Evans told Mr Hammond that the price of granular urea was rising. In response to Mr Hammond's comment that Nipro could buy the product from another supplier at \$595 per tonne, Mr Evans told him that to do so would be his best option to meet Nipro's need.

- [20] On 10 July 2008 Mr Hammond sent a fax to Mr Evans which referred to the contract as "as it has been extended" being for the supply of 4,000 tonnes of prilled urea by 8 August 2008. Mr Hammond observed that Nipro had "already committed our business to the on selling of this product to our customers" and noted that he was becoming increasingly anxious that Interfert would be unable to supply the product by the agreed date. He sought confirmation that the product had been shipped and the usual shipping details and, if there was likely to be a delay, then details of when delivery was expected so that Nipro could consider its position and advise its customers. In a response on 11 July 2008 Mr Evans noted that Interfert was continuing to press for performance from its supplier. He asked whether Nipro proposed to terminate the contract and observed that the matter could be dealt with under the force majeure provisions of the contract. Mr Hammond replied on 14 July 2008 disputing the applicability of the force majeure clause and asking whether Nipro would be able to supply the full quantity, or any quantity, under the contract by the "due date" of 9 August 2008 (that being the last of the 180 days from 11 February 2008).
- [21] Mr Evans replied on 17 July 2008. He advised there was no certainty of supply by 9 August 2008 but that Interfert's supplier had indicated a "probable loading between the 2nd and the last week in August with delivery into Australia between the middle to the last week of September". That repeated the assurance given by the third party to Interfert earlier the same day. Mr Evans advised that Interfert would continue to press for the supply to be expedited but that there was no viable alternative of supply on the same or similar terms at the moment. Mr Evans again referred to the force majeure clause but did not invoke it. Mr Evans wrote that, "if Nipro's position is that it will suffer loss or damage and will seek (and/or attempt) to recover such from Interfert, Interfert will be left with no option but to either suspend performance or terminate." Mr Evans asked Nipro to "state clearly in writing its position on whether it wishes to continue with its contract and if so whether it is going to attempt to seek recompense as regards the delay (beyond the dates mentioned in the contract) in supply."
- [22] On 31 July 2008, by an email wrongly dated 26 September 2008, Mr Hammond stated that Interfert's position was unacceptable. He asked whether Interfert could supply by 9 August 2008, and, if not, whether it had an alternative proposal. Mr Hammond's email made it clear that Nipro continued to treat the contract as being on foot: he wrote, for example, that that the product "to be supplied under our

agreement is 4,000 metric tonnes of Prilled Urea.” On 31 July Mr Evans replied. He also treated the contract as remaining on foot. He wrote that the latest report from Interfert’s supplier was that the shipment would arrive in mid to late September 2008 and that Interfert “now elects to suspend performance until 30 September 2008”. Mr Evans concluded his email by noting that although Interfert’s supplier had been found to be unsatisfactory his contract of supply remained on foot and Interfert intended to hold him to it.

- [23] The third party failed to deliver to Interfert the shipment of prilled urea out of which Interfert had intended to supply Nipro. Interfert did not supply any prilled urea to Nipro. By Nipro’s solicitor’s letter to Interfert’s solicitor on 30 September 2008 Nipro gave notice that it terminated the contract for reasons which had been set out in Nipro’s claim and statement of claim filed on 9 September 2008.
- [24] In the period between February and September 2008 Nipro purchased from Interfert and others the amount of granulated urea that it required for its manufacturing needs in that period. Its purchase of the first 4,000 tonnes of that granulated urea between February and July 2008 cost it \$2,548,053.60.
- [25] The market continued to rise. Mr Hammond gave evidence with reference to Nipro’s financial records that after Nipro terminated the contract in September 2008 it purchased 4,000 tonnes of granulated urea between October and December 2008 at the total cost of \$3,537,975.20, that it needed to purchase that urea to fulfil its manufacturing requirements in that period, and that those purchases were made at less than the market price of granulated urea at that time. Interfert did not challenge that evidence. Although the trial judge made no specific finding about that evidence, his Honour recorded that each party accepted that Nipro’s loss should be measured with reference to the relevant prices paid by Nipro for granulated urea and that the market price continued to increase during 2008.¹²

Interfert’s appeal: construction of the force majeure clause

- [26] The force majeure clause provided:
 - “7. Notwithstanding anything else contained in this contract, neither party shall be liable for any delay in or failure to perform any of its obligations under this contract if such delay or failure is caused by circumstances beyond that party’s reasonable control, including without limitation, fire, flood, act of God, strikes, lock outs, stoppage of work, trade disputes, loss of banking facilities, non-supply to Interfert of Product or shipping services or any act of war or terrorism. On occurrence of any such event or condition, Interfert may:
 - (a) elect to suspend performance for such time as may be reasonable under the circumstances;
 - (b) reduce the quantities of Product to be sold and purchased hereunder by the amount affected by such event or condition;

¹² *Yara Nipro P/L v Interfert Australia P/L & Anor* [2009] QSC 314 at [61].

- (c) elect to terminate this contract if, in Interfert's opinion, such event or condition may materially impair the benefits of this contract to either Interfert or Customer;
- (d) allocate Product called for by this contract among Customer and Interfert's other contracted customers for such Product from the same shipment on any basis which Interfert may determine in good faith."

- [27] The relevant principles applicable in the construction of contracts are settled. The task is to determine what a reasonable person in the position of the parties would have understood the words of the contentious provision to mean, taking into account the contract as a whole and giving proper weight to the context in which the contract was made.¹³
- [28] The trial judge held that: the originally agreed date for delivery was 11 February 2008, it being a matter for Nipro as to the rate at which it removed the product from Geelong; after 11 February had passed the contract remained on foot, Nipro not being bound to terminate it;¹⁴ and Interfert's non-performance went beyond a failure to have the product ready for collection on 11 February 2008, its liability being for a failure to deliver at all.¹⁵ His Honour accepted that the third party's "non-supply to Interfert of Product" was a circumstance "beyond [Interfert's] reasonable control", but the trial judge was not persuaded that Interfert's failure to supply to Nipro was "caused by" that circumstance.¹⁶ The trial judge held that the meaning of the expression "caused by" in this contract is to be determined in accordance with the reasonable person's understanding of those words in the context in which they appear.¹⁷ The trial judge reasoned that because there was no evidence that Interfert was unable to fulfil its contract with Nipro by supplying the agreed quantity of prilled urea of Russian or Ukrainian origin from a source other than the third party, there was no evidence that, more probably than not, Interfert was unable to supply the product in accordance with its contract.¹⁸
- [29] Interfert accepted that, as the trial judge held, it bore the onus of proving that clause 7 relieved it of liability for its breach of contract.¹⁹ Interfert also accepted that there was no evidence that it was unable to fulfil its contract with Nipro by supplying the agreed quantity of prilled urea of Russian or Ukrainian origin from a source other than the third party. It did not seek to prove, as it had asserted in Mr Evans' email of 17 July 2008, that "[t]here is no viable alternative of supply on the same or similar terms at the moment". Interfert did not seek to prove that any issue associated with any alternative source of that product, or any feature associated with its contract with the third party, rendered it impossible,

¹³ See *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at [40]; *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109; *Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500 at 510.

¹⁴ The trial judge referred to *Sale of Goods Act* 1896 (Qld), s 14(1) and A.G. Guest (ed), *Benjamin's Sale of Goods* (7th Ed, 2006), at para 8-026.

¹⁵ [2009] QSC 314 at [56].

¹⁶ [2009] QSC 314 at [45] - [48].

¹⁷ [2009] QSC 314 at [49], citing *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235 per Spigelman CJ at [100].

¹⁸ [2009] QSC 314 at [47] - [58].

¹⁹ [2009] QSC 314 at [57].

impracticable, or even difficult for it to fulfil its obligations to Nipro. Rather, Interfert argued that the trial judge erred in failing to hold that the possible availability to it of an alternative source of supply was irrelevant. It argued that the relevant force majeure event was the third party's non-supply to Interfert, that the effect of that event on the arrangements Interfert had made to fulfil its obligations to Nipro was that Interfert was left without any prilled urea to supply to Nipro, and that the third party's default was for those reasons an effective cause of Interfert's non-performance of its obligations. Later in these reasons I refer to aspects of clause 7 which Interfert emphasised in support of those arguments.

- [30] Interfert argued that the relevant context included that Nipro, by Mr Hammond, assumed or inferred from email and telephone communications that Interfert's ability to supply Nipro under the contract would be dependent upon Interfert receiving the 12,000 tonne shipment from its supplier. The trial judge made no such finding. It is not justified by Mr Hammond's evidence in cross-examination that prilled urea was not commonly imported into Australia or bought or sold in the fertilizer industry in Australia in 2007 and 2008, that importation of prilled urea from Russia at that time was very uncommon, that it was something of a new venture for Interfert, and that Nipro anticipated that the 4,000 tonnes to be supplied under Interfert's contract would be supplied out of prilled urea originating in Russia. In support of the suggested finding, Interfert also referred the Court to the following passage in the cross-examination of Mr Hammond:

"I'm suggesting that you would infer from that e-mail, from the information in the e-mail you would infer that if this deal goes ahead and Nipro does take some tonnage under this proposal Interfert's ability to supply to Nipro would be dependent upon Interfert receiving delivery of the shipment from its supplier?-- I – clearly it's imported, you would assume that, yes."

The answer was not responsive to the question. In the 3 October 2007 email from Mr James-Martin to Mr Hammond which was referred to in the question, Mr James-Martin remarked that he had completed his negotiation to supply limited amounts of prilled urea into Australia and that "[s]uccessful talks with Interfert will enable a consistent supply of product to be available ex Geelong". Under the heading "Details", the email described prilled urea originating in Russia packed in 1,000 kilogram bulk bags and making up 12,500 tonnes "per vessel". The email also referred to the "first vessel" loading in mid November 2007. Neither that email nor any other communication suggested that Interfert's ability to supply depended upon it receiving one particular shipment. Nothing was said about the availability of the product from sources other than the supplier adverted to in Interfert's communications to Nipro. Clause 7 must be construed in the context that the parties did not advert to the question whether or not alternative sources of the specified product were available to Interfert.

- [31] Interfert emphasised that the trial judge accepted that the third party's non-supply was beyond Interfert's reasonable control, but that is not the test posed by the clause. The phrase "non-supply to Interfert of Product" does not direct attention only to the arrangements Interfert had made to obtain product from a particular supplier. The clause does not condition relief from liability for non-delivery upon "non-supply to Interfert of Product under a contract made by Interfert to acquire the Product from a third party for re-supply to Nipro" or any similar event. Interfert was required to go further and to prove that its non-delivery was "caused by

circumstances beyond [its] reasonable control” constituted by “non-supply to Interfert of Product”. In light of the generality of the latter expression, the requirement that Interfert’s failure to perform its contractual obligation was caused by circumstances beyond its reasonable control constituted by non-supply to Interfert was not satisfied merely by non-supply by a particular supplier upon which Interfert had originally relied. Had it been intended in that way to transfer from Interfert to Nipro the risk of loss of the contract on account of non-supply by one particular supplier chosen by Interfert, one would expect to see that expressed in clause 7. It is not, and no basis appears for any implication to that effect. Such a construction is also objectively unlikely when neither party adverted to any potential difficulty in Interfert finding an alternative source of supply, the identity of Interfert’s supplier was not disclosed to Nipro before the contract was made, the contract contained no requirement for timely disclosure to Nipro of details of the third party arrangement or any breakdown in it, and there was no other contractual mechanism to mitigate the risk which Interfert argued lay with Nipro.

- [32] That some of the force majeure events are applicable only to Interfert and that the second part of the clause confers its broad remedies only upon Interfert does not justify disregard of the expressed requirement that the failure or delay be caused by the relevant circumstance. It must be borne in mind that aspects of the first part of the clause apply also to Nipro. Thus, for example, on the construction advocated by Interfert, the loss of a particular banking facility organised by Nipro to pay for the Product would relieve Nipro of liability for non-payment even where an alternative banking facility was readily available to Nipro upon no less favourable terms. Reasonable contracting parties surely would not have intended that the expressed requirement of causation in clause 7 would be satisfied in such a case. Similarly, although clause 7 might apply in particular cases where the event interrupts Interfert’s arrangements, the clause does not make such an interruption conclusive, either as to delay or failure. If the delay or failure were avoidable by adoption of an available alternative it would be unreasonable to regard the delay or failure as having been caused by the particular impact.
- [33] The trial judge’s construction that clause 7 applies only where performance is impossible is not inconsistent with the condition in paragraph (c) of the second part of the clause (“in Interfert’s opinion, such event or condition may materially impair the benefits of this contract to either Interfert or Customer”). The fact that one of the listed events renders a particular contractual obligation impossible to perform does not necessarily mean that the benefits of this contract are materially impaired; that depends upon the nature of the particular obligation. Paragraph (c) serves the commercially useful purpose of limiting disputes about the materiality of the obligation that has been affected by the force majeure event. Nor does paragraph (d) infer that Interfert would not be liable for non-delivery of the full quantity contracted merely upon proof that the supplier to Interfert failed to ship sufficient product to meet Interfert’s contracted on-sales. The reference in paragraph (d) to “Product from the same shipment” does not exclude reference to a shipment from a supplier other than a supplier originally engaged by Interfert. Paragraph (d) is readily capable of application if the “same shipment” refers to the only shipment available to Interfert. We were referred to decisions in which the problem addressed by this paragraph had arisen,²⁰ but the form and structure of the force majeure clause in those cases differed markedly from clause 7.

²⁰

Tennants (Lancashire) Ltd v C S Wilson & Co Ltd [1917] AC 495; *Intertradex SA v Lesieur-Tourteaux SARL* [1978] 2 Lloyd’s Rep 509.

- [34] The trial judge referred to *P J van der Zijden Wildhandel NV v Tucker*,²¹ in which the relevant clause provided:

“Should the sellers fail to deliver the contracted goods or effect the shipment in time by reason of war, flood, fire, storm, heavy snow or any other causes beyond their control, the time of shipment might be extended, or alternatively a part or whole of the contract might be cancelled but the sellers have to furnish the buyers with a certificate attesting such event or events.”

- [35] The sellers invoked the clause in circumstances in which their supplier had defaulted. Donaldson J held that the sellers were unable to bring themselves within the wide words of the clause because all that they had been able to show was that the imports of the relevant product were much smaller in quantity than the amount the sellers were required to supply under their contracts. Because the sellers had failed to obtain a finding that they were unable to buy in the product from some supplier other than the one with whom they contracted they were unable to show that they were prevented from fulfilling their contract by a cause beyond their control.

- [36] *P J van der Zijden Wildhandel NV v Tucker* was cited with approval by the Privy Council in *Hoecheong Products Limited v Cargill Limited*²² where the sellers relied upon the following force majeure clause:

“Force majeure: Should [the sellers] fail to deliver the contracted goods or effect the shipment in time by reason of war, flood, fire, storm, heavy snow or any other causes beyond their control, the time of shipment might be duly extended, or alternatively a part/whole of the contract might be cancelled, but [the sellers have] to furnish [the buyers] with a certificate issued by China Council for the Promotion of International Trade (‘C.C.P.I.T.’) or an independent and competent Chinese authority attesting such event or events.”

- [37] Lord Mustill said:²³

“It is convenient to start by considering first what the sellers would have had to establish, to avoid liability, if the clause had ended with the words “a part/whole of the contract might be cancelled.” There was little, if any, conflict about this. The sellers would be required to show, first, that there had been an event of the kind stipulated by the clause operating at the relevant time; second, that this event had adversely affected the supply of the goods by the sellers; and third, that the sellers could not overcome this adverse effect by obtaining from a source other than the one which they had planned goods which matched the requirements of the contract. Authority for these propositions, if any is required, can be found in *Van Der Zijden v Wildhandel N.V. v. Tucker & Cross Ltd* [1975] 2 Lloyd’s Rep. 240, a decision on a virtually identical clause. As the result of findings in the courts below, against which there is no appeal, it is no longer disputed that all three requirements were satisfied by the evidence in the present case.”

²¹ [1975] 2 Lloyd’s Rep 240 at 240.

²² [1995] 1 WLR 404.

²³ [1995] 1 WLR 404 at 409.

- [38] *P J van der Zijden Wildhandel NV v Tucker* was also cited with apparent approval by Kiefel J, sitting as a single judge at the Federal Court in *Hyundai Merchant Marine Co Ltd v Dartbrook Coal (Sales) Pty Ltd*.²⁴ Her Honour observed that “[i]mpracticability of performance is not generally recognised as a ground of discharge of a contracting party’s obligations”.²⁵
- [39] Interfert argued that *P J van der Zijden Wildhandel NV v Tucker* should be distinguished on the ground that the clause construed by Donaldson J relieved from liability where performance was “prevented” by the supervening event rather than merely being “hindered” or “delayed” by that event. That clause was very similar to clause 7, in that it relieved the sellers of liability should they “fail to deliver the contracted goods or effect the shipment in time”. The context and the contract in that decision were sufficiently like those here to throw some light on what a reasonable person in the position of these parties would have understood clause 7 to mean.
- [40] Interfert argued that commercial buyers and sellers of an international commodity would wish to protect themselves against a situation in which arrangements put in place to facilitate the performance of their obligations broke down through no fault of the buyer or seller and even where it might be possible or even practicable for the buyer or seller to resort to alternative arrangements to fulfil the contract. In *Fairclough Dodd & Jones Ltd v JH Vantol Ltd*,²⁶ Lord Tucker said:
- “It seems to me quite natural that merchants should for their convenience make provision for what is to happen in the event of difficulties arising in the performance of their contracts, even if such difficulties are not such as to render performance impossible. Sellers, who for one of the specified causes are unable to make use of the vessel on which they intended to ship the goods, may have difficulty in making other arrangements and have to plan some way ahead.”
- [41] That observation was directed to a very different form of contract. The seller was obliged to supply the buyer with particulars of the relevant shipment with due despatch and within a fixed period from the date of the bill of lading and the force majeure clause provided a fixed period of extension to meet a situation in which that shipment was delayed by a force majeure event. There are no similar provisions in clause 7. It is not confined to shipping delays, it contains no provision for the details of Interfert’s supply or shipping arrangements to be conveyed to Nipro, and it requires that the delay or failure to perform a party’s obligations be “caused by” the force majeure event. Accordingly the decision in *Fairclough Dodd & Jones v JH Vantol Ltd* and Lord Tucker’s remarks do not advance Interfert’s argument. Its argument was also not advanced by other decisions which concerned force majeure clauses that dealt only with shipment and which contained indications that the parties had in mind a particular shipment arranged by the seller.²⁷

²⁴ (2006) 236 ALR 115 at 130.

²⁵ (2006) 236 ALR 115 at 130.

²⁶ [1957] 1 WLR 136 at 143.

²⁷ *European Grain & Shipping Ltd v J H Rayner & Co Ltd* [1970] 2 Lloyd’s Rep 239; *Koninklijke Bunge v Compagnie Continentale d’Importation* [1973] 2 Lloyd’s Rep 44 (Kerr J); *Tradax Export v Andre et Cie SA* [1976] 1 Lloyd’s Rep 416; *Intertradex SA v Lesieur-Tourteaux SARL* [1978] 2 Lloyd’s Rep 509.

[42] Interfert argued that numerous authorities supported the following rules of construction, though the rules might be displaced by the language of a particular force majeure clause:

1. In the “prevented” category of force majeure clauses, the force majeure clause is inapplicable where the supervening event did not affect all possible modes of performance.²⁸
2. In the “hindered” category of clause, it is not necessary to show that other means by which the party might have performed are rendered unavailable and it is enough that the manner in which the party had arranged to perform is impeded, impaired, or interfered with.²⁹
3. In the “delayed” category, if the impact upon arrangements made by a party to perform its obligations has caused performance to be delayed it is not necessary to show that there are no other means by which the party could have performed on time.³⁰

[43] If such an analysis were applicable I would not be convinced that so much of clause 7 as excuses liability for a party’s failure to perform a contractual obligation belongs to the “hindered” or “delayed” categories, rather than the “prevented” category, but the analysis is not applicable here. Many of the cited decisions concerned clauses similar to those construed in the cases cited in paragraph 41 of these reasons. None of them concerned force majeure clauses that were sufficiently similar to clause 7 to throw light upon its meaning. The exercise of categorising a large collection of contractual terms and then seeking to place the very different term in issue into one or other of the categories departs from the applicable principles of contractual construction. It is neither necessary nor appropriate to attempt to rationalize all of the decisions in order to determine the proper construction of clause 7.

[44] In my opinion the trial judge’s construction of clause 7 was correct. I would dismiss Interfert’s appeal.

Nipro’s cross appeal: the assessment of damages

[45] The trial judge found that Interfert’s breach was a wrongful neglect to deliver the goods, delivery in that sense requiring Interfert to make the product available to

²⁸ *Tennants (Lancashire) Ltd v C S Wilson & Co Ltd* [1917] AC 495 at 509, 518; *P J van der Zijden Wildhandel NV v Tucker* [1975] 2 Lloyd’s Rep 240; Guenter Treitel, *Frustration and Force Majeure* (2nd Ed, 2004), at para 12-023; H. G. Beale (ed), *Chitty on Contracts: Volume 2 Specific Contracts* (30th Ed, 2008), at para 14-141; A.G.Guest (ed), *Benjamin’s Sale of Goods* (7th Ed, 2006), at para 8-092.

²⁹ *Tennants (Lancashire) Ltd v C S Wilson & Co Ltd* [1917] AC 495 at 510, 522, 526; *Peter Dixon & Sons Ltd v Henderson Craig & Co* [1919] 2 KB 778; Guenter Treitel, *Frustration and Force Majeure* (2nd Ed, 2004), at para 12-024; H. G. Beale (ed), *Chitty on Contracts: Volume 2 Specific Contracts* (30th Ed, 2008) at para 14-143 and A.G.Guest (ed), *Benjamin’s Sale of Goods* (7th Ed, 2006), at para 8-094.

³⁰ *Fairclough Dodd & Jones v JH Vantol Ltd* [1957] 1 WLR 136 at 143-145; *European Grain & Shipping Ltd v J H Rayner & Co Ltd* [1970] 2 Lloyd’s Rep 239 at 246; *Koninklijke Bunge v Compagnie Continentale d’Importation* [1973] 2 Lloyd’s Rep 44 at 50-51; *Tradax Export v Andre et Cie SA* [1976] 1 Lloyd’s Rep 416 at 426-427; *Warinco v Mauthner (Fritz)* [1978] 1 Lloyd’s Rep 151 at 154; *Intertradex SA v Lesieur-Tourteaux SARL* [1978] 2 Lloyd’s Rep 509 at 518-519; *Sociedad Iberica de Molturacion SA v Tradax Export SA* [1978] 2 Lloyd’s Rep 545 at 553-554; H. G. Beale (ed), *Chitty on Contracts: Volume 2 Specific Contracts* (30th Ed, 2008), at para 14.144; Guenter Treitel, *Frustration and Force Majeure* (2nd Ed, 2004), at paras 12.028 and 12.029; A.G.Guest (ed), *Benjamin’s Sale of Goods* (7th Ed, 2006), at para 8-095.

Nipro at Interfert's Geelong premises.³¹ Nipro's cross appeal challenges the trial judge's assessment of damages for that breach of contract.

[46] The only component of the calculation of damages in issue is the amount to be allowed to Nipro as its cost of buying granulated urea in substitution for the prilled urea Interfert had contracted to provide. The trial judge allowed \$2,548,053.60 for alternative purchases against Nipro's claim on that account of \$3,537,975.20. There was no issue in the appeal about the calculation of either sum and each party accepted that Nipro's loss should be measured by the difference between the contract prices and the prices paid by Nipro for granular urea (subject to an allowance assessed by the trial judge at \$20 per tonne in Interfert's favour to reflect Nipro's greater cost of freighting and handling prilled urea). The issue concerns the time at which Nipro suffered its loss. Nipro's case was that the contract price should be compared with the costs of its purchases of granular urea between October and December 2008 after it had terminated the contract in September. Interfert's case was that the relevant comparator was the cost of Nipro's purchases between 11 February 2008 and July 2008. The price per tonne rose from about \$500 to \$900 between those periods.

[47] Section 50 of the *Sale of Goods Act 1895* (SA)³² provides:

“50 - Damages for non-delivery

- (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.
- (2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.
- (3) Where there is an available market for the goods in question the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver.”

[48] Neither party contended that there was an available market for the prilled urea. The applicable provision is therefore s 50(2), which effectively re-enacts the first limb of *Hadley v Baxendale*.³³

[49] At the trial Nipro argued that because it remained contractually bound until it terminated the contract in September 2008 its loss was the loss of a contract under which it was entitled to purchase the agreed quantity at the contract price, a loss it sustained upon termination. Nipro relied upon *Ogle v Earl Vane*.³⁴ In that case the

³¹ [2009] QSC 314 at [60], referring to *Sale of Goods Act 1896* (Qld), ss 30, 31(1).

³² Clause 14 of the contract provided that it was governed by and must be construed in accordance with the laws of South Australia. The trial judge referred to the *Sale of Goods Act 1896* (Qld) rather than the South Australian legislation but that is of no moment. There is no material difference between the two statutes.

³³ (1854) 156 ER 145: see *Francis v Lyon* (1907) 4 CLR 1023 per Isaacs J at 1042; Kenneth Sutton, *Sales and Consumer Law* (4th Ed, 1995) at p 629 (fn 104).

³⁴ (1868) LR 3 QB 272.

purchaser agreed to buy from the seller a quantity of iron by the end of a particular month. The iron was not delivered and at the seller's request the purchaser waited for more than six months, after which "he lost all patience and went into the market, and brought this action".³⁵ At the trial Baron Martin directed the jury as follows:

"When the time comes to complete a contract to supply goods and the vendor says "I cannot deliver," the damages are the difference between the market price when the contract is broken and the contract price. But if the vendor holds out that he will be able to deliver at some future time, and the vendee waits accordingly, there is no fresh contract, but the circumstance may be taken into consideration in ascertaining the damages, when the vendee goes into the market on the vendor turning out unable after all to deliver the goods."³⁶

- [50] The Court of Queen's Bench held that the direction was correct. Blackburn J held that although no fresh contract for an extension was made, the buyer's conduct in waiting for delivery of the goods at the request of the seller, "amounted to a postponement of the day at which he might go into the market, and at which the jury might calculate the measure of damages".³⁷ Lush J expressed the principle in similar terms.³⁸

- [51] That decision was affirmed in the Exchequer Chamber. Kelly CB (with whose reasons Channel B, Keating J, Montague Smith JJ, and, in a separate judgment, Willes J, agreed) said:³⁹

"It would be contrary to common sense and justice, when there has been a series of proposals by the defendant involving delay for his own benefit, and acquiescence on the part of the plaintiff, that because there may be no binding contract, varying the terms of the former contract, the plaintiff is to be tied down to the strict letter of the rule as to the measure of damages for the non-delivery of goods, and not be entitled to the damages consequent upon the delay."

- [52] The trial judge held that the principle did not apply. His Honour concluded that Nipro was acquiring "substitute urea" well before 30 September 2008; there was no evidence to suggest that Nipro's manufacture of liquid fertiliser was postponed or reduced because of the unavailability of the urea under the contract; because Nipro's practice was to acquire urea as and when it needed it for its manufacturing program and because it did not at any time in its purchases from 11 February 2008 acquire urea for less than the contract price, it should be inferred that the first 4,000 tonnes of granulated urea which Nipro purchased after 11 February 2008 was "effectively in substitution for what it would have taken from [Interfert] under the subject contract."⁴⁰ The trial judge held:

"By the actual purchases which it made after 11 February, it has demonstrated the amounts which it then required. Because the price

³⁵ (1867) LR 2 QB 275 per Blackburn J at 281.

³⁶ (1867) LR 2 QB 275 at 278-279.

³⁷ (1867) LR 2 QB 275 at 282.

³⁸ (1867) LR 2 QB 275 at 284.

³⁹ (1868) LR 3 QB 272 at 279.

⁴⁰ [2009] QSC 314 at [64].

in each case was higher than under this contract, it can be inferred that it would have taken the same quantities at the same time from the defendant had the prilled urea been available. Mr Hammond did not entirely accept the suggestion that the first 4,000 tonnes purchased after 11 February were in substitution for the prilled urea. But nor did he say that some of it, and if so how much, would have been purchased at that time in any case, i.e. absent the defendant's breach."⁴¹

- [53] The trial judge distinguished *Ogle v Earl Vane* on the ground that the buyer there waited until after termination of the contract before buying "substitute goods". His Honour thought that the present case was more like *Re Voss*,⁴² in which the buyer bought substitute goods in the market when the seller failed to deliver them.

Summary of the arguments in the appeal

- [54] Nipro argued that the trial judge was wrong to distinguish *Ogle v Earl Vane* and that the present case was not analogous to *Re Voss*. It argued that on the facts as found by the primary judge Nipro's purchases of urea before 30 September 2008 were not made in substitution for what it would have taken under the contract with Interfert. When Nipro made those purchases there was no reduction in the amount of prilled urea to be supplied under the contract with Interfert and the contract remained on foot.
- [55] Interfert argued that the trial judge's analysis was correct. It relied upon the trial judge's finding that the urea purchased by Nipro at the earlier time was a substitute for what it would have taken under the contract. It argued that Mr Hammond's evidence to the following effect supported the finding: Nipro was a manufacturer of fertiliser and it was always buying urea for use in that process; Nipro had intended to use the 4,000 tonnes of urea during the 180 day period commencing 11 February; when that did not arrive by 11 February Nipro was obliged to buy urea for its manufacturing requirements; it bought urea in the 180 day period in order to fill the gap left by non-delivery of the 4,000 tonne shipment; its purchases in that period were dictated by its requirements for manufacturing; those requirements were unaffected by the question whether the 4,000 tonne shipment arrived or did not arrive; the evidence demonstrated that Nipro's purchases of urea from 11 February 2008 reached 4,000 tonnes by 31 July 2008; and Mr Hammond agreed in cross-examination that the timing and quantities of the recorded purchases in that period allowed for the likely inference that it would have taken up the urea in the same way from the 4,000 tonne shipment had that been available on and from 11 February 2008. Interfert contended that the first 4,000 tonnes of urea purchased by Nipro after 11 February should therefore be characterised as purchases made to fill the gap left by non-delivery of the 4,000 tonne shipment. This conclusion was said to be reinforced by the dealings between Nipro and Interfert in which Nipro expressed its requirement for urea to continue its business and Interfert offered to sell and Nipro agreed to buy granular urea for that purpose at AUD \$580 per tonne.

Consideration

- [56] The trial judge's conclusion that Nipro's purchases between February and July should be regarded as substitutes for the contracted delivery for the purposes of assessing damages was not a finding of fact. It involved a legal conclusion based

⁴¹ [2009] QSC 314 at [64].

⁴² (1873) LR 16 Eq 155.

upon inferences drawn from the facts, which were themselves uncontroversial. The trial judge's conclusions as to the appropriate inferences must be respected but this Court is in as good a position as the trial judge to decide what inferences should be drawn and it must also decide upon the appropriate legal characterisation of the facts.⁴³

- [57] The evidence upon which Interfert relied justified the inference that Nipro's purchases of granulated urea between February and July fulfilled Nipro's manufacturing requirements in that period which otherwise would have been fulfilled from Interfert's delivery of prilled urea at the time specified in the contract. The trial judge also found that there was no agreed variation of the date by which the defendant was to deliver or the period during which the defendant was to take delivery.⁴⁴ It is nevertheless clear from the trial judge's other findings and the uncontroversial evidence that at Interfert's implicit request Nipro forbore from insisting upon delivery of the prilled urea on the due date under the contract on the footing that (as the trial judge also found⁴⁵) the contract remained on foot, and that until Interfert delivered the 4,000 tonnes of prilled urea under the contract Nipro would buy granulated urea to satisfy its manufacturing needs. Nor was there any challenge to Mr Hammond's evidence that when Interfert failed to deliver at the later time Nipro was required to buy and did buy 4,000 tonnes of granulated urea at the higher prices then prevailing in order to meet its manufacturing requirements at that time.
- [58] In my respectful opinion, on those facts this case falls squarely within *Ogle v Earl Vane*. That decision has long been regarded as authority for the proposition that where the time fixed for delivery is postponed at the seller's request, but the seller fails to deliver the goods at or before the postponed date of delivery, the buyer's damages for non-delivery should be assessed on the basis of the market price at the latter date.⁴⁶ The application of the decision in this case accords with principle. In assessing damages for breach of contract the innocent party should be put into the position that it would have been in had the defaulting party performed the contract.⁴⁷ Consistently with that principle, the general rule is that damages are assessed as at the date of breach; but that general rule may be departed from where that is necessary properly to compensate the innocent party.⁴⁸ *Ogle v Earl Vane* reflects the unsurprising view that it is in the interests of justice to assess damages at a time later than the date of breach where the innocent party acts upon the request of the party in breach to wait to see whether that party will deliver at the later date.
- [59] A number of different rationales for the rule have been identified, each of which is satisfied in this case. In *Toprak v Finagrain*⁴⁹ Robert Goff J considered that where

⁴³ *Warren v Coombes* (1979) 142 CLR 531 at 551; *Fox v Percy* (2003) 214 CLR 118 at 126-127.

⁴⁴ [2009] QSC 314 at [62].

⁴⁵ [2009] QSC 314 at [56].

⁴⁶ See *Blackburn Bobbin Co Ltd v T W Allen & Sons Ltd* [1918] 1 KB 540 per McCardie J at 554. See also A.G.Guest (ed), *Benjamin's Sale of Goods* (7th Ed, 2006), at para 17-011; Harvey McGregor, *McGregor on Damages*, (18th Ed, 2009), at para 20-018. See also *Hickman v Haynes* (1875) LR 10 CP 598.

⁴⁷ *Wenham v Ella* (1972) 127 CLR 454.

⁴⁸ *Johnson v Perez* (1988) 166 CLR 351 per Mason CJ at 355-356; per Wilson Toohey and Gaudron JJ at 367; per Deane J at 380; per Dawson J at 386 (referring to *Ogle v Earl Vane*).

⁴⁹ [1979] 2 Lloyd's Rep 98. It was not necessary for the Court of Appeal to consider this issue, because Lord Denning MR, with whose judgment Roskill and Cumming-Bruce LJ agreed, inferred that there was an extension of time for performance of the contract; but Roskill LJ added that he would have had been content to adopt "Mr Justice Robert Goff's admirable judgment as my own": [1979] 2 Lloyd's Rep 98 at 117.

there was no variation of the terms of the contract nor any waiver or estoppel but the innocent party had forborne to act at the request of the party in default, the innocent party's entitlement to damages with reference to the higher market price was explicable by the general principle of English law that, where one party acts at the request of another party, then, in the absence of circumstances indicating a contrary intention, the party who so acted is entitled to be indemnified by the party who requested him so to act against the consequences of so doing. An alternative explanation is that the rationale lies, "in the enquiry: at what date could the plaintiff reasonably have been expected to mitigate the damages by seeking an alternative to performance of the contractual obligation?"⁵⁰ Whatever may be the underlying rationale of the rule it is entrenched as an aspect of the assessment of damages. In *Agricultural & Rural Finance Pty Ltd v Gardiner*⁵¹ Gummow, Hayne and Kiefel JJ referred to the statement by Lord Wilberforce in *Johnson v Agnew*⁵² that *Ogle v Earl Vane* was authority for the following statement:

"In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost."

- [60] In my respectful opinion this case is not within *Re Voss*.⁵³ In that case the contract required the seller, a manufacturer of iron, to deliver 20 tonnes of two different products every month. In some months no delivery was made and in others the delivery was deficient. By the time of the seller's liquidation the price of iron had risen and the buyer claimed to prove in the seller's liquidation for a sum equal to the difference between the contract price and the market price at the date of the petition for liquidation. The proof was rejected on the ground that it could only be made as to the deficiency in each monthly delivery for the difference between the contract price and the market price at the end of the month in which delivery ought to have been made. The evidence demonstrated that the buyer had bought some iron in the market from time to time in consequence of the seller's non-delivery or short delivery under the contract. Bacon CJ distinguished *Ogle v Earl Vane* on the ground that the evidence shows, "that the vendees went into the market, not when the insolvency of the vendors happened, but from time to time as they required it, and bought some iron; and as to that they have a right, on the clearest principles, to claim as a debt the difference between the price they contracted to pay and that which they were obliged to pay to some other vendor. There was no such purchase in *Ogle v. Earl Vane*."⁵⁴

- [61] Interfert contended for the same point of distinction in this case. It should be noticed, however, that Bacon CJ went on to observe that even if there had been a purchase by the vendees, "still that would have been, as Baron *Martin* said, a matter for the jury to take into consideration upon all the circumstances of the case." It is evident that Bacon CJ did not find any request by the seller for the purchaser to

⁵⁰ *Radford v De Froberville* [1978] 1 All ER 33 at 56; [1977] 1 WLR 1262 at 1285, discussed by Mason CJ in *Johnson v Perez* (1988) 166 CLR 351 at 357.

⁵¹ (2008) 238 CLR 570 at 596.

⁵² [1980] AC 367 at 401. See also H. G. Beale (ed), *Chitty on Contracts: Volume 2 Specific Contracts* (30th Ed, 2008), at para 26-064.

⁵³ (1873) LR 16 Eq 155.

⁵⁴ (1873) LR 16 Eq 155 at 159.

forbear from insisting upon timely delivery. That was the ground upon which an appeal from the decision was dismissed:⁵⁵ James LJ (with whose reasons Mellish LJ agreed) pointed out that, “there is not a particle of evidence of forbearance on the part of the purchasers at the request of the vendor”. That was also the case in *Brown v Muller*⁵⁶ and *Roper v Johnson*,⁵⁷ in which it was held that the proper measure of damages for non-delivery under a contract for delivery by instalments was the sum of the differences between the contract price and the market prices as at the relevant dates for delivery for each instalment. The absence of any forbearance by the purchaser at the request of the seller is, in my respectful opinion, the substantial point of distinction between *Re Voss* and *Ogle v Earl Vane*.

- [62] There was such a request and forbearance in this case. Furthermore, when the parties acquiesced in the deferral of the delivery of the prilled urea it was made clear in their communications that their contract remained on foot for the delivery of the full amount of the contract quantity at a later time even though Nipro would buy granulated urea to fulfil its manufacturing requirements in the meantime. The pattern of the parties’ dealings was set by the conversation of 22 January 2008 and it was confirmed by Mr Evans’ email of 4 February 2008, in which Interfert itself foreshadowed Nipro’s need to buy granulated urea pending the anticipated late delivery of the prilled urea, “to get you through”. The parties therefore dealt with each other on the basis that the granulated urea was **not** a substitute for the delivery of prilled urea under the contract. That is consistent also with the absence of any contemporaneous suggestion that Interfert should supply the granulated urea at a price commensurate with the contract price for prilled urea. The same pattern continued after 9 May 2008, when Mr Evans in terms adverted to the fact that the price for granular urea was rising. The parties’ communications thereafter remained consistent only with the view that each of them regarded Interfert as remaining obliged to deliver and Nipro to accept the whole contract tonnage at a later date. This attitude continued as late as Mr Evans’ email of 31 July 2008 in which, in response to Mr Hammond’s insistence upon supply under the contract of 4,000 tonnes of prilled urea, Interfert purported to suspend performance of that obligation until 30 September 2008. It must have been obvious that if Interfert failed to deliver the prilled urea at the later time Nipro would be required to purchase the necessary 4,000 tonnes of granulated urea at the price then prevailing. The market price for granulated urea having risen, it would be manifestly unjust in these circumstances to limit the assessment of Nipro’s damages by reference to the cost of its purchases at the price prevailing earlier in the year.

Nipro’s appeal against refusal of leave to appeal against the costs order

- [63] The trial judge refused Nipro’s application under s 253 of the *Supreme Court Act* 1995 (Qld) for leave to appeal against the costs order in favour of Interfert.⁵⁸ Nipro has appealed against that decision. It contends that this Court should set aside the trial judge’s refusal of leave to appeal and instead grant leave to appeal, allow that appeal, set aside the trial judge’s costs order, and order Interfert to pay Nipro’s costs upon the claim and counterclaim.
- [64] In view of my conclusion that Nipro’s cross appeal should be allowed, with consequential revision of the trial judge’s costs orders, it is not strictly necessary to

⁵⁵ (1873) LR 16 Eq 155 at 162 (note).

⁵⁶ (1872) LR 7 Ex 319.

⁵⁷ (1873) LR 8 CP 167.

⁵⁸ Transcript, 5 March 2010.

determine Nipro's appeal. I will nevertheless record my reasons for rejecting Nipro's argument that the trial judge erred in refusing to grant leave to appeal against his Honour's costs order in favour of Interfert.

- [65] Upon the trial judge's findings the event favoured Interfert: Nipro's claim was dismissed after allowing for the uncontested set off of Interfert's counterclaim and Interfert was also the successful party on its counterclaim, with a net judgment in its favour. In ordering Nipro to pay Interfert's costs of the claim and counterclaim the trial judge applied a principle expressed in previous decisions,⁵⁹ which Nipro does not challenge, that ordinarily a successful party is not denied its costs because it has succeeded on one argument and not on an alternative case. The trial judge noted that the procedural rules in Queensland⁶⁰ may provide a wider discretion than the previous rules⁶¹ but there must still be a basis for departing from the ordinary rule that costs should follow the event. His Honour concluded that the fact that Interfert unsuccessfully argued that the force majeure clause was a complete defence did not justify such departure when it succeeded in making out a complete defence to Interfert's claim. The trial judge also recorded that the costs orders sought by Interfert accorded with the outcome in *Hanak v Green*.⁶²
- [66] In subsequently refusing leave to appeal against that costs order, the trial judge applied the principle that leave should not be given unless there is an arguable case, that applying the principles of *House v King*,⁶³ the discretion will be overturned on appeal.⁶⁴ The trial judge held that none of the many grounds set out in Nipro's proposed notice of appeal raised a fairly arguable basis for interfering with the exercise of the discretion. Nipro contended that the trial judge erred in so holding and incorrectly found that Interfert succeeded on each of the claim and counterclaim.
- [67] It has been said that the powers of a Court of Appeal to entertain an appeal against the refusal of leave are "extremely limited".⁶⁵ Certainly Nipro assumed a heavy burden in seeking to establish that the discretion under s 253 of the *Supreme Court Act 1995* (Qld) miscarried, for as Keane JA (as Keane CJ then was) observed in *Morrison v Hudson & Anor*.⁶⁶

"Whether leave to appeal should be granted will usually depend on the primary judge's view as to the balance of competing arguments, whether those arguments relate to matters of legal principle or disputed questions of fact, the importance and difficulty of such arguments, and, on occasion, the amount of money involved."

⁵⁹ *Australand Corporation (Qld) Pty Ltd v Johnson & Ors* [2007] QSC 128 at [17]; *Todrell Pty Ltd v Finch (No 2)* [2008] 2 Qd R 95 at [21]; *BHP Coal Pty Ltd and Ors v O & K Orenstein & Koppel AG and Ors (No 2)* [2009] QSC 64.

⁶⁰ UCPR r 681(1) by which ordinarily costs should follow the event; r 684(1), which provides that an order may be made for the costs of the "particular question in, or a particular part of, a proceeding"; and r 684(2) which provides that a court may declare "what percentage of the costs of the proceeding is attributable to the question or part".

⁶¹ *Todrell Pty Ltd v Finch (No2)* [2008] 2 Qd R 95 at [13].

⁶² [1958] 2 QB 9.

⁶³ (1936) 55 CLR 499.

⁶⁴ *Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors* [2003] QSC 484 per Chesterman J at [41]; *AGL Sales (Qld) P/L v Dawson Sales P/L & Ors* [2009] QCA 262 at [50].

⁶⁵ *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 WLR 394 at 403, cited with approval in *Barameda Enterprises Pty Ltd v O'Connor* [1988] 1 Qd R 359 at 370 by Kelly SPJ.

⁶⁶ [2006] QCA 170 at [24].

- [68] Although Interfert expanded upon the grounds of its proposed appeal against the costs orders, it did not direct any detailed argument to the threshold question whether the discretion of the trial judge to refuse leave to appeal miscarried. The only error of principle for which it contended was that the trial judge treated *Hanak v Green* as establishing a legal principle that ought to be applied in all such cases of equitable set-off. It is quite plain that the trial judge did not do so. Nipro also argued that the costs order was unreasonable or plainly unjust for various reasons: Nipro succeeded and Interfert failed on the “substantive issue at trial”; the *Trade Practices Act* 1974 (Cth) counterclaim was based on substantially the same facts as the claim for breach of contract; Nipro admitted the counterclaim; and the quantum of its damages had to be assessed by the court. There is, however, no reason to think that the trial judge overlooked these arguments. The trial judge expressly took into account Nipro’s success and Interfert’s failure on the force majeure issue, but his Honour was not bound to treat that as decisive. Nipro’s other proposed grounds of appeal either duplicated those points or raised only questions of the weight to be attributed to particular factors. None of its arguments approached the demonstration of error in the trial judge’s decision to refuse leave to appeal.
- [69] Because I have concluded that Nipro’s costs appeal lacked substantial merit, I would order it to pay Interfert’s costs of that appeal even though the appeal was rendered unnecessary by Nipro’s success on its cross appeal.

Disposition

- [70] Nipro contended that it should be given judgment for \$821,676.88, calculated as follows:

Alternative urea	\$3,537,975.20
Less price paid under Supply Agreement	\$1,804,004.91
Less Handling	\$ 80,000.00
	\$ 989,921.60
<u>Plus deposit</u>	<u>\$ 176,000.00</u>
Loss	\$1,829,970.29
<u>Less Amount owed to defendant</u>	<u>\$1,008,293.41</u>
Total Loss	\$ 821,676.88

- [71] In the event that Nipro succeeded on its cross appeal, Interfert did not challenge the appropriateness of allowing \$3,537,975.20 as Nipro’s cost of buying 4,000 tonnes of granulated urea during October to December 2008 instead of the \$2,548,053.60 allowed by the trial judge as the cost of Nipro’s purchases of granulated urea between February and July 2008. Of the other figures in the above calculation the only difficulty concerns the deduction for the amount owed to Interfert of \$1,008,293.41. That is the amount of the judgment in favour of Interfert against the third party, which included amounts that have no obvious relevance to Interfert’s counterclaim.⁶⁷ The amount allowed on the counterclaim for principal should comprise the unpaid cost of Nipro’s purchases from Interfert. Nipro also claimed interest. Neither party challenged the trial judge’s selection of 1 July 2008 as an appropriate commencement date for the calculation on the total cost of Nipro’s unpaid purchases and 12 per cent as the appropriate rate in relation to both claim and counterclaim⁶⁸ and I would adopt those components, but there are two

⁶⁷ See *Yara Nipro P/L v Interfert Australia P/L & Anor* [2009] QSC 314 at [83].

⁶⁸ *Yara Nipro P/L v Interfert Australia P/L & Anor* [2009] QSC 314 at [75], [78].

remaining points. First, the date for the commencement of interest upon Nipro's damages must be fixed. Secondly, interest on the amount of Nipro's deposit of \$175,000 might also be allowed, presumably from 1 October 2008, the day after Nipro terminated the contract. The parties' submissions did not address the appropriateness of the deduction of \$1,008,293.41 or the commencement dates for interest. I would allow them the opportunity to reach agreement or, failing agreement, to make a submission in those respects and as to the calculation of the amount of the judgment to be given in Nipro's favour.

[72] Interfert should be ordered to pay Nipro's costs of the claim, Interfert's appeal, and Nipro's cross appeal. I would give the parties leave to make a submission about the costs of the counterclaim.

[73] I note that the third party was not a party to the appeal and that Interfert did not submit that it should have the amount of its judgment against the third party increased to reflect any success by Nipro on its cross appeal.

Proposed orders

[74] I would make the following orders:

1. Dismiss the appeal in Appeal No 12074 of 2009.
2. Allow the cross appeal in Appeal No 12074 of 2009, set aside the orders made by the trial judge on 30 September 2009 dismissing the plaintiff's claim and giving judgment for the defendant on the counterclaim for \$77,058.65 and the order made by the trial judge on 5 February 2010 ordering the plaintiff to pay the defendant's costs upon the claim and counterclaim, and instead order that:
 - (a) The defendant is to pay the plaintiff an amount to be fixed by the Court.
 - (b) The defendant is to pay the plaintiff's costs of the claim, to be assessed on the standard basis.
 - (c) Unless the Court is earlier notified that the parties have agreed upon the appropriate orders, each party has leave to make one concise submission in writing within 7 days of the date of delivery of this judgment as to the amount to be fixed by the Court under paragraph (a) to reflect the Court's reasons in that respect and as to the costs of the counterclaim.
3. The appellant/cross respondent is to pay the respondent/cross appellant's costs of the appeal and cross appeal in Appeal No 12074 of 2009, to be assessed on the standard basis.
4. The appeal in Appeal No 2349 of 2010 against the order refusing leave to appeal made by the trial judge on 5 March 2010 is dismissed with costs to be assessed on the standard basis.

[75] **Ann LYONS J:** I agree with the reasons of Fraser and Muir JJA and with the orders proposed by Fraser JA.