Federal Court of Australia

MCL Pty Ltd v The Agency Group Australia Ltd (No 3) [2021] FCA 1241

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| File number: |  |
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| Judgment of: | **COLVIN J** |
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| Date of judgment: | 14 October 2021 |
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| Catchwords: | **CORPORATIONS** - cross-claim for enforcement of payment of fees and interest under terms of agreement - where parties entered into agreement for cross-claimant to advance finance to cross-respondent - where agreement provides for payment of fees by borrower in circumstances of withdrawal from agreement - where no funds advanced by cross-claimant - whether cross-claimant exercised contractual right to withdraw from agreement on basis of due diligence issues or breach of exclusivity provision by cross-respondent - whether exercise of contractual right to withdraw triggers liability for payment of fees by borrower - alternatively whether liability for payment as to one type of fee arose upon entry into agreement - whether agreement void by reason of mutual abandonment of agreement - application allowed to limited extent |
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| Legislation: | *Personal Property Securities Act 2009* (Cth) |
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| Cases cited: | *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99  *Bibby Financial Services Australia Pty Ltd v Sharma* [2014] NSWCA 37  *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2005] NSWCA 248  *Cedar Meats (Aust) Pty Ltd v Five Star Lamb Pty Ltd* [2014] VSCA 32  *CIC Insurance Ltd v Bankstown Football Club Inc* (1995) 8 ANZ Ins Cases 61-232  *Clifton (Liquidator) v Kerry J Investment Pty Ltd trading as Clenergy* [2020] FCAFC 5  *Concut Pty Ltd v Worrell* [2000] HCA 64  *DTR Nominees Pty Ltd v Mona Homes Proprietary Ltd*  (1978) 138 CLR 423  *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; (2017) 261 CLR 544  *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640  *Fazio v Fazio* [2012] WASCA 72  *Gange v Sullivan* (1966) 116 CLR 418  *GC NSW Pty Ltd v Galati* [2020] NSWCA 326  *Hampton v BHP Billiton Minerals Pty Ltd [No 2]* [2012] WASC 285  *Havenbar Pty Ltd v Butterfield* (1974) 133 CLR 449  *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; (2001) 210 CLR 181  *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32; (2019) 267 CLR 560  *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; (2000) 203 CLR 579  *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457  *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20; (2015) 229 FCR 221  *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39  *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104  *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17  *Quinn Villages Pty Ltd v Mulherin* [2006] QCA 433  *Rudi's Enterprises Pty Ltd v Jay* (1987) 10 NSWLR 568  *Ryder v Frohlich* [2004] NSWCA 472  *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359  *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245  *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418  *Waterman v Gerling Australia Insurance Company Pty Ltd* [2005] NSWSC 1066; (2005) 65 NSWLR 300  *Westralian Farmers Ltd v Commonwealth* (1936) 54 CLR 361  *Williams v Frayne* (1937) 58 CLR 710 |
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| Number of paragraphs: | 196 |
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| Date of last submissions: | 28 April 2021 (Cross‑Claimant) |
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| Date of hearing: | 14, 15 & 23 April 2021 |
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| Counsel for the Cross‑Claimant: | Mr PT Russell |
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| Solicitor for the Cross‑Claimant: | Ashurst Australia |
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| Counsel for the Cross‑Respondent: | Mr AJ Papamatheos |
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| Solicitor for the Cross‑Respondent: | Tottle Partners |

ORDERS

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|  | | WAD 7 of 2021 |
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| BETWEEN: | MCL PTY LTD (ACN 638 967 218)  Cross-Claimant | |
| AND: | THE AGENCY GROUP AUSTRALIA LTD (ACN 118 913 232)  Cross-Respondent | |

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| order made by: | COLVIN J |
| DATE OF ORDER: | 14 OCTOBER 2021 |

THE COURT ORDERS THAT:

1. Within 21 days each of the parties do file a minute of the orders sought to give effect to the reasons for judgment together with an outline of submissions of no more than five pages and any further affidavit on the questions of interest and costs.
2. Within 10 days thereafter each party do file any submissions in reply of no more than five pages together with any further affidavit on the questions of interest and costs.
3. Subject to further order, the final orders be determined on the papers.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

COLVIN J:

1. MCL 105 Pty Ltd (**MCL**) is one of a number of companies that form what is described as the Magnolia Capital Group. Mr Mitchell Atkins is the sole director of MCL. He says that the activities of Magnolia Capital Group include raising capital from its network of investors (described as high net worth individuals and large corporations) and on-lending those funds.
2. The Agency Group Australia Limited (**The Agency**), is a listed public company. Its activities include the management of rental properties. It maintains a record of the properties and rents that it collects (or rent roll) and earns management fees many of which are a percentage of rent collected. At the time of relevant events, Mr Atkins was a director of The Agency. Other directors of The Agency included Mr Paul Niardone (Managing Director) and Mr Andrew Jensen (Chairman and Chief Operating Officer).
3. The present proceedings concern a cross-claim advanced by MCL in response to a claim made in this Court by The Agency. The principal claim by The Agency has been resolved. The cross-claim was heard separately and these reasons are confined to the issues raised by the cross-claim. The cross-claim concerns an agreement made in February 2020 by which MCL agreed to provide finance to The Agency. No funds were ever advanced by MCL to The Agency. Nevertheless, MCL says that The Agency is liable to pay certain fees to MCL under the terms of the agreement. The fees claimed are an establishment fee, a due diligence fee, an early withdrawal fee, legal fees, search fees and interest on those amounts. MCL maintains that those fees are due and payable. Its total claim is for about $400,000 plus interest.
4. Broadly speaking, The Agency says that MCL never had the funds to provide the finance as agreed and that the agreement (a) was terminated by MCL on 1 May 2020; (b) alternatively, was abandoned by the parties at the time; or (c) otherwise came to an end according to its terms. It says that whatever the precise legal characterisation of the events that have occurred, the fees claimed are not payable.
5. By the time of closing submissions, MCL accepted that as at 1 May 2020 it did not have the capital for the loan to be made under the agreement. Even so, it maintains that (a) MCL withdrew from the agreement as it was entitled to do, particularly in circumstances where it says there had been inadequate responses to due diligence inquiries; or (b) it was terminated because The Agency entered into a mandate with another party to raise funds in breach of an exclusivity provision in the agreement with MCL. It says that in either case The Agency is liable to pay the fees claimed. There is an alternative claim that certain 'Upfront Fees' were payable in any event.
6. It can be seen that it is common ground that the agreement is at an end. The dispute between the parties concerns whether the circumstances in which the agreement came to an end mean that the fees provided for in the agreement are due and payable by The Agency to MCL.
7. It is convenient to start with the terms of the agreement. Ultimately, the competing cases as to the proper construction of the agreement did not depend in any relevant respect upon matters of context. Both parties advanced their position as to the proper interpretation of the relevant provisions of the agreement on the basis of its terms as expressed.

## Relevant principles as to the proper construction of the agreement

1. There was no dispute as to the principles to be applied in determining the meaning of the agreement. They are well known and for present purposes may be summarised as follows:
2. It is necessary to ask what a reasonable businessperson would have understood the terms to mean. Consideration must be given to the language used and the commercial purposes or objects secured by their contract and they must be given a businesslike interpretation: *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 640 at [35]; and *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104 at [46]‑[52].
3. The task should be approached on the basis that the parties intended to produce a result that makes commercial sense given the evident commercial object: *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* [2017] HCA 12; (2017) 261 CLR 544 at [17]. However, care must be taken to ensure that it is the evident commercial object that is being given effect recognising that minds may differ as to the commerciality of a particular outcome: *Maggbury Pty Ltd v Hafele Australia Pty Ltd* [2001] HCA 70; (2001) 210 CLR 181 at [43]. There is a difference between resolving an ambiguity in language so as to avoid a construction which is commercially unreasonable or plainly inconsistent with the evident commercial object of the instrument and choosing between alternatives on the basis of a sense of commercial fairness. The task of the Court is to construe the words used not to remake the commercial bargain. Therefore, reasoning by reference to commerciality has its limits and must conform to any contrary intention expressed in the instrument: *Mount Bruce* at [51].
4. The Court should construe commercial instruments fairly and broadly without being too astute or subtle in finding defects: *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99 at 109‑110. Commercial instruments should be interpreted in a practical and realistic way, not by adopting an overly theoretical approach: *McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; (2000) 203 CLR 579 at [22], [81], [197].

## The terms of the agreement

1. The agreement took the form of a letter from 'Magnolia Credit' to The Agency. The letter enclosed a term sheet and an annexure setting out Standard Terms and Conditions. The letter was dated 30 January 2020. It began as follows:

Magnolia Private Capital Pty Ltd via its nominated entity, MCL … is pleased to advise you that your application for finance has been approved on the terms detailed within this Letter, the **attached** Term Sheet and its Annexures (**Offer**).

1. The letter went on to say that once the Offer had been executed, 'you will be bound by the terms but note that we will not have any obligation to provide finance until and unless the formal loan and security documentation have been executed and all obligations under those documents have been complied with'.
2. The Offer as described was accepted by The Agency executing a form of acceptance provided at the end of the Offer. The form of acceptance stated, amongst other things:

We hereby accept the terms and conditions set out in this Offer and its incorporating Annexures.

1. The result of the use of the term 'Offer' in this way is that, somewhat awkwardly, it comes to be the term used to describe both the offer made by MCL and the agreement created by the acceptance of that offer. Indeed, in submissions for the parties the term 'Offer' was used to refer to the agreement. Consistently with this approach, the Standard Terms and Conditions included as an annexure to the letter contain the following provision in cl 1(b):

The Lender is offering to enter into an agreement with the Borrower comprising of the following documents that are set out in the Lenders Offer terms (which we describe as the, 'Term Sheet', 'the loan', 'the Offer', 'Offer terms' or 'these terms'):

i. the cover letter;

ii. the Loan Summary/Term Sheet;

iii. this Annexure;

iv. any other document which is annexed to or referred to in the Loan Summary or this Annexure; and

v. any other document which the Lender notifies to the Borrower as being part of the Offer.

1. Therefore, when it comes to the Standard Terms and Conditions (see below), it is important to bear in mind that the capitalised term Offer refers to the offer prior to its acceptance as well as to the agreed terms once there is acceptance (that is, the agreement created by acceptance of the offer).
2. The Term Sheet (also described as Annexure 1) included the following terms:
3. The date of offer was specified as 30 January 2020.
4. The Lender was specified as MCL 'and related entities (or its nominee)'.
5. The Borrowers were specified as The Agency and group subsidiaries.
6. The loan amount was specified as:

Up to $15,000,000 subject to LVR condition to be advanced in two tranches:

1. Tranche A - capped at $12,300,000.00;

2. Tranche B - capped at $2,700,000.00.

1. Financial Close was specified as '31 March 2020 and subject to the conditions of this Offer'.
2. The purpose of the loan was stated as to Tranche A to refinance existing Macquarie Bank debt and for working capital purposes and as to Tranche B to be used for working capital, to be approved by the Lender.
3. There were provisions as to interest that applied based upon the LVR which was specified as:

As at the drawdown date, the Facility Limit must be no more than 60% of the current market value of the Rent Roll of the Borrower Parties to be calculated based on the prior 3 month rolling average of the rent roll to the satisfaction of the Lender.

1. There was a summary of the estimated security which included an estimated value of the Rent Roll of $23,500,000 and a specified LVR at 60% showing a corresponding estimated loan amount of $14,100,000. The estimate referred to 'ASX 4C announcement date 30 January 2020'.
2. There were a number of special conditions including:

1. Lender to be satisfied with the most recent monthly Rent Roll Report;

…

12. any other conditions precedent usual for a facility of this type and nature.

1. There were a number of matters listed as 'Information Undertakings' as follows:

1. a copy of the Borrower's Rent Roll Book Report detailing amongst other things, the number of properties managed, the number of properties with rental arrears, the average management fee %, number of landlords and average weekly rent, the property management and other income received each month;

2. a copy of the Borrower's Recipient Created Tax Invoice (RCTI) received by the Borrower from the Aggregator and an electronic excel copy of the commission payments each month;

3. Updated report relating to achievement of KPIs by the Borrower and each Guarantor and statement of Rent Roll figures required for the calculation of the LVR to be provided within 5 days of month end and updated monthly financial statements for the Borrower to be provided within 14 days of month end; and

4. any other information that the Lender requires.

1. There were specified Loan Fees and Charges expressed as follows:

**Establishment Fee** - a fee to be paid by the Borrower to the Lender as an establishment fee for this loan. The Establishment Fee is due and payable by the Borrower on the occurrence of Financial Close. The Establishment Fee is to be capitalised at the commencement of the initial term of the loan.

**2.0% of the Facility Limit**

**Withdrawal Fee** - a fee to be paid by the Borrower in the event that the Borrower **does not** proceed with the loan after issue of final execution copies of Loan Documentation on usual terms for a facility of this type and nature and negotiated in the usual course (and after provision of valuation that is reasonably satisfactory to the Borrower)

**1.0% of the Facility Limit**

**Early Withdrawal Fee** - a fee to be paid by the Borrower in the event the Borrower does not proceed with the loan after the Offer is accepted in accordance with clause 9 of Annexure 2

**0.5% of the Facility Limit**

**Loan Documentation Fee** - a fee to be paid by the Borrower to us (or our solicitor) for the loan documentation that has been prepared for this Loan. This fee is payable at or prior to the entry into this loan or the advance by the Lender of the Loan Amount. This fee is only an estimate and may vary depending on the actual cost charged by our solicitor.

**At Cost**

**Due Diligence Fee** - a non-refundable fee to be paid by the Borrower to the Lender. This fee is due by the Borrower on execution of this Offer and will be payable on the sooner of Financial Close of the Debt Facility or termination of this Offer.

**$10,000**

**Annual Review Fee** - a fee that may be charged by the Lender to the Borrower on each anniversary date from Financial Close. This is payable immediately upon of the upon demand by the Lender.

**2.00% of the outstanding balance**

**Minimum Interest Amount** - the Lenders must earn a minimum interest amount equivalent to 12 months interest on each drawdown.

**12 months interest**

1. It is the Establishment Fee, Due Diligence Fee, Early Withdrawal Fee and the Loan Documentation Fee that are relevant for present purposes. It should be noted that the Term Sheet did not simply specify the amounts that were applicable for each of these fees. It also specified the circumstances in which each fee would be payable. That is to say, it set out operative terms that would determine when liability to pay the fees would arise.
2. The Standard Terms and Conditions were included as a separate annexure to the letter. They set out detailed provisions in terms that were generic in the sense that they did not refer to MCL or The Agency by name and contained no provisions that were specific to the circumstances of the particular funding referred to in the letter.
3. The **Interpretation** provision of the Terms and Conditions stated that terms italicised in the Term Sheet will have the same meaning when used in the Standard Terms and Conditions (cl 1(a)). However, terms are only italicised in the Standard Terms and Conditions and it appears that the intention was for those italicised terms to refer to the Term Sheet. So, for example, the term 'Magnolia, we, us' is defined to mean 'the *Lender or its nominee*'. The term 'Borrower Parties' is defined to mean 'the *Borrower* and any Guarantor'. The term 'Upfront Fees' is defined to mean 'the *Establishment Fee, Due Diligence Fee and Risk Fee*'. Each of these (and other) italicised terms in the Terms and Conditions are terms that are set out in the Term Sheet.
4. As to **Loan document preparation**, the Standard Terms and Condition provide (cl 5(a) and (b)):

At your expense we will instruct our solicitor to prepare all loan and security documentation ('**the Formal Loan Documents**') which will contain the provisions that we require.

By signing the Offer you authorise us to instruct our solicitor to proceed with the preparation of the loan documentation and acknowledge that all fees, costs and outlays charged by our solicitor are immediately payable by you upon demand by our solicitor, even if the loan does not proceed for any reason whatsoever (including withdrawal by the Lender).

1. As to **Upfront Fees**, the Standard Terms and Conditions provide (cl 7):

a) We require you to pay the non-refundable *Upfront Fees* upon signing the Offer.

b) If we agree to defer the *Upfront Fees* until drawdown of the loan, the *Upfront Fees* are payable by you whether or not the loan proceeds (whether or not it is you or us that withdraws from this loan).

c) Valuations and Formal Loan Documents may not be ordered until the *Upfront Fees* are paid by you (or deferred in accordance with the preceding paragraph).

1. As to **Withdrawal of the offer** by MCL, the Standard Terms and Conditions provide (cl 8):

(a) We may withdraw or revoke the Offer at any time if:

i. settlement is not affected [sic] within 7 days of acceptance of this Offer;

ii. circumstances or facts arise or come to our attention which, in our opinion may be prejudicial to our interests or result in a situation where it would, in our opinion, be uncommercial to provide the loan pursuant to the Offer.

b) You agree that we shall incur no liability whatsoever to you if we withdraw or revoke the Offer.

1. At this point it may be noted that the terms of cl 8 do not confer a general contractual right on the part of MCL to withdraw. Instead, cl 8 takes the form of specifying particular circumstances in which MCL 'may' (that is, at its discretion) withdraw or revoke the Offer.
2. It is clear from its terms that cl 8 is dealing with instances that include where MCL withdraws after the Offer has been accepted because it refers to withdrawal within seven days of acceptance of the Offer. The use of the term 'withdraw' does suggest that cl 8 is conferring a unilateral right, despite acceptance of the Offer, to bring to an end the effect of its acceptance. It appears that the potential to 'revoke' the Offer would apply even before acceptance. The provision (unlike most of the provisions in the Standard Terms and Conditions) appears to be using the term Offer in both senses (the offer extended by the sending of the letter and the Offer being the agreement brought into existence by its acceptance). In consequence, cl 8(b) would operate to relieve MCL of any liability where there was a revocation of the Offer before its acceptance.
3. It must be doubtful whether, in the particular circumstances of this case, the right specified in cl 8(a)(i) would arise because of the express provision in the Term Sheet that Financial Close is '31 March 2020 and subject to the conditions of this Offer' (being a date many weeks after acceptance). However, that is not an aspect that was in issue between the parties because no reliance was placed by MCL upon the terms of cl 8(a)(i). Rather, the claim made by MCL was that it was entitled to withdraw under cl 8(a)(ii) and that it did so.
4. Clause 8(a)(ii) enabled MCL to withdraw based upon its opinion as to the commerciality of proceeding based upon facts and circumstances known to MCL. Also, it is to be noted that cl 8(a)(ii) is dealing with circumstances that provide a foundation for the formation of the opinion that it would be 'uncommercial to provide the loan pursuant to the Offer'. It is not dealing with circumstances where MCL is unable to provide the loan because it does not have the funds to do so. Therefore, cl 8 is not a provision that might be relied upon by MCL to withdraw from its agreement to provide finance to The Agency on the basis that it did not have the funds to advance. As we will see, the terms of cl 9(g) are consistent with this position because they provide that The Agency is not liable to pay the fees if the 'Facility' is exclusively cancelled because the Lender did not have the capital to fund the loan.
5. The precise scope of what may be embraced by the term 'commercial' was not explored by the parties. MCL maintained that concerns were raised in the course of its due diligence and it was those matters that caused it to exercise its right to withdraw under cl 8. The Agency disputed those claims as a matter of fact.
6. However, the scope of the circumstances in which cl 8 permitted withdrawal by the Lender may assume significance for the overall construction of the Terms and Conditions because of the claim by MCL that it was entitled to payment of fees if it withdrew under cl 8. As is considered below, the broader the circumstances in which MCL may withdraw then perhaps it may be said to be less likely that the parties intended that it conferred a right to withdraw on the basis that The Agency must still pay some or all of the fees provided for in the Offer. In that regard, it may be significant that cl 8(b) provides that there will be no liability on the part of MCL if it withdraws, but there is no reference in cl 8 to the Borrower being liable for fees if the Lender withdraws. Whether that is so is addressed below.
7. Finally, it may be noted that cl 8 does not itself contain any provision for the payment of fees in consequence of withdrawal under that clause.
8. Next, there is cl 9. It is at the heart of the issues in dispute. It is expressed as follows (including the heading):

**Costs if you withdraw [from] the Offer after acceptance [of] the Offer.**

a) Once you accept this Offer you agree that you cannot withdraw from the Offer without our prior written consent.

b) If, after you accept this Offer, the Offer is withdrawn prior to the Formal Loan Documents' being issued then you agree to pay on demand:

i. any unpaid *Upfront Fees* (if any);

ii. the *Valuation Fee*;

iii. the full amount of the *Loan Documentation Fee*;

iv. any other costs and expenses incurred by the Lender including (but not limited to) any costs incurred as referenced in the Special Conditions; and

v. 33% of the *Early Withdrawal Fee*.

c) If, after you accept this Offer, the Offer is cancelled after the Formal Loan Documents have been issued but before the final execution version of the Formal Loan Documents are issued, then you agree to pay on demand:

d) any unpaid *Upfront Fees*;

i. the *Valuation Fee*;

ii. the full amount of the *Loan Documentation Fee*;

iii. any other costs and expenses incurred by the Lender including (but not limited to) any costs incurred as referenced in the Special Conditions; and

iv. 100% of the *Early Withdrawal Fee*.

e) If, after you accept this Offer, the Offer is cancelled after the final execution version of the Formal Loan Documents are issued but before the Loan Amount has been deposited into trust, then you agree to pay on demand:

i. any unpaid *Upfront Fees*;

ii. the *Valuation Fee*;

iii. the full amount of the *Loan Documentation Fee*;

iv. any other costs and expenses incurred by the Lender including (but not limited to) any costs incurred as referenced in the Special Conditions; and

v. 100% of the *Withdrawal Fee*.

f) If the Offer is cancelled by you after the Loan Amount has been deposited into trust, which will not occur without the consent of the Borrower, then you agree to pay on demand:

i. any unpaid *Upfront Fees*;

ii. the *Valuation Fee*;

iii. the full amount of the *Loan Documentation Fee*;

iv. any other costs and expenses incurred by the Lender including (but not limited to) any costs incurred as referenced in the Special Conditions;

v. 100% of the *Withdrawal Fee*; and

vi. the costs of funds fee, which is the cost incurred by us in obtaining the loan amount from our investors which is equal to one months' interest at the normal interest rate.

(collectively '**the Costs**')

g) You agree that you are liable to pay the Costs on demand even if we have agreed to defer the payment of any of the Costs until drawdown of the loan amount, unless it can be demonstrated by the Borrower that the Facility was exclusively cancelled because the Lender did not have the capital to fund the Loan, in which case the Borrower will be reimbursed the Costs.

h) You agree that the Costs are a genuine pre-estimate of the loss that we will suffer if you withdraw from the Offer.

i) You agree that should the Costs not be paid within 7 days of being invoiced or demanded, the Costs will attract interest at 15% per annum.

j) You agree that you will be liable for all recovery costs, including legal fees, on an indemnity basis, should the Costs not be paid within 7 days of invoicing.

1. Plainly there is an error in the paragraph numbering at cl 9(d) and its provisions should form part of cl 9(c).
2. It may also be noted that the Standard Terms and Conditions provide that headings are for reference only and are not intended to affect the construction or interpretation of the agreement.
3. One of the main issues between the parties concerning the construction of cl 9 is whether it applies to a case where MCL as Lender withdraws from the Offer, particularly if MCL withdraws in the exercise of the rights conferred by cl 8.
4. Of course, cl 9 must be read in the context of cl 8 which, as has been noted, deals with withdrawal or revocation by MCL. Clause 9 begins by stating in sub-clause (a) that withdrawal from the Offer (that is, the agreement) by the Borrower requires the consent of MCL. This suggests a focus upon the circumstances in which the Borrower may withdraw. If so, having dealt with withdrawal by MCL in cl 8, the Standard Terms and Conditions then deal with withdrawal by the Borrower.
5. Thereafter, the sequence of provisions in cl 9 (noting that (d) is part of (c)) is as follows:
6. (b) deals with withdrawal prior to Formal Loan Documents being issued;
7. (c) deals with cancellation after Formal Loan Documents have been issued but before the final execution version of those documents;
8. (e) deals with cancellation after the final execution version but before the Loan Amount has been deposited into trust; and
9. (f) deals with cancellation 'by you' after the Loan Amount has been deposited into trust.
10. The evident scheme of the provisions is that they provide for a greater burden of fees the later the occurrence of the withdrawal or the cancellation in the course of performance of the Offer.
11. Different terminology is used in sub-clause (b) compared to the other sub-clauses. It uses the term 'withdrawn', being the same terminology used in cl 8. Thereafter, the term 'cancelled' is used in the various sub-clauses up until sub-clause (h). It refers to the identified 'Costs' being a genuine pre-estimate of the loss that the Lender will suffer 'if you withdraw from the Offer'.
12. For reasons explained below, the reference to Costs is to the fees that are to be paid under any of the sub-clauses (b) to (f). In that context, there are two points to be made about the way sub‑clause (h) is expressed. First, it uses the term withdraw from the Offer to refer to Costs that are to be paid under provisions that are expressed to apply if the Offer is 'cancelled'. This mixing of terminology indicates that the terms are used without discrimination. Second, and significantly, it refers to pre-estimate of loss 'if **you** withdraw from the Offer' (emphasis added). The reference to 'you' is to the Borrower (that is, The Agency). The language of cl 9(h) of 'you withdraw' may be contrasted with the language of cl 8 of 'We may withdraw'. It is consistent with the language of cl 9(a) 'you cannot withdraw'. Therefore, the provision appears to contemplate, at least, that the agreement about genuine pre-estimate of loss binds the Borrower and not the Lender. However, it is equivocal as to whether the earlier provisions giving rise to the liability to pay the Costs also contemplate their application in the case of withdrawal by the Lender. As has been indicated, that aspect is addressed below.
13. Although different terminology is used ('withdrawn', 'cancelled', 'cancelled by you') the sequence of the provisions would indicate to a reasonable reader that it is dealing with the same type of activity at different stages. It would not be logical if each stage in the sequence was referring to a different type of activity. Commercially unlikely consequences would follow. For example, if there was a material distinction between the terms withdrawal or cancellation then it would mean, for example, that if there was a cancellation that was not a withdrawal that occurred prior to formal loan documentation then there would be no provision that would apply. There is no apparent reason why there would be such a distinction that would leave a gap in the application of the clause. It would mean that there was a liability to pay upon withdrawal by the Borrower (which can only occur with consent of MCL) but no provision that would apply in the event of a cancellation by the Borrower.
14. Further, it would be illogical if cl 9(b) applied to withdrawal by either MCL or by the Borrower, but later provisions referring to cancellation did not. There is no evident reason why the staged character of the clause would not apply. In short, its structure indicates that either the whole of cl 9 applies to withdrawal by either party or the whole of the provision is confined to the Borrower.
15. There are other aspects of cl 9 which point to its application to withdrawal (or cancellation) by either party.
16. Firstly, there is the reference in cl 9(f) to 'cancelled **by you**'. It may be contrasted with the earlier sub-clauses where the reference is simply to 'is cancelled'. This difference suggests that the earlier parts of the provision apply to cancellation by either party but cl 9(f) is dealing only with cancellation by the Borrower. The proposition that the language is significant is supported by the whole of the opening language to cl 9(f) which is as follows:

If the Offer is cancelled by you after the Loan Amount has been deposited into trust, which will not occur without the consent of the Borrower, then you agree to pay on demand [the Costs].

1. The words 'which will not occur without the consent of the Borrower' hark back to cl 9(a). Those words appear to be included to remind the reader of the Standard Terms and Conditions that the cancellation of the Offer by the Borrower can only occur with the consent of the Lender. This appears to be a further instance that indicates that the terms 'cancelled' and 'withdraw' are used interchangeably.
2. Notably, similar language to that contained in the opening words of sub-clause (f) is not to be found in the earlier sub-clauses which simply refer to the Offer being cancelled. The difference suggests that the earlier provisions were expected to apply to cancellation by the Lender as well as cancellation by the Borrower with the requisite consent.
3. Secondly, there is the language used in cl 9(g). For convenience of reference, I will set it out again. It says:

You agree that you are liable to pay the Costs on demand even if we have agreed to defer the payment of any of the Costs until drawdown of the loan amount, unless it can be demonstrated by the Borrower that the Facility was exclusively cancelled because the Lender did not have the capital to fund the Loan, in which case the Borrower will be reimbursed the Costs.

1. Sub-clause (g) creates an obligation to pay the Costs unless the cancellation of the Offer was because MCL as the Lender did not have the funds (in which case there would be a reimbursement). The terms of cl 9(g) and the nature of the qualification reinforce a construction of cl 9 to the effect that the reference to '(collectively '**the Costs**')' at the end of sub-clause (f) refers to the costs that are payable as described in each of the preceding sub‑clauses (see below). It would be odd if the obligation to pay the Costs on demand subject to the qualification only applied to the case described in cl 9(f). There is no evident commercial reason why it should only arise in such a case, particularly as cl 9(f) deals with an instance where the Loan Amount has been deposited into trust. It would confine the operation of cl 9(g) to those instances where the qualification would not apply.
2. Clause 9(g) goes on to provide that there is no liability to pay the Costs if the Borrower could demonstrate that the cancellation of the facility was because the Lender did not have the capital to fund the loan. A qualification of that kind suggests that it may be the Lender who has cancelled and the Borrower is being provided with the benefit of a qualification to the circumstances in which it would have to pay the Costs. If indeed the Lender (MCL) does not have the money then it is difficult to see how that would lead to the Borrower (The Agency) as distinct from the Lender cancelling the Offer and being liable to pay the Costs specified in the clause as a result.
3. Turning attention then to the end of cl 9, it has a series of provisions which are expressed as 'you agree' (see sub-clauses (g) to (j)). Although, each of those provisions applies only to the Borrower they do so in a way that could deal with consequences of cancellation by either party. They each apply to 'the Costs' being a term that is defined at the end of sub-clause (f). The defined term 'Costs' is set out at the end of sub-clause (f) using the words '(collectively "**the Costs**")' suggesting it applies to the list of costs in that sub-clause. However, it is to be noted that the list in sub-clause (f) encompasses the full set of costs referred to in earlier provisions. Given the form of cl 9 as a whole it would be odd if the protections afforded by sub-clauses (g) to (j) were confined to the circumstances addressed by sub-clause (f). There is no evident commercial purpose that would be served by confining them to cl 9(f). They apply equally to instances in which there was a liability to pay by operation of sub-clauses (b) to (e).
4. The manner in which cl 9(h) operates has already been addressed.
5. For those reasons, the terms in which sub-clauses (g) to (j) are expressed apply to the Costs in the earlier sub-clauses and reinforce the conclusion that sub-clauses (b) to (f) are dealing with the same type of activity (whether it be described as withdrawal or cancellation) occurring at different stages of the process of performing the Offer.
6. On that approach, the fees (or, as described in the clause, the Costs) that the Borrower must pay increase the further along the process of performance of the terms of the Offer that there is a cancellation. Which is the final aspect of the clause to be considered in determining whether it applies to cancellation by either party or just to cancellation by the Borrower. The scheme of increasing costs to be paid by the Borrower is consistent with either construction, provided the alternative where it applies to the Lender is limited to instances where the Lender is exercising rights under cl 8 and those rights are reasonably confined. A confined application of the circumstances in which it was 'uncommercial' to proceed because of facts that arise or come to the attention of the Lender would mean that it would be commercially logical for the Borrower to bear the Costs as provided for in cl 9.
7. It can be seen that not all incidents of cl 9 point in the same direction when it comes to its construction. However, in the result the distinct language used in cl 9(f) which is not to be found in the other provisions is the most significant aspect of the clause. It makes clear that it is the only provision that applies only to cancellation by the Borrower.
8. For those reasons, the provisions of cl 9 (other than cl 9(f)) should be construed as applying to withdrawal or cancellation by the Lender in the exercise of the contractual right conferred by cl 8 or by the Borrower with the consent of the Lender as required by cl 9(a). As to the need for consent if the Borrower is withdrawing or cancelling, there is no indication that the provisions in sub-clauses (b) to (e) were intended to confer a contractual right on the part of the Borrower to withdraw with the consent of the Lender. Any such withdrawal would be in breach of the Terms and Conditions and would not be the kind of circumstance provided for by cl 9. In such a case, MCL would have its contractual remedies for breach of contract. The assessment of damages is likely to be undertaken by reference to the fees that would be payable if there had been withdrawal or cancellation with consent as required by cl 9. However, MCL would not be confined to claiming the fees. These matters need not be explored further because, as is explained below, the claim by MCL was confined to a claim to the fees in accordance with the terms of the Offer. There was no claim to damages.
9. Therefore, the terms of cl 9(g) mean that there is an expressly agreed contractual liability to pay the Costs as specified in the relevant sub-clause if MCL exercised its right to withdraw under cl 8 of the agreement. Further, if such a right is exercised then there is no liability to pay the Costs and any Costs that have been paid must be reimbursed in any case where the Borrower can demonstrate that 'the Facility' was cancelled only for the reason that the Lender did not have the capital. The reference to 'exclusively cancelled' for that reason is to be noted. For a party in the position of The Agency to claim that it should not bear the Costs it must be shown that the lack of capital to fund the Loan was the only reason for the cancellation. Otherwise, if the cancellation is the act of the Borrower then there is a liability to pay the Costs on demand.
10. The next provision of relevance is cl 10(a) of the Terms and Conditions. It provides that the Borrowers will deal exclusively with MCL. It is expressed in the following terms:

The Borrower Parties agrees to deal exclusively with us in relation to any type of debt finance arrangement similar to the Offer and no other arrangers, advisors, brokers, financiers or other parties will be appointed, employed, solicited or briefed to approach, procure, structure or negotiate the [sic] any of the funding set out in this Offer while this engagement remains in existence.

1. The reference to 'debt finance arrangement similar to the Offer' is to be noted. The exclusivity provided for is confined by that language.
2. As to breach of the exclusivity provision, cl 10(c) of the Terms and Conditions provides:

In the event of any breach of this provision this will constitute an automatic default of this Offer and the terms contained herein, and the Lender will thereby be entitled to withdraw and/or revoke the Offer and thereafter the provisions of this agreement, including clause 9, will apply.

1. Finally, it may be observed that there is a no waiver provision in cl 23.
2. Clause 27(b) of the Terms and Conditions provides as follows:

Any advance of the Loan Amount is conditional upon complete satisfaction of the loan, security and any other matters we consider are important in our absolute discretion.

1. Reliance was placed upon that provision to support the actions of MCL in terminating the agreement. Precisely what was to be made of that provision was not articulated. It is a provision that should be considered in its immediate context. Clause 27(a) provides:

This is not an unconditional Offer for financial accommodation and should not be relied upon as such by any party.

1. Clause 27(c) provides:

The Offer is a brief summary of facility terms and the full terms will be outlined in the formal loan documents.

1. It may be noted that these provisions appear to emphasise that there will be more detailed provisions in the loan documentation to be provided and that the agreement that comprises the Offer is concluded on that basis. However, there was no claim by either party that that the agreed terms lacked the requisite certainty to be enforceable. Indeed, the claim by MCL presupposed that the Offer was enforceable according to its terms. Therefore, in context, the terms of cl 27(b) do no more than state, in effect, that the agreement is to be more fully documented and MCL reserved the right to include further matters of usual detail. It is necessary to read the terms of cl 27(b) in that way in order for the Offer to be binding as the parties evidently intended.

## The significance of the use of the term 'withdrawal' in the Offer

1. It was submitted for MCL that the references in cl 8 and cl 9 of the terms and conditions to the term 'withdraw' (and also to 'revoke the Offer' and to the Offer being 'cancelled') were references to termination of the Offer by any means. In other words, on a proper construction of the Offer, the liability to pay the Costs as specified in cl 9 arose irrespective of the manner in which or basis upon which the Offer was terminated. For the following reasons, that contention should not be accepted.
2. Clause 8 and cl 9 set up a regime that deals with the circumstances in which each of MCL (as lender) and The Agency (as borrower) may withdraw.
3. In the case of MCL it may withdraw if the events specified in cl 8 occur. It may also revoke the Offer in any such case. In context, those additional words are dealing with an instance where the terms have been offered but have not yet been accepted. Those words make clear that the offer (in terms of the Offer) may be withdrawn before acceptance. This may occur despite the fact that the offer is available for written acceptance for 14 days from 30 January 2020 (as stated in the last sentence of the letter that forms part of the Offer). Significantly, cl 8 does not refer to breach by The Agency, whether anticipatory or actual. It identifies only particular circumstances in which MCL may 'withdraw'.
4. In the case of The Agency it can only withdraw with consent of MCL: cl 9(a). Again there is no reference to termination for breach.
5. For reasons that have been given, if there is withdrawal as permitted by these contractual provisions then, depending on the time when such withdrawal occurs, the relevant provision in cl 9 concerning the Costs that The Agency is liable to pay are applicable.
6. It is well established that clear words are needed to rebut the presumption that a contracting party does not abandon general law remedies for breach of contract: *Concut Pty Ltd v Worrell* [2000] HCA 64 (Gleeson CJ, Gaudron and Gummow JJ) at [23]. It is most unlikely that the Costs provided for in cl 9 were to be paid by The Agency in the event that it terminated the Offer for breach by The Agency and there could otherwise be no claim for damages consequent upon termination for breach by MCL. Put another way, the terms in which cl 9 are expressed do not amount to clear words by which The Agency abandoned its general law right to damages consequent upon termination for breach. The same may be said as to MCL.
7. Therefore, cl 8 and cl 9 do not amount to an abandonment of general law remedies on termination. Those remedies remain.
8. The next question is whether cl 8 and cl 9 provide for remedies that apply irrespective of whether termination occurs in the circumstances provided for in those clauses. If that were the case then termination on grounds not specified would result in a liability on the part of The Agency to pay the Costs as specified, irrespective of the manner and circumstances of termination. However, the provisions deal expressly with the circumstances in which there may be 'withdrawal'. It is only in those circumstances that the contractual liability to pay the Costs arises.
9. The language of withdrawal is used to refer to the extent to which there is an express contractual right for either party to bring the contract to an end. In the case of MCL that is where the condition expressed in cl 8 is met and in the case of The Agency where MCL consents. Otherwise, the words 'withdrawn' and 'cancelled' are used interchangeably to refer to the exercise of the contractual rights conferred by cl 8 and cl 9. This can be seen in the terms of cl 9(g) which uses the term 'cancelled' to refer to conduct that may be taken under cl 9(b) (withdrawn) and cl 9(c) (cancelled) and cl 9(f) (cancelled by you). Likewise, cl 9(h) uses the term 'withdraw' in a provision about the Costs being a genuine pre-estimate which applies to those same provisions in cl 9.
10. In consequence, in order to establish a liability to pay the Costs under cl 9(g), a party must demonstrate that there has been a withdrawal in the exercise of the particular contractual rights conferred by the Offer. Those rights are withdrawal by MCL as provided for in cl 8 (relevantly when facts or circumstances have come to the attention of MCL which, in its opinion may be prejudicial to the interest of MCL or result in a situation where it would be uncommercial to MCL to provide the loan) or withdrawal by The Agency where MCL has consented to withdrawal by The Agency. In addition there is the withdrawal provided for by the exclusivity provision (cl 10(c)).
11. Termination of the Offer by any other means, including termination for default or anticipatory breach or mutual abandonment will not give rise to a liability to pay the Costs under cl 9(g).

## The significance of the reference to 'automatic default' in cl 10(c) of the Offer

1. As has been noted, cl 10(c) provides that cl 9 applies in the circumstances there described. It deals with the consequences of a breach of the exclusivity obligation stated in cl 10(a). It states that a breach of the exclusivity obligation 'will constitute an automatic default of this Offer' and that MCL 'will thereby be entitled to withdraw and/or revoke the Offer' and the provisions of cl 9 will apply. Expressed in those terms it provides a further circumstance in which MCL may withdraw (in the sense that has just been described). Again, it is not dealing with rights that apply as a consequence of all forms of termination. It is dealing with a particular instance.
2. The use of the term 'automatic' suggests the possible engagement of the principles concerned with contractual provisions that purport to bring about the end of a contract upon the happening of a specified event. However, it is to be noted that cl 10(c) deals with 'automatic default' not with automatic termination. The expressed consequence of such an 'automatic default' is that MCL has an entitlement to withdraw or revoke the Offer. The provision does not state that the breach brings about the automatic end of the Offer. Rather, it makes clear that a breach of the exclusivity provision is in all instances and without more a default. Further, the contractual right to withdraw (leading to the liability on the part of The Agency to pay the Costs) may arise if there was such a default.
3. Therefore, a breach of the exclusivity provision does not bring the Offer to an end nor does it automatically give rise to a liability to pay the Costs under cl 9. Rather, there must be an act by MCL exercising the contractual right to withdraw from the Offer which, if exercised, will give right to an entitlement to the Costs.
4. Even if cl 10(c) was expressed in terms that suggested that the Offer came to an automatic end or was void if there was a breach of the exclusivity provision then it is unlikely that the provision would be construed as being self-executing. Provisions of that kind are usually construed as rendering the contract voidable at the instance of the party not responsible for the fulfilment of the condition: *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 440‑441; *Gange v Sullivan* (1966) 116 CLR 418 at 441; *Havenbar Pty Ltd v Butterfield* (1974) 133 CLR 449 at 456-457, noting the reasoning in *Rudi's Enterprises Pty Ltd v Jay* (1987) 10 NSWLR 568 at 579 and *MK & JA Roche Pty Ltd v Metro Edgley Pty Ltd* [2005] NSWCA 39 at [42]‑[47] to the effect that *Suttor* does not establish a principle of general application (approved by Brereton J in *Waterman v Gerling Australia Insurance Company Pty Ltd* [2005] NSWSC 1066; (2005) 65 NSWLR 300 at [47]‑[51]) and the views of Edelman J to similar effect in *Hampton v BHP Billiton Minerals Pty Ltd [No 2]* [2012] WASC 285 at [144]‑[148] and the apparent contrary view in *Quinn Villages Pty Ltd v Mulherin* [2006] QCA 433 at [41]-[53].
5. In my view, cl 10(c) does not manifest an intention that there be an automatic termination of the Offer in the event of a breach of the exclusivity provision. The language does not support that conclusion. It would give rise to the unreasonable consequence that the loan could be made by MCL only to find that the agreement to lend has been automatically terminated.
6. It follows that the contractual consequence of a liability on the part of The Agency to pay the Costs as provided for in cl 9 will only arise under cl 10(c) if MCL exercises its contractual right to withdraw based on that provision.

## The case as advanced by MCL

1. MCL claims that it commenced carrying out due diligence from about 14 February 2020. It says that by about April or May 2020 circumstances or facts came to the attention of MCL which led it to form the requisite opinion under cl 8(a)(ii). It also says that in or about April 2020, The Agency breached the exclusivity provision by soliciting from and entering into a mandate with Canaccord Genuine Capital Markets (**Canaccord**) to act as a corporate advisor in respect of debt financing and potential equity raising.
2. MCL pleads that at a board meeting of The Agency on 1 May 2020 (being a meeting attended by Mr Atkins and other directors of The Agency):
3. the Agency withdrew from the Offer or the Offer was withdrawn pursuant to cl 9 of the Terms and Conditions;
4. further or alternatively, MCL was entitled to withdraw and/or revoke the Offer pursuant to cl 10(c) of the Terms and Conditions (being the exclusivity provision) and did so; and
5. further or alternatively, MCL was entitled to withdraw or revoke the Offer pursuant to cl 8(a)(ii) of the Terms and Conditions and did so.
6. It may be noted that these claims do not involve any allegation that there was some form of automatic termination of the Offer. Nor is it claimed that there was some later act (after the meeting) by which MCL is alleged to have withdrawn from or revoked the Offer. Nor is it claimed that there was an exercise of a common law right to terminate. The claim in each case is that The Agency or MCL withdrew from or revoked the Offer (that is, exercised the express contractual right to do so) and that it did so at the board meeting on 1 May 2020. Ultimately, in closing, the case for MCL was put on the basis that it was Mr Atkins who terminated the Offer at the board meeting. Therefore, it is only that aspect of the claim that needs to be considered.
7. There is an alternative claim pleaded that MCL pursued its due diligence after 1 May 2020 and there were breaches of the exclusivity provision thereafter by The Agency in obtaining finance from Peters Investments Pty Ltd (**Peters**) and the parties took no further steps under the Offer to advance the provision by MCL of finance to The Agency and the loan did not proceed. MCL claims also to have invoiced The Agency on 26 November 2020 by tax invoice for the fees claimed and to have done so pursuant to cl 9(b) of the Terms and Conditions. Based on those pleas, MCL alleges in its claim that in all those circumstances, the Offer was withdrawn and that fees are payable as claimed in the November invoice. However, ultimately these alternatives were not pressed because, as has been noted, in closing MCL claimed only that the Offer came to an end at the board meeting of the Agency on 1 May 2020.
8. There is a further alternative claim that The Agency is liable to pay what it is alleged to be Upfront Fees on the basis that those fees were payable in any event.
9. Significantly, the claim advanced by MCL is confined to a claim for identified amounts provided for by the terms of the Offer that are said to be due and payable. There is no claim for damages for alleged breach of the Offer. In the course of opening, counsel for MCL sought to articulate a claim based upon alleged repudiation of the Offer by The Agency. It was brought to the attention of counsel that the claim as pleaded was only for liquidated sums as identified in the agreement between the parties. It was indicated at that point that the matter might be discussed between counsel. However, it was not raised again as a basis for the claim made by MCL. Counsel for The Agency relied upon the absence of any claim that the agreement between the parties had been terminated by MCL accepting an alleged repudiatory breach by The Agency. That was said to be significant when it came to a proper characterisation of how the agreement was terminated. It will be necessary in due course to address that aspect of the case. Otherwise, the claim by MCL was a claim for amounts alleged to be due under the agreed terms of the Offer.

## The defences advanced by The Agency

1. The Agency claimed that there was no entitlement to the payment of fees upon signing of the Offer. This contention responds to the alternative claim made under cl 7 of the Terms and Conditions to the payment of Upfront Fees. As has been noted it required the payment of 'non‑refundable *Upfront Fees* upon signing the offer'. For various reasons it was claimed that, as a matter of proper construction of the Offer, there were no such Upfront Fees.
2. It was separately claimed for The Agency that on a proper construction of the Offer, the fees listed in the Term Sheet were only payable on financial close which had not occurred. Alternatively, it was said that on the proper construction of cl 9(b) it only applied to withdrawal by The Agency and there was no such withdrawal because MCL terminated, repudiated or renounced the Offer at the meeting on 1 May 2020 and that conduct was accepted by The Agency. It was contended that however that conduct was characterised as a matter of law it was not properly characterised as a withdrawal by The Agency for the purposes of cl 9(b) as alleged by MCL. In closing submissions reliance was placed, in particular, upon those cases concerned with mutual abandonment as properly characterising what occurred at the meeting on 1 May 2020.
3. The claim by MCL that it terminated by reason of due diligence matters was disputed. It was said that those matters were not the basis for the termination that occurred on 1 May 2020. To the extent that they were pursued thereafter they were said to be irrelevant because by that time the Offer was at an end (and were inconsistent with the claim that due diligence concerns prompted termination by MCL on 1 May 2020). It was also said that what was being pursued by MCL were changes to its business operations or the production of new documents that would assist MCL in seeking to raise finance. Those matters were said to go beyond due diligence and could not be a basis for the exercise of rights to withdraw conferred by the Offer.
4. As to the reliance upon the exclusivity provision, it was said that the termination on 1 May 2020 was not pursuant to cl 10 of the Terms and Conditions (the exclusivity provision). It was also alleged that MCL consented or acquiesced to the dealings with Canaccord or otherwise waived any right to exclusivity. Further, it was claimed that the exclusivity requirement was contrary to public interest or otherwise unenforceable.
5. It was separately contended that if cl 9(b) did apply (or cl 10 was invoked with the consequence that cl 9(b) applied) then there was no liability to pay any fees because MCL did not have the funds to advance the loan to The Agency as at 1 May 2020 and the qualification to cl 9(g) applied.

## The claim that fees only payable on financial close

1. The claim by The Agency that the Costs as specified are only payable on financial close should be rejected. For reasons that have been given, the terms of the Offer provide for payment of Upfront Fees and also for fees upon withdrawal in the circumstances specified in the Offer.

## The issues for determination

1. The pleaded claim by MCL turns upon four events, namely:
2. entry into the Offer which is said to trigger liability to pay Upfront Fees in any event;
3. the board meeting of 1 May 2020 at which the Offer is said to have been terminated;
4. breach of the exclusivity provision in the Offer which is said to give rise to a claim for the Costs; and
5. the sending of an invoice on 26 November 2020 by which the Offer is said to have been terminated.
6. The sending of the invoice would only assume significance if the Offer was not brought to an end by what occurred at the board meeting. For reasons I have given, I accept the submission for The Agency that by the time of closing submissions there was no real contest that the Offer came to an end on 1 May 2020. The issue between the parties was the proper characterisation of how the Offer came to an end at that time. This is reflected in the submission advanced by MCL in its written closing submissions that 'the Offer was terminated on 1 May 2020 at the board meeting … that termination was brought about by Mitchell Atkins on behalf of MCL'. The key issue is what was effected by what Mr Atkins said at the board meeting. Therefore, it is not necessary to consider the claim that there was termination as a result of the sending of the invoice on 26 November 2020.
7. Even so, the events after the board meeting are possibly relevant to a limited extent. The actions by the parties after the board meeting cast light on the opinions they may have formed at the time of the meeting. In particular, they are relevant to whether Mr Atkins as the relevant officer of MCL had formed the opinion required by cl 8(a)(ii) based on facts or circumstances that had come to his attention at that time or whether he terminated based upon the exclusivity provision.
8. Further, for the purposes of determining the claim by MCL to the payment of the fees in accordance with the terms of the Offer it is not necessary to determine whether there has been a termination of the Offer at general law. MCL makes no claim that depends upon such matters. It seeks no damages at common law. Its claim depends entirely upon the terms of the Offer that provide for the circumstances in which there is an express contractual right to the fees as claimed. There is no claim that those fees are payable if the Offer is terminated by any means. Rather, the claim is that the fees are payable because (a) cl 9(b) applies or; (b) there has been breach of the exclusivity provision in circumstances where cl 9(b) applies. Alternatively, it is claimed that there are non-refundable Upfront Fees payable under cl 7.
9. Therefore, the issues are as follows:
10. Upon the proper construction of the Offer, did cl 9(b) of the Standard Terms and Conditions confer a contractual right upon MCL to withdraw from the Offer that would trigger a liability to pay the Costs specified in cl 9?
11. If yes to Issue (1), did the events that occurred at the board meeting on 1 May 2020 amount to an exercise by MCL of its right to withdraw from the Offer?
12. If yes to Issue (2), what if any of the fees claimed by MCL was The Agency liable to pay under cl 9 of the Offer?
13. Did MCL purport to invoke cl 10(c) of the Standard Terms and Conditions at the board meeting?
14. If yes to Issue (4), was there a breach of cl 10(c) by reason of dealings by The Agency in relation to the mandate with Canaccord?
15. If yes to Issue (5), is MCL unable to rely upon such breach as a basis to claim any of the Costs because (a) MCL consented or acquiesced in the dealings with Canaccord; (b) MCL waived any right to exclusivity; or (c) the exclusivity requirement was contrary to public interest or otherwise unenforceable?
16. If yes to Issue (5) and no to Issue (6), what if any of the fees claimed by MCL was The Agency liable to pay under cl 9 of the Offer?
17. In any event, are any of the Upfront Fees claimed by MCL payable under cl 7 on the basis that they are payable whether or not the loan proceeds?

## Principles concerning common law and express contractual remedies

1. The common law affords various remedies to a party who can demonstrate the existence of an enforceable contract. They include the recognition of a right to terminate and to an award of damages for breach. The common law will also give effect to the terms of the contract where they provide for an express right to terminate and agreed consequences for breach. There are qualifications to the generality with which the propositions as just stated have been expressed. However, for present purposes, the important distinction to be drawn is between common law remedies and the enforcement of express provisions of a contract that are remedial in character.
2. Therefore, it has long been established that a party who exercises a contractual right to terminate will not be entitled to damages for loss of the bargain unless the party would also have been entitled to terminate at common law: *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17. The damages to be paid upon termination are assessed by reference to the nature of the old obligations even though the future performance of those obligations has been brought to an end: *Mann v Paterson Constructions Pty Ltd* [2019] HCA 32; (2019) 267 CLR 560 at [12]‑[13]. If there is no right to terminate at common law then loss of bargain damages can only be claimed if they are expressly provided for as a consequence of the exercise of the contractually conferred right to terminate.
3. As has been noted, in the present case, MCL seeks only to enforce the contractual provisions concerning the payment of fees. As has been explained, the claim to those fees is not based upon a claim to damages. Rather, it relies upon the express contractual provisions. Those provisions do not apply in every instance where there was termination. They only apply if there is withdrawal, cancellation or revocation of the Offer in accordance with the express terms of the Offer (pursuant to the provisions of cl 8, cl 9) or automatic termination for breach of the exclusivity obligation (pursuant to cl 10(c)). If termination has occurred at common law (that is, in a manner that was not governed by the express contractual provisions as to the circumstances in which the specified fees would be payable) then there is no entitlement to payment of the Costs.
4. It was submitted for MCL that it could rely upon matters that it discovered after the board meeting of 1 May 2020 to justify its termination of the Offer. If the issue in the proceedings was whether the Offer had been validly terminated then that would be the case. It has long been established that 'a contracting party, who, after he has become entitled to refuse performance of his contractual obligations, gives a wrong reason for his refusal, does not thereby deprive himself of a justification which in fact existed, whether he was aware of it or not': *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 at 377‑378 (Dixon J). In the later decision of *Williams v Frayne* (1937) 58 CLR 710 at 733, his Honour said as to the principle:

… as a general rule, it is enough that upon the true facts a party is entitled to act as he has done and his justification is independent of his own knowledge of the facts …

1. In *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 262 Mason CJ (Deane, Dawson and Toohey JJ agreeing) put the principle in these terms:

a termination of a contract may be justified by reference to any ground that was valid at the time of termination, even though it was not relied on at the time and even though the ground actually relied on is found to be without substance.

1. However, for reasons that have been given, the issue in this case is not whether the Offer has been validly terminated. Rather, it concerns whether the Offer has been 'withdrawn' in the circumstances provided for in the Offer being the only circumstances in which The Agency will be liable to pay the Costs as provided for in cl 9.
2. The non-refundable Upfront Fees are in a different category. The obligation to pay those fees arises from signing the Offer (cl 7(a)), even if payment was deferred (cl 7(b)) to the extent that there are any such fees.

## Other principles as to termination of contracts

1. Having regard to certain of the submissions made by the parties, I note the following:
2. a contract can be terminated just once: *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20; (2015) 229 FCR 221 at [112] (Tracey, Gilmour, Jagot and Beach JJ).
3. if two concurrent rights of termination arise, and the promisee's election to terminate satisfies the requirements for each such right, the promisee's election will be the simultaneous exercise of both unless as a matter of construction, one excludes the other: *Progressive Mailing House v Tabali* at 55-56. The mere fact that the promisee purported to terminate in reliance on one of two rights of termination does not prevent justification of the election by reference to the other: *Bibby Financial Services Australia Pty Ltd v Sharma* [2014] NSWCA 37 at [126].
4. a termination of a contract discharges the parties from further performance of the contract, but any rights that have been unconditionally acquired are not divested or discharged: *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476‑477.

## Factual context for the board meeting on 1 May 2020

1. Certain matters of context should be noted before considering what occurred at the board meeting on 1 May 2020. My findings as to those matters set out below. They are based upon the documents and matters that I take to have been accepted by Mr Niardone and Mr Jensen in their evidence. As to the findings, I note that a Mr Michael Atkins (no relation of Mr Mitchell Atkins) was a senior advisor for Canaccord and involved in its dealings with The Agency. I will refer to him as Mr Michael Atkins to avoid confusion with Mr Atkins the director of MCL. My findings are:
2. Prior to the entry into the Offer, The Agency had been seeking to refinance its existing debt with Macquarie Bank.
3. Under the terms of its existing loan, it was required to pay down $500,000, discharge the entire facility by 31 March 2020 and provide by 31 January 2020 a credit approved term sheet evidencing a commitment by a lender to provide financial accommodation or an executed asset sale agreement to a third party that would release sufficient funds to pay out the facility.
4. The Offer did not result in the provision of funds by the end of March 2020 and the position of Macquarie Bank was that it required a payment of $1 million as a condition of any further extension.
5. After 30 March 2020, the board of The Agency was considering all possible solutions to raise finance.
6. By early April 2020, Mr Michael Atkins and Mr Niardone were in discussions as to the terms of a mandate upon which Canaccord would be engaged by The Agency.
7. Mr Niardone had the carriage of the dealings with Canaccord. He reported matters to Mr Jensen but Mr Jensen did not participate in the discussions with Mr Michael Atkins.
8. Mr Atkins was not involved with the negotiations on behalf of The Agency with Canaccord.
9. On 15 April 2020, Mr Atkins sent a message in a WhatsApp chat between the members of the board of The Agency. It said:

Hi everyone I just received a call from Michael Atkins regarding a debt mandate it was my understanding that this was meant to be equity

1. There was a response to the message from Mr Jensen stating that he believed it was a rights issue or some form of equity and directing a question to Mr Niardone as to whether he had received the mandate.
2. On the morning of 16 April 2020, Mr Michael Atkins provided to Mr Niardone 'a final draft Mandate for your consideration' and indicated that he was happy for Mr Niardone to refer to the terms of the mandate in principle in discussion with Macquarie Bank. The draft mandate referred to an 'Issue Size' of $13 million as traditional secured debt to refinance the existing Macquarie Bank secured facilities. As to the offer structure the draft also said:

[Canaccord] may also include an element of equity securities, such as a convertible note, in place of or as part of the Debt Finance, and to include an element of working capital.

1. I infer from the above that Mr Niardone was presenting the willingness of Canaccord to be involved with Macquarie Bank in order to manage its dealings in relation to its existing debt commitments.
2. After midday on 16 April 2020, Mr Atkins sent a further message on the WhatsApp chat as follows:

Hi Lads, can someone please let me know what is happening with Canaccord? Received an email this morning to touch base again?

A heads up would be good so I dont sound like a flop

1. The next day, Mr Niardone posted the following message to the WhatsApp chat:

Nothing yet will follow up

1. Mr Atkins responded:

But are you following up a debt or equity mandate?

1. Mr Niardone responded:

They are likely to send one that encompass both which like the last one they did and it must recognise Magnolia and what is in place I hope to have a draft today.

As we agreed as a board we need options A B and C have also reached out to a group regarding JV rent roll.

1. The reference to 'A B and C' was a reference to discussions at board level to the effect that the board needed to consider all options.
2. Mr Atkins responded:

I never agreed to a debt mandate from Canaccord only a fully underwritten placement. But i must have missed it.

Lets discuss when it comes through.

We will hold tight.

Is everyone ok with Forrest's letter?

1. Mr Niardone did not accept the proposed terms sent by Mr Michael Atkins on 16 April 2020. On 17 April 2020, Mr Niardone sent an email to Mr Michael Atkins in which Mr Niardone said:

Thank you for the draft mandate …

One of my first initial thoughts is around the break fee. I appreciate that a large amount of work goes onto this and that Canaccord would not present a terms sheet it didn't think that it couldn't complete [sic].

As you know Magnolia is progressing a debt deal and as a Board member I would like a backup plan in case this does not eventuate. However if successful a payment of $130,000 is quite expensive.

Can you consider what a fair payment would be if we way terminated in 2 weeks from signing.

1. Mr Michael Atkins responded:

Thanks Paul - I am a little cautious about Mitch [Atkins] as if he could deal why has he not done so - he has been talking about it for months. But that being said, we are starting from scratch again, as the last data I had is now months old. So if he can do it in 2 weeks then maybe a $50,000 break fee, but it would need to be a firm deal not just another soft proposal. What do you think?

1. By 20 April 2020, Mr Niardone was looking to convene a board meeting of The Agency and 'to get the Canaccord mandate out to all Board members'.
2. On 24 April 2020, Mr Niardone provided comments to Mr Michael Atkins on the draft proposal from Canaccord and discussion between directors of The Agency other than Mr Atkins occurred thereafter.
3. After further negotiation, Canaccord provided a signed copy of their proposed mandate on 30 April 2020 and Mr Niardone arranged to call a board meeting 'to discuss Canaccord mandate, magnolia mandate extension and final approval of MQB agreement'.
4. Until 30 April 2020, the only possible mandate with Canaccord that was discussed with Mr Atkins was the potential of Canaccord providing $1 million in funding to The Agency (and the earlier communications by way of WhatsApp must be understood in that context).
5. The first time Mr Niardone provided a copy of the proposed mandate with Canaccord to Mr Atkins was on 30 April 2020 when it was provided together with the agenda for the board meeting on 1 May 2020.
6. A number of board meetings of The Agency were held in March and April 2020. There is no reference in the board minutes for those to any discussion of the possibility of a $13 million mandate to Canaccord.
7. The agenda for the 1 May board meeting listed the following items of special business:

3.1 Canaccord mandate [attached]

3.2 Magnolia mandate extension

3.3 Macquarie Bank

3.4 Financial position and reporting

3.5 MA role

3.6 Other Business

The reference to 'MA role' is a reference to Mr Mitchell Atkins. The agenda also recorded that for item 3.1 and 3.2 both Mr Atkins and Mr Davey would be excluded from any discussion and voting due to conflicts of interest.

1. Upon receiving the agenda for the 1 May board meeting, Mr Atkins sent an email which included the following:

Regarding today's meeting could you please:

* Move discussion point 3.5 to 3.1
* Move discussion point 3.3 to 3.2
* Move discussion point 3.4 to 3.3

Therefore, Mr Atkins wanted the following order of business:

* 1. first, discussion of his own role;
  2. second, discussion of Macquarie Bank; and
  3. third, discussion of financial reporting and position.

1. A countersigned copy of the Canaccord mandate was sent by Mr Niardone to Mr Michael Atkins on 4 May 2020.
2. It may be noted that when the Canaccord mandate came to be presented to the board, an agreement had not been concluded and it was presented as a proposal for consideration for the board. Further, the agenda item in relation to Magnolia was presented as a consideration of an extension of its 'mandate'.
3. Mr Atkins suggested in the course of cross-examination that he may not have received the draft Canaccord mandate with the papers for the board meeting. I do not accept that evidence. The WhatsApp exchanges show that he took a keen interest in the dealings with Canaccord. During the board meeting on 1 May, Mr Atkins raised issues as to the terms on which Canaccord might be engaged (see below). The terms of what might be agreed with Canaccord were plainly of considerable interest to him. The documents show that the draft Canaccord mandate was circulated to board members. I consider it most unlikely that Mr Atkins would not have had close regard to the draft and would have sought a copy if it had not been provided to him.
4. As to the extension of the 'Magnolia mandate', the Offer provided for financial close to occur on 31 March 2020. Therefore, both parties were obliged to perform their obligations, including in respect of documentation so that the funds as agreed to be provided could be made available by that time. Of course, the obligation to complete by that time was on the basis that other conditions were met. It appears that date was informally extended to 30 April 2020. Both parties presented submissions on that basis. However, no party sought to terminate the agreement for breach based upon a failure to perform obligations so as to achieve financial close by 30 April 2020.
5. Mr Atkins' evidence was to the effect that the lawyers acting for MCL requested an extension until 30 April 2020. During the course of his cross‑examination there was the following exchange:

The financial close date of 31 March, was that ever formally extended?---Well, I think it was - I don't - I believe our lawyers requested it, and then on 30 April, AJ [Mr Jensen] sent me an email very early in the morning, like, early, like, 8-ish, saying - acknowledging the extension expired on 30 April and where things were at, and that's when I went back to AJ and said - not word for word, but something like, 'I don't want to get into a back and forth, but we are still waiting on a number of items. In particular, two dropbox folders,' which were quite substantial, which I never received a response on.

1. The reference to the dropbox folders appears to be a reference to requests that Mr Atkins had made for information concerning the rent roll and management agreements of The Agency.
2. The cross-examination of Mr Atkins then continued as follows:

So you accept that the - when the agenda was sent on that day, 30 April 2020, for the board meeting, that it asked about a potential extension of that offer?---The agency were trying to extend, yes. There's references to extending, and that's in the minutes as well.

Yes. And so, you knew that was going to be the subject of discussion at the 1 May board meeting?---Yes. For the record, though, I called the board meeting.

1. On the evidence, I find that no formal agreement to extend the date for financial close was made with The Agency prior to the 1 May board meeting. Further, by the time of the 1 May board meeting, both parties were proceeding on the basis that there needed to be agreement to extend the time for financial close because the date of 30 April had been reached without the loan being provided. At that time, there was an ongoing process in which Mr Atkins was seeking information from The Agency about management agreements for the purpose of being able to raise those funds.
2. Also, as Mr Atkins accepted in cross-examination, up until 30 April 2020 he was still putting out information to Greensill and other investors seeking to solicit the provision of funds that would enable MCL to provide the funds as provided in the Offer.
3. It was also plain by the time of the 1 May board meeting that The Agency, through Mr Niardone, was soliciting Canaccord to enter into an agreement to act as an advisor under the terms of which agreement Canaccord would procure, structure or negotiate funding of the kind the subject of the Offer. However, I find that it was not until the board meeting that Mr Atkins became aware that the dealings with Canaccord concerned a mandate to provide the funding that The Agency required. Prior to then, he had his suspicions as is evident from the terms of the WhatsApp exchanges. However, he was not brought in to those discussions.
4. Given the terms of the response from Mr Atkins in the WhatsApp group and the lack of any specific evidence from Mr Niardone or Mr Jensen of any conversation with Mr Atkins prior to the 1 May meeting concerning the proposed mandate or any other factual finding for acquiescence, the factual basis for the submissions on behalf of The Agency to the effect that there was some form of acquiescence or waiver by MCL or Mr Atkins on its behalf should not be accepted. Mr Atkins was raising concerns (consistent with the exclusivity condition in the Offer) as to whether the dealings with Canaccord were in respect of a proposed debt facility. There is no suggestion that the draft proposal for a mandate was provided to Mr Atkins despite his questions. The general evidence of Mr Niardone and Mr Jensen to the effect that Mr Atkins knew of the nature of the dealings with Canaccord prior to being provided with the draft mandate on 30 April 2020 should not be accepted. It is not consistent with the documentary evidence.
5. As to the factual claims in relation to due diligence, I make the following findings:
6. Mr Jensen arranged for the supply of information requested by Mr Atkins in relation to the Offer.
7. Mr Jensen kept Mr Niardone informed about developments in relation to due diligence inquiries by Mr Atkins.
8. In mid‑April, Mr Atkins was pursuing information about the rent roll that related to the certainty with which fees may be expected to be earned from the rent roll.
9. The information that was being sought was information that would affect the value of income coming in to The Agency.
10. At the board meeting of The Agency on 21 April 2020, Mr Atkins explained that he was hitting roadblocks and that they related to differences between the data relating to the rent roll of The Agency, being matters being pursued in relation to due diligence by MCL.
11. There were delays in providing a full report as to the rent roll to Mr Atkins.
12. MCL was seeking to firm up the terms of the relevant management agreements to provide greater certainty to the income that might be expected and the value of the rent roll of The Agency.
13. Steps were initiated to consider amendments to the terms of the management agreements and legal advice was taken and those steps were continuing up until the board meeting on 1 May 2020 with the encouragement of Mr Atkins.
14. In context, those complaints concerned the provision of details about the management agreements and steps being taken to firm up those commitments.
15. By the time of the board meeting on 1 May 2020, Mr Atkins was complaining about the quality of information that he was receiving under the due diligence process.
16. Mr Atkins continued to cause due diligence matters to be pursued after the 1 May 2020 meeting and correspondence was sent on 12 and 18 May 2020 in that regard.
17. The evidence of Mr Atkins as to the position immediately before the 1 May board meeting as given in cross-examination was as follows:

So you really hadn't made a decision at 30 April or 1 May that the due diligence condition had been failed?---At 6.48 am we were still awaiting information, according to this email.

But I'm putting to you that as at 30 April or 1 May, notwithstanding all the things you have put in your affidavit about conducting your own review of all the books after the event, you had not made a decision that you would not lend the money, that you were dissatisfied?---I called the board meeting at 30 April to discuss how uncomfortable I was with the board.

With the board. That's all it was to - - -?---And the lack of financial information and the quality of the information I was receiving.

But that is not a decision about dissatisfaction of the due diligence condition, is it?---The fact that I'm calling a board meeting about my concerns for the company, and then during that board meeting I think I take a breadth a few times in the first part of how disgusted I was that an ASX listed company is missing 800-odd agreements. It's pathetic.

But do you accept, just on that subject?---Yes.

1. On Mr Atkins' own account the only due diligence issue that was raised concerned the provision of the management agreements.
2. As will emerge, Mr Atkins made no reference at the board meeting on 1 May 2020 to the Offer coming to an end because of any view that he had formed based upon the due diligence inquiries. Given the subject matter of the meeting and the nature of complaints raised by him, if there had been a genuine concern on his behalf about the financial circumstances of The Agency being such that it was not in the financial interests of MCL to continue to consider providing finance to The Agency then that is a matter that would have been reflected in the discussion at the meeting. It was not. Further, as has been noted, as late as 30 April 2020, MCL was pursuing the possible provision of finance by Greensill or other investors to MCL so it could provide those funds to The Agency. MCL also pursued due diligence inquiries after the meeting on 1 May 2020.
3. It appears that the focus by MCL upon the management agreements that supported the rent roll arose from its dealings with Greensill Capital Pty Ltd. MCL presented a proposal to Greensill to advance monies to MCL that would be on-lent to The Agency. Greensill proposed terms that would involve a hybrid form of factoring arrangement (noting the Mr Atkins disputed that description of the proposal) by which it would be entitled to the funds received by The Agency and would have security over all of the assets of The Agency, not just the receivables. In order to ensure that there was cash flow to support the repayments required under the proposed arrangement, Greensill pressed for further information as to the rent roll. It appears that Mr Atkins, in his dealings with Greensill, was maintaining that the rent roll (or property management book) supported the valuation. On 9 April 2020 he communicated with Greensill in relation to an inquiry as to whether 100% of management fees had been received by The Agency in respect of properties under management (referred to as PUM). Mr Atkins said:

The current rental arrears rate (over 14 days) is less than 0.5% of the total property management book (being the full amount of PUMs).

The CEO, Head of Property Management and COO have confirmed that no management fee income has been written [off] in the company's history.

Please keep me informed on the timing as we can relay this to Macquarie Bank.

1. These communications and other communications by MCL to prospective lenders to MCL (including investor presentation documents) that are in evidence do not manifest any genuine concern on the part of Mr Atkins as to the value of the rent book. Mr Atkins continued to present the valuations of the rent book that had been published by The Agency to prospective lenders to MCL. Therefore, I find that he was willing to present that information to such prospective lenders and was not waiting for any response to due diligence inquiries. Rather, it appears that by his dealings with The Agency concerning the management agreements, Mr Atkins was seeking to put in place revised management arrangements in order to be able to persuade Greensill in particular to lend funds to MCL so that it would have the funds to lend to The Agency in accordance with the terms that MCL had agreed with The Agency in the Offer.
2. MCL claimed that there were other aspects of due diligence that were being pursued. On the evidence those matters seem to have come into prominence after the board meeting on 1 May 2020. I find that no other matters being pursued by Mr Atkins on behalf of MCL prior to the board meeting.
3. As stated below, I am not satisfied that any opinion in relation to matters of due diligence was formed by Mr Atkins as the basis for what occurred at the meeting on 1 May 2020. As MCL's claim depends upon it establishing that it discharged the agreement in accordance with the provisions that confer a contractual right to the Costs and that it did so on 1 May 2020 or upon its claim to the Upfront Fees, if the requisite opinion in relation to due diligence was not formed at that time then matters of due diligence cannot have been the reason for what occurred on 1 May 2020.
4. In the above circumstances, I do not accept the general evidence of Mr Atkins to the effect that due diligence concerns had some bearing upon bringing the Offer to an end at the meeting on 1 May 2020. The pursuit of due diligence inquiries thereafter is consistent with the Offer coming to an end at the 1 May meeting. There was still a commercial opportunity for The Agency to provide the funds and for the Offer to be reinstated. On the evidence, MCL continued to pursue that opportunity after the meeting. However, it did so in circumstances where the Offer was at an end.
5. It was well after 1 May 2020, when The Agency eventually put arrangements in place that included selling part of its rent roll and reduced financial support from Macquarie Bank.

## Issue (1): Upon the proper construction of the Offer, did cl 9(b) of the Standard Terms and Conditions confer a right upon MCL to withdraw from the Offer that would trigger a liability to pay the Costs specified in cl 9?

1. For reasons that have already been given, cl 9(b) applies if MCL exercises its express contractual right to withdraw or revoke the Offer under cl 8 of the Terms and Conditions. In that event, there is a liability on the part of The Agency to pay the Costs to the extent that they are specified in cl 9(b).
2. However, an exercise of a common law right to terminate the Offer (which is not alleged by MCL) or the expiry of the obligation to perform the Offer according to its terms or the operation of a common law principle such as mutual abandonment by which the Offer was brought to an end, would not trigger the contractual liability to pay the specified amounts. Putting to one side the operation of cl 10(c), only withdrawal by MCL that was an exercise of the express right conferred by cl 8 would trigger the liability to pay, on demand, the Costs as specified.

## Issue (2): If yes to Issue (1), did the events that occurred at the board meeting on 1 May 2020 amount to an exercise by MCL of its right to withdraw from the Offer?

1. Having regard to the answer to Issue (1), the question posed by Issue (2) is whether the events at the board meeting on 1 May 2020 amounted to an exercise by MCL of its contractual right to withdraw as conferred by cl 8.
2. In evidence was a transcript of what occurred at the board meeting of The Agency held on 1 May 2020. The terms of the transcript were agreed as accurate and were prepared from a recording of the meeting. Insofar as is relevant, the transcript records the following.
3. After introductory comments, the position in relation to conflicts was noted. In relation to Mr Davey that conflict arises because of his association with Canaccord. In relation to Mr Atkins that position arise because of his involvement with Magnolia Capital and MCL.
4. Then Mr Atkins said:

Yeah, on that, it was only … like, to be transparent, we're gonna come back … our lawyers are coming back on the Magnolia's mandate so there's no need to vote on that.

1. Mr Atkins went on to say:

That's pretty much where that sits so I think it's not gonna be positive, that's for sure. So I definitely think that you guys need to discuss the Canaccord mandate you were doing.

1. Plainly, Mr Atkins is encouraging the Board to consider the Canaccord mandate. He is doing that at a time when he is aware of its terms and that it provides, amongst other things, for a mandate to raise $13 million of debt to pay out Macquarie Bank. He is not objecting to the consideration of the Canaccord mandate as being a breach of the Offer.
2. Then, Mr Atkins was given an opportunity to address item 3.1 being the discussion of his own role in The Agency. At that point he is both a significant shareholder and a director. He is also, through MCL, a party who has agreed to provide finance to The Agency. Mr Atkins went through a number of concerns. He said that he had met with his lawyers probably two weeks ago and he was getting conflicting advice on whether or not he should be on the board. The board then engages in a free ranging discussion during which the need to address the Macquarie Bank financing is referred to a number of times. One aspect is that Macquarie Bank is seeking a reduction in the debt of $1 million as a condition of any extension.
3. Significantly, there is no statement that could be construed as the manifestation of the formation of an opinion by Mr Atkins by that time that for MCL to provide finance to The Agency would be prejudicial to its interests or would be uncommercial. There is also no complaint that dealings with Canaccord were a breach of the exclusivity provision in the Offer.
4. After the discussion of the concerns raised by Mr Atkins, Mr Jensen as Chair of the meeting then turned to the mandates in the following way:

Alright, thanks for that. Look we're on to the mandates. Should we do any other business first before we do that, so … ?

1. Mr Atkins agreed that there should be discussion of the mandates. Mr Niardone then informed the board of discussions that had been held about a possible sale of the rent roll on terms that would see it continue to be managed by The Agency.
2. Mr Jensen then drew that discussion to a close by saying 'Is there anything from anyone else on other business'. Mr Atkins then responded to that invitation in the following way:

Just, I guess … I know it's more … there's a mandate discussion which we can put that to the side, just high level, the biggest concern for me at the moment is this million dollars and just a strategy on how we're doing that. Obviously I think it's apparent now that the Magnolia mandate can't co-exist with the Canaccord mandate, so on a high level Magnolia's terminated so that's expired. So that's fine. So that takes that Magnolia discussion … as a board without any mandate at the moment. How do we go to raise … [the million] before the board talks to external parties.

1. These comments must be considered in the context in which the agenda item is expressed concerning Magnolia, namely an *extension* to the mandate and the earlier comment from Mr Atkins to the effect that his lawyers are preparing a letter and Mr Atkins doesn't think it will be positive so the Canaccord mandate needs to be discussed. It is also to be considered in a context where, on the common position of the parties, there has been an extension of the Financial Close from 31 March 2020 to 30 April 2020.
2. In those circumstances, the position being communicated by Mr Atkins is that there will be no extension to the mandate that is expressed in the Offer. This is to treat the Offer as no more than a mandate to raise funds as distinct from a firm offer to provide those funds, but it is a view that is not dissented from by others at the meeting. Therefore, what is communicated by Mr Atkins is a view that that the Offer has expired and an indication that there would be a communication from the lawyers for MCL.
3. Mr Atkins then went on to say:

So, as a board the biggest pressing issue is the million and I understand that the Macquarie finance is there as well.

1. And followed up with:

Before engaging or talking to external parties around this, I think the board needs to pass resolution on how they would like to raise that money so there is some form of structure and rigour around that so it's not everybody just running and talking to everybody and running around in circles. We're gonna have some sort of plan around how much it is, what are we gonna pay and what structure is it - debt or equity or convertible notes or etcetera - so that we can go to advisors and get clear mandates based on that.

1. In context, these matters relate to the raising of the $1 million.
2. Mr Jensen then asked: 'So are you saying Magnolia's interested in that, hearing about that as well though, Mitch, or … ?'.
3. Mr Atkins responded to the effect that Magnolia's position depends (a) on the response to the matters discussed at the outset of the meeting 'and then (b) like yeah, 'cause as I say let's just say for argument's sake, no'.
4. Mr Atkins then said:

Cos it can't co-exist with Canaccord … so let's have that discussion later, but I think let's work on the structure and then let's work who on the board can participate in that, because that's obviously … the cheapest form of capital 'cause there's no mandate around that.

1. Again, Mr Atkins is maintaining the position that the Offer is at an end.
2. Discussion then ensued until Mr Atkins said:

So, I think, just closing on that, high level as a board. I think we just need to find … agree that if we're going to a party, let's lock it in … My thoughts on mandates is any monthly fee, especially in this market …

1. At that point, Mr Davey interrupted to say:

Guys can I get off the call 'cos when a mandate I do not wanna be and I want it recorded. I just don't wanna be in the conversation where we talk about anything [with mandate in it or with mandating it] … just a general reference to Canaccord or whatever. I'd just rather be off and let you guys go through that.

1. The following then ensued:
2. Mr Atkins said that he would like to minute the position of Mr Davey 'at the end of the discussion about raising capital and the form of how the board would engage with external parties to discuss such mandate';
3. Mr Davey pointed out that there were already some mandates so it was not a theoretical discussion that was required;
4. Mr Atkins then said that he would like to see not just one, two or three mandates but 'a general structure of what we're looking for as a board with respect to mandates';
5. Mr Davey then said that he would jump off and leave for others;
6. Mr Davey left the meeting;
7. Mr Atkins said 'I would just like a pre-agreed kind of structure that we want from an advisor';
8. Mr Atkins then raised matters that might be included in such a structure and expressed the view that 'it's a lot easier to go out to parties and say here's an indicative structure, con note, this is our target interest rate, this is the target fee … we're prepared to pay up to this in a monthly fee and we need it done at this time, it is guaranteed';
9. Mr Niardone then said that they had a template in the form of the Canaccord mandate;
10. Mr Atkins continued to press for consideration of the parameters of a mandate;
11. Mr Atkins asked whether existing investors had been approached;
12. Mr Atkins again pressed that on the mandate the Board needed to make a decision on structure and then make a decision based on that structure;
13. Mr Atkins referred to putting Magnolia's hat on and said 'there's no … like it's non‑exclusive, I'm not […] happy to not have a mandate. If something happens, it happens. But on that, there will be no fee payable on any money that I put in, ever, to external advisors;
14. Mr Jensen then said:

So that's on Magnolia. So if Magnolia still get the $13 million or 15, whatever the number is, $13 million next week, we're not paying a fee to Canaccord? That's what you're saying? Whatever the …

1. Mr Atkins interrupted to say: 'The Magnolia mandate's expired. I can talk openly as a director now, on the Canaccord mandate';
2. Mr Atkins then said that he was not against the Canaccord mandate 'on the basis that there is no cash component and the monthly fee and history says on their mandates that's never been a problem';
3. Mr Atkins then said that 'as myself and a board member' if Magnolia or anybody comes along 'I don't think any fee payable to Canaccord is fair';
4. Mr Atkins then expressed the view that there needed to be some form of declaration from Mr Davey as to what he was getting from Canaccord; and
5. the matter was left on the basis that there would be input after the meeting from one of the other directors who had not read the Canaccord mandate.
6. It is plain from the extensive discussion at the meeting that Mr Atkins adopted the position that the Offer had expired and that there was no longer any agreement between The Agency and MCL. On that basis he did not have a conflict and for that reason he was able to continue in the meeting when the Canaccord mandate was discussed.
7. Therefore, having regard to the context for the board meeting on 1 May 2020 and the matters discussed at the meeting, particularly the statements by Mr Atkins, I find that at the board meeting on 1 May 2021, as a matter of fact, Mr Atkins on behalf of MCL acted unilaterally in maintaining that the Offer was at an end. He did so on the basis that there had been an expiry. His position was not challenged by other members of the board. Indeed, the meeting had been convened on the basis that it would consider whether there was an extension of the mandate to MCL. Therefore, implicit in the basis on which the agenda was set was a recognition by The Agency of the position that the Offer had expired.
8. There was no claim that the Offer had come to an end by reason of the matters specified in cl 8(a)(ii) of the Offer. There was no claim that there had been a breach of the exclusivity provision and that there should be a termination for that reason. This was despite the fact that it was evident by the time that Mr Atkins received the draft mandate that it must have been preceded by discussion with Canaccord to solicit the proposal.
9. For those reasons, the actions of Mr Atkins at the board meeting on 1 May did not amount to an exercise of the right to withdraw under cl 8 (or reliance upon cl 10(c)).
10. It was submitted for The Agency that what occurred at the board meeting on 1 May was a mutual abandonment of the Offer by both parties. The circumstances in which the conduct of the parties may be so characterised were summarised in *GC NSW Pty Ltd v Galati* [2020] NSWCA 326 at [112]. In such cases, the Court infers, as a matter of objective fact, that neither party intends the contract to be further performed. In order to resolve Issue (2), it is not necessary to determine whether the present case is one to which those principles apply. On the evidence, it may be that the better legal characterisation is that the parties agreed that the Offer had expired. That is to say, by their conduct they agreed that the Offer (that is the agreement between them) was at an end. In any case, what is apparent is that there was no exercise of the contractual right to withdraw (and, in consequence, no liability to pay the Costs).
11. There was a further issue the subject of submissions that concerned whether the abandonment or termination of the agreement operated prospectively without affecting accrued rights. Again, in order to answer Issue (2), it is not necessary to reach any conclusion as to the merits of the competing positions concerning those matters of legal principle. For reasons that have been given, we are not concerned with the rights that arise upon termination. Rather, we are concerned with a claim by MCL that it exercised an express contractual right to withdraw. For reasons that have been given that claim should not be accepted. There being no claim to damages consequent upon termination, the issues about whether the manner in which the contract was brought to an end operated prospectively do not arise.

## Issue (3): If yes to Issue (2), what if any of the fees claimed by MCL was The Agency liable to pay under cl 9 of the Offer?

1. For reasons I have given, if MCL had validly exercised its right to withdraw under cl 8 then The Agency would have been liable to pay the Costs as provided for in cl 9 unless the qualification in cl 9(g) applied. By way of reminder, cl 9(g) qualifies the liability to pay the Costs if it can be demonstrated by The Agency that the Offer was exclusively cancelled because MCL did not have the capital to fund the Loan, in which case there will be an entitlement to reimbursement of all fees (including any Upfront Fees).
2. It is not in dispute that the Upfront Fees have not been paid. The Agency disputes the claim to their payment. If it is the case that the qualification to cl 9(g) applies then the alternative claim to the Upfront Fees under cl 7 would be affected because there would be an obligation to reimburse any such fees that may otherwise be payable. In other words, the qualification to cl 9(g), if established, would answer both the claim by MCL and the alternative claim to the Upfront Fees.
3. As has been noted, counsel for MCL accepts that as at 1 May 2020 it did not have the capital for the loan facility under the Offer. Therefore, it is not necessary to deal with the evidence in that regard beyond noting that, in my assessment, the concession appropriately reflected the state of that evidence.
4. Nevertheless, MCL disputes the claim by The Agency that it has demonstrated that the facility was exclusively cancelled because MCL did not have the capital to fund the loan.
5. MCL relies upon the matters spoken at the meeting by Mr Atkins to establish why Mr Atkins cancelled the Offer. For reasons that have been given, the claims that the Offer was brought to an end by MCL because of issues with due diligence or breach of the exclusivity provision should be rejected. There was no exercise of the contractual rights under cl 8(a)(ii) (or cl 10(c)) by MCL at the board meeting. Rather its position was that the Offer had expired. The Agency joined in that position. The board meeting was convened on the basis that the Offer had expired.
6. Therefore, it is not the case that the Offer was exclusively cancelled because MCL did not have the funds. The Offer came to an end because both parties accepted that it had expired.
7. Therefore, if (contrary to my finding as to Issue (2)) there was a withdrawal from the Offer by MCL then it would have occurred at the time provided for in cl 9(b) (that is, after the Offer was accepted and prior to Formal Loan Documents being issued). For reasons that have been given, the fees referred to in that provision would have been payable by The Agency.
8. However, as the answer to Issue (2) is 'no', there is no such liability.
9. For completeness, I note that there would have been issues for MCL in seeking to recover the Costs on the basis that they represented the appropriate measure of damages consequent upon termination for breach. MCL conceded that it did not have the funds to make the loan as at the time that the Offer was terminated. In those circumstances, it was likely to be unable to demonstrate that it was ready and able to perform the coordinate obligation necessary to found a claim to damages. This is to emphasise the importance of understanding that the claim by MCL was a claim to the Costs on the basis that it had exercised an express contractual right to withdraw.

## Issue (4): Did MCL purport to invoke cl 10(c) of the Standard Terms and Conditions at the board meeting?

1. For reasons that have been given in response to Issue (2), the answer to Issue (4) is 'no'.

## Issue (5): If yes to Issue (4), was there a breach of cl 10(c) by reason of dealings by The Agency in relation to the mandate with Canaccord?

1. As to the answer to Issue (4) is 'no' this Issue does not arise for consideration. However, had it been necessary to decide I would have concluded that the dealings by The Agency with Canaccord were in breach of the exclusivity provision to the extent that they proposed a mandate for debt funding of more than $1 million. Clause 10(a) provides that The Agency will deal exclusively with MCL and, relevantly, that 'no other … advisors … or other parties will be appointed … solicited or briefed to … procure, structure or negotiate … any of the funding set out in this Offer while this engagement remains in existence'.
2. The entry into the agreement with Canaccord post-dated the 1 May meeting at which the Offer came to an end. Therefore, there can be no complaint about that conduct. However, on the evidence, in April, The Agency through Mr Niardone solicited Canaccord to procure the funding set out in the Offer while it remained in existence.

## Issue (6): If yes to Issue (5), is MCL unable to rely upon such breach as a basis to claim any of the Costs because (a) MCL consented or acquiesced in the dealings with Canaccord; (b) MCL waived any right to exclusivity; or (c) the exclusivity requirement was contrary to public interest or otherwise unenforceable?

1. Again, as to the answer to Issue (4) is 'no' this Issue does not arise for consideration. In those circumstances, the Issue may be addressed briefly.
2. As to (a), for reasons I have given there was no consent or acquiescence by MCL.
3. As to (b), assuming that waiver was available as an answer as a matter of law, The Agency has not demonstrated conduct as a matter of fact that would amount to waiver.
4. As to (c), it is not necessary to determine the contentions based upon public interest. They give rise to legal issues best left for determination in proceedings in which the answers to those questions are determinative.

## Issue (7): If yes to Issue (5) and no to Issue (6), what if any of the fees claimed by MCL was The Agency liable to pay under cl 9 of the Offer?

1. Once again, as to the answer to Issue (4) is 'no' this Issue does not arise for consideration. If it was required to be determined then the answer to Issue (3) would apply.

## Issue (8): In any event, are any of the Upfront Fees claimed by MCL payable under cl 7 on the basis that they are payable whether or not the loan proceeds.

1. MCL claims that even if there are no fees payable under cl 9, there are still Upfront Fees payable because the liability to pay those fees arose upon entry into the Offer. The Upfront Fees are said to be payable because of the terms of cl 7. The clause has already been quoted but for ease of reference it provides:

a) We require you to pay the non-refundable *Upfront Fees* upon signing the Offer.

b) If we agree to defer the *Upfront Fees* until drawdown of the loan, the *Upfront Fees* are payable by you whether or not the loan proceeds (whether or not it is you or us that withdraws from this loan).

c) Valuations and Formal Loan Documents may not be ordered until the *Upfront Fees* are paid by you (or deferred in accordance with the preceding paragraph).

(original emphasis)

1. As has been noted the term 'Upfront Fees' is defined by the Terms and Conditions. As has been explained, it means the Establishment Fee, Due Diligence Fee and Risk Fee as those terms are described in the Term Sheet. There is no reference to a Risk Fee in the Term Sheet so that aspect may be put to one side.
2. The fees that are claimed by MCL to be Upfront Fees are the Establishment Fee and the Due Diligence Fee.
3. As to the Establishment Fee, the Term Sheet did not simply specify an amount for the fee or the manner in which the fee amount would be computed. Rather, the Term Sheet set out in clear terms the circumstances in which the Establishment Fee was due and payable. It was not expressed to be a fee that was payable as a non-refundable fee upon signing the Offer. Rather, it was identified as a fee that was 'due and payable by the Borrower on the occurrence of Financial Close'. As has been noted Financial Close was specified as 31 March 2020 'and subject to … this Offer'. It is common ground that Financial Close never occurred.
4. The language 'due and payable' as used in the Term Sheet when describing the Establishment Fee is significant. It is terminology that is entirely inconsistent with an obligation to pay upon signing the Offer. The Term Sheet provides that the Establishment Fee is not due or payable unless or until there is Financial Close. Further, the description in the Term Sheet is not to the effect that the Establishment Fee is non-refundable.
5. Clause 7 of the terms and conditions does not refer to all Upfront Fees. It refers to specifically to 'non-refundable *Upfront Fees*'. The word 'non-refundable' must be given operative effect. It contemplates that there may be circumstances like the present where there is an Establishment Fee that is payable but it is not expressed to be non-refundable (that is, payable irrespective of the circumstances in which the provision of the finance does not proceed). Rather, it is only payable if certain events occur.
6. Plainly, the Establishment Fee described in the Term Sheet is a different type of fee to that described in the Terms and Conditions. It is not a non-refundable fee. Rather, the language used in the Term Sheet describes a fee that is neither due nor payable unless and until there is Financial Close. It is not an instance where the payment of the Establishment Fee is deferred. Nor is it a case where payment of the Establishment Fee has been agreed to be deferred. The terminology used in the Term Sheet is to the effect that the Establishment Fee is not due until Financial Close. For those reasons, the claim that the Establishment Fee is due under cl 7(a) of the Terms and Conditions should not be accepted.
7. Further, the language used in the Term Sheet is specifically directed to the particular case and describes not only the amount of the fee but its characteristics, particularly when it is due and payable. It may be accepted that the parties provided for the Offer to comprise both the Term Sheet and the Standard Terms and Conditions. The Offer did not incorporate the Terms and Conditions by reference. However, if contrary to the view I have expressed there is inconsistency between the provisions then it should be resolved by the language of the specific and particular provision in the Term Sheet prevailing over the more general language in the Terms and Conditions. For that further reason the Establishment Fee is not due under cl 7(a).
8. As to the Due Diligence Fee, it is described in the Term Sheet as a 'non-refundable fee' and it is expressed to be due 'on execution of this Offer' and payable on the sooner of Financial Close or termination of the Offer. The use of this terminology in the case of the Due Diligence Fee but not in the case of the Establishment Fee supports the conclusions already reached to the effect that the Establishment Fee is not payable under cl 7(a). It also supports the claim by MCL.
9. For those reasons, on the face of the terms of cl 7 the non-refundable Due Diligence Fee is a fee that The Agency is liable to pay. It is specified as an amount of $10,000.
10. It remains only to consider whether the submission for The Agency based upon abandonment is an answer to the claim to the Due Diligence Fee. The submission made was to the effect that what occurred at the board meeting on 1 May 2020 was a mutual abandonment of the Offer and that such abandonment had the effect, as a matter of law, that the agreement between the parties was void from the outset. Reliance was placed upon the reasons of Kirby P in *CIC Insurance Ltd v Bankstown Football Club Inc* (1995) 8 ANZ Ins Cases 61-232 where his Honour expressed the view that abandonment operates 'at least normally, *ab initio*': at 75,558. His Honour's view was based upon the authorities to the effect that abandonment or abrogation is used to describe an instance where the parties by their conduct evince an intention to dispense with further performance of the contract at all. His Honour distinguished such instances from those where there may be an abandonment of future performance.
11. However, more recently, the relevant law was summarised in the following way in *Cedar Meats (Aust) Pty Ltd v Five Star Lamb Pty Ltd* [2014] VSCA 32 at [19] (Nettle, Beach JJA and McMillan AJA):

The consequences of the discharge of a contract by abandonment depend on the intention of the parties as manifested in the way that they have acted in relation to each other. According to ordinary contractual principles, the manifestation of such an intention may be express or implied. Where, however, a contract has been partly performed, it is not lightly to be supposed that parties intend to abandon accrued rights. Absent a clear indication to the contrary, it is to be inferred that the abandonment of a contract operates prospectively without prejudice to accrued entitlements.

1. High Court authorities were footnoted in support of the above passage. However, the authority cited in support of the final sentence, *Westralian Farmers Ltd v Commonwealth* (1936) 54 CLR 361 at 369 is not concerned with abandonment. It is a case dealing with the consequence of an express provision in a contract providing for immediate termination upon the occurrence of certain events.
2. There was no reference in *Cedar Meats* to *CIC Insurance*, noting that the latter decision did not exclude the possibility of abandonment *in futuro*.
3. It was suggested that for present purposes the decision in *CIC Insurance* should be applied because the law of the Offer was expressed to be the law of New South Wales. However, the Australian common law of contract is a single unified law and the submission to that effect must be rejected.
4. The point does not appear to have arisen in the recent consideration of the principles in *Ryder v Frohlich* [2004] NSWCA 472 at [135]‑[137] (McColl JA) as applied in *GC NSW v Galati* at [112] and *Clifton (Liquidator) v Kerry J Investment Pty Ltd trading as Clenergy* [2020] FCAFC 5 at [326].
5. In *Fazio v Fazio* [2012] WASCA 72 at [74], Murphy JA (Newnes JA agreeing) referred to a category of case where there had been mutual abandonment 'in the sense of the mutual release of future obligations'; see also, *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* [2005] NSWCA 248 at [74] (Ipp JA, Hodgson and McColl JJA agreeing).
6. It is to be noted that there have been instances where it has been determined that abandonment has the consequence that a deposit paid before the abandonment is returnable: *DTR Nominees Pty Ltd v Mona Homes Proprietary Ltd* (1978) 138 CLR 423 at 434.
7. What is clear is that abandonment operates as a legal principle arising from the conduct of the parties, not based upon an implied agreement to bring the existing contract to an end. It does not operate by reference to actual intention. It depends upon the legal consequence of a view formed by the court as to whether the conduct of the parties viewed objectively manifests an intention to discharge the contract.
8. Given the present state of the authorities it appears that there are two types of abandonment. One where the objective intention is to release any future performance and the other where the objective intention is to discharge the contract *ab initio*. Each of *CIC Insurance* and *Cedar Meats* recognise both possibilities. *Cedar Meats* says that a result that will bring to an end accrued rights is not to be lightly inferred.
9. In the present case, given the terms in which the obligation to pay the non-refundable fee is expressed, by the time of the 1 May board meeting there was an accrued right on the part of MCL to receive the Due Diligence Fee. There is no fact that suggests an objective intention to alter that position. In those circumstances, any abandonment operated as a mutual release of future obligations. Alternatively, there was an agreement between the parties by their conduct to the effect that the agreement was terminated as to its future performance.
10. Therefore, The Agency is liable to pay the Due Diligence Fee of $10,000.

## Interest, costs and final orders

1. It follows that MCL has succeeded, but only as to a very modest part of its total claim. MCL sought interest on the amount claimed. It also sought costs. In accordance with directions made during the course of the hearing the parties have provided information to assist in making a lump sum provision in relation to costs. In accordance with the established practice of this Court, a lump sum award of costs is appropriate in a claim of this kind. However, having regard to the outcome, I propose to allow the parties an opportunity to make any further submissions as to interest and costs.
2. The Agency sought orders under a cross-claim that would require the removal of statements registered on the Personal Property Securities Register maintained under the *Personal Property Securities Act 2009* (Cth). MCL advanced no submission in opposition in the event that The Agency met any liability as adjudicated. Therefore, it has been established that upon payment of the amount as determined there should be removal of the statement. Orders may be made to that effect if required.
3. I will make directions for the parties to provide minutes of the orders they seek in light of these reasons together with any affidavit and further submissions. Subject to further order, the terms of final orders will be determined on the papers. Any party seeking a further oral hearing should provide any submissions in support of that position at the time of providing submissions in support of the party's proposed orders.

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| I certify that the preceding one hundred and ninety-six (196) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Colvin. |  |

Associate:

Dated: 14 October 2021