FEDERAL COURT OF AUSTRALIA

Coghill v Indochine Resources Pty Ltd (No 2) [2015] FCA 1030

Citation:	Coghill v Indochine Resources Pty Ltd (No 2) [2015] FCA 1030
Parties:	**ROBERT EDMOND COGHILL v INDOCHINE RESOURCES PTY LTD (ACN 119 808 007)**
File number:	NSD 206 of 2014
Judge:	**KATZMANN J**
Date of judgment:	17 September 2015
Catchwords:	**CONTRACTS** — contract of employment — breach of contract — whether oral variation of written contract temporary or permanent — termination without notice or payment in lieu of notice — unpaid salary, superannuation, accrued annual leave and other benefits — whether alleged entitlement to five years' salary and other benefits under the contract a genuine pre-estimate of damage or a penalty **INDUSTRIAL LAW** — untaken paid annual leave owing on termination of employment — whether employee entitled to payment in lieu of written notice — whether employment terminated for serious misconduct — *Fair Work Act 2009* (Cth), ss 90(2), 117, 123(1)(b)
Legislation:	*Annual Holidays Act 1944* (NSW) s 4 *Evidence Act 1995* (Cth) s 136 *Fair Work Act 2009* (Cth) ss 12, 13, 14, 61(1), 87, 90(2), 117, 123(1)(b) *Federal Court of Australia Act 1976* (Cth) s 51A *Federal Court Rules 2011* (Cth) r 30.21
Cases cited:	*AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 *Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1973) 129 CLR 99 *Bartercard Ltd v Myallhurst Pty Ltd* [2000] QCA 445 *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337 *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited* [1915] AC 79 *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 *Esanda Finance Corporation Limited v Plessnig* (1988) 166 CLR 131

	Franklins Pty Ltd v Metcash Trading Ltd (2009) 76 NSWLR 603 *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd* (1992) 33 NSWLR 504 *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 *PT Thiess Contractors Indonesia v PT Arutmin Indonesia* [2015] QSC 123 *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128
Other materials:	Carter, JW, *Contract Law in Australia* (6th ed, LexisNexis Butterworths Australia, 2013) Sneddon NC, Bigwood RA and Ellinghaus MP, *Cheshire and Fifoot Law of Contract* (10th ed, LexisNexis Butterworths Australia, 2012 Prince T, "Defending orthodoxy: Codelfa and ambiguity" (2015) 89 ALJ 491
Date of hearing:	14 September 2015
Place:	Sydney
Division:	FAIR WORK DIVISION
Category:	Catchwords
Number of paragraphs:	108
Counsel for the Applicant:	Mr D W Robertson
Solicitor for the Applicant:	DC Legal Pty Ltd
Counsel for the Respondent:	The Respondent did not appear

IN THE FEDERAL COURT OF AUSTRALIA
NEW SOUTH WALES DISTRICT REGISTRY
FAIR WORK DIVISION **NSD 206 of 2014**

BETWEEN:	**ROBERT EDMOND COGHILL** **Applicant**
AND:	**INDOCHINE RESOURCES PTY LTD (ACN 119 808 007)** **Respondent**

JUDGE:	**KATZMANN J**
DATE OF ORDER:	**17 SEPTEMBER 2015**
WHERE MADE:	**SYDNEY**

THE COURT ORDERS THAT:

1. By 1 October 2015 the applicant file further submissions on the questions of pre-judgment interest, declaratory relief and costs.

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

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PLACE:	**SYDNEY**

REASONS FOR JUDGMENT

1 Robert Coghill was a senior executive of Indochine Resources Limited ("IRL") (now Indochine Resources Pty Ltd), whose employment was brought to an abrupt end on 21 June 2010. In this proceeding, launched in February 2014, he complains that the termination was in breach of his contract of employment and that IRL contravened various provisions of the *Fair Work Act 2009* (Cth) ("FW Act") by failing to give him written notice of termination or payment in lieu and by failing to pay annual leave due to him on termination. A claim for damages for personal injury arising from his employment appeared in the statement of claim filed with the originating application but it was not pressed.

2 IRL filed a defence on 23 April 2014 and up until 29 July 2015 was represented by Eakin McCaffery Cox, solicitors, who had instructed Jamie Darams of counsel. By its defence IRL denied that it owed Mr Coghill any money and alleged, in effect, that it was entitled to dismiss Mr Coghill summarily for serious misconduct. Several witness statements were filed by both parties in support of their respective positions in anticipation of an oral hearing where the credit of all witnesses was in dispute.

3 On 4 May 2015, when Stephen Boatswain, solicitor, appeared for IRL, the application was fixed for hearing and ancillary orders were made, amongst other things, for the filing of outlines of submissions and lists of authorities. On 29 July 2015, however, the solicitors filed a notice of ceasing to act and Mr Darams's instructions were apparently withdrawn. No new solicitors were retained and the orders to which I have referred were not complied with.

4 When the proceeding was called on for hearing on 14 September 2015 there was no appearance for IRL. Accordingly, Mr Coghill, through his counsel, applied for and was granted leave to proceed in the absence of the respondent, pursuant to r 30.21(1)(b) of the *Federal Court Rules 2011* (Cth). In the result, the alleged misconduct was not proved. The only witness who was called was Mr Coghill. He denied the allegations of misconduct and his evidence was not challenged. That evidence was not inherently implausible and I accept it. In all but a few respects, he also made out his claim for damages.

THE EVIDENCE

5 IRL's business included the exploration for minerals of deposits in Cambodia and it held a number of mining licences. It had one wholly owned subsidiary — Indochine Resources (Cambodia) Limited ("IR (Cambodia)") — through which the work was undertaken. All the executive employees were employed by IRL, all other employees by IR (Cambodia). Mr Coghill was one of the directors of IR Cambodia.

6 Mr Coghill was employed by IRL as chairman, company secretary and chief financial officer, pursuant to a written contract. The proposed terms were set out in a letter of offer dated 23 June 2008 addressed to Mr Coghill. Mr Coghill was invited to signify his acceptance by 26 June 2008 by signing and returning to the company an attached copy of the agreement. He did so and the executed contract bears his signature. It also bears the signature of David Evans, who was also a director of IR (Cambodia) and an executive director of IRL. The contract was expressed to be subject to the laws of New South Wales and the parties agreed to submit "to the Courts of this jurisdiction" (cl 14).

7 Mr Coghill was employed for an initial term of five years, commencing from 1 May 2008, renewable with at least six months' notice "on substantially the same terms" for "perpetuating" five-year periods (cl 1). That is to say, he was employed for an "Initial Term" of five years, which was renewable "on substantially the same terms" for another five years ("The Subsequent Term") on and from the expiration of the Initial Term, if he so agreed in writing with the company at least six months before the conclusion of the Initial Term. He was to report directly to the board of IRL "and its subsidiaries" (cl 2). Schedule 1 of the contract set out a list of his duties. It read (without alteration):

> Your duties will include:
> Direct, staff and organise the accounting and Company Secretarial functions of the Company as required.
> Directing and assisting in the listing of the company on the ASX and reporting as

> required to the ASX.
>
> Liaising with the Company's General Manager Asia on the general administration of the subsidiary company.
>
> Ensure that accounting and documentation of all transactions are recorded in a satisfactory manner for all companies in the group.
>
> Report to the Board of the Company and its subsidiary on a regular basis.
>
> Ensure that the company subsidiary Indochine Resources (Cambodia) Limited is funded at all times.
>
> Manage the treasury of all funds of the company and its subsidiary.
>
> Planning, budgeting and monitoring the costs of the company and its subsidiary.
>
> Directing and overseeing the standards of compliance and governance for the Company and its subsidiaries. This includes the Audit, Remuneration and Governance committees.

8 By cl 2 Mr Coghill was required to comply with all reasonable directions of the Company's board in the performance of his duties and instructed:

> You must carry out your duties to the best of your ability, act in the best interests of the Company and its subsidiaries, and use your best endeavours to promote and extend the Company and its subsidiaries business and to protect their interests and reputation. The Company reserves the right to vary your duties in accordance with its needs which shall be consistent with the matters set out in Schedule 1 to this agreement.

9 Clause 3 was concerned with remuneration. It began with the following terms:

> 3.1 *Salary*
>
> Your commencing salary will be $USD 240000.00 per annum, exclusive of superannuation, payable monthly until the Company is listed on the Australian or other Stock Exchange.
>
> Upon the listing of the Company on the Australian or other Stock Exchange your salary will revert to USD 220000.00 per annum payable monthly and all other benefits & entitlements offered and accepted in this contract below will become payable as of the commencement date of this contract in addition to your base salary.
>
> Your salary shall increase each year by one-fifth (1/5) in USD plus CPI for (Australian All Groups). You may request that a certain percentage of your salary be paid into the Company's Employees Investment Trust
>
> 3.2 *Superannuation*
>
> In addition to your salary, the Company will pay superannuation equal to 9% of your salary, into the Company's superannuation fund or such other superannuation fund as nominated by you.

10 The contract also provided for the payment of various allowances and benefits including the use of a company motor vehicle where available, to be maintained by IRL, or an annual

motor vehicle allowance of up to USD20,800; overseas living allowances; reimbursement of life insurance premiums, arranging and paying for "adequate general health" for Mr Coghill and his immediate family, accident and income protection insurance (up to a maximum of USD6,900 per annum); airfares for him and his family for holidays up to a maximum amount of USD18,560 each year, costs of club memberships of up to USD3,300, and share options.

11 Clause 3.11 contained a promise that the company would review Mr Coghill's remuneration each July without "denigrat[ing] from the benefits already contracted to [him]".

12 Clause 6 dealt with leave entitlements. The provision for annual leave was in the following terms:

> You will be entitled to six (6) weeks' paid annual leave for each completed year of employment … This leave is to be taken at times reasonably approved by the Company.

13 Termination was covered by cl 8, relevantly by cl 8.1, which read:

> The Company may terminate your employment immediately, without previous notice without payment in lieu of notice, and without prejudice to any existing claims by the Company against you if:
>
> (a) you commit a serious or persistent breach or do not observe of any of the provisions of this agreement;
> (b) you commit fraud, dishonesty or wilful misconduct;
> (c) you are convicted of a serious criminal offence in accordance with Cambodian law;
> (d) you use or abuse alcohol or drugs to the extent that, in the reasonable opinion of the Company, such use or abuse materially affects your ability to carry out your duties;
> (e) you become mentally incapacitated or are otherwise unable to perform your duties.
>
> In all other cases of termination by the Company, the Company will pay your base salary & benefits in lieu of notice.
>
> In all other cases, either party may terminate this agreement upon eight (8) weeks' written notice to the other party.
>
> In addition, where this agreement is terminated by the Company for no proper cause, wherein proper cause can only arise from a breach of this agreement, the Company shall be liable to pay you the entirety of the "Initial Term", "The Subsequent Term" or "Subsequent Terms" contract i.e. 5 years from the date of the termination without proper cause.
>
> For the avoidance of doubt, if the agreement is so terminated by the Company without proper cause at any time during the "Initial Term" of five (5) years or, any "Subsequent Term" or "Subsequent Terms", you shall have the entirety of the contract term, i.e. five (5) years, paid out from the date of termination without proper

> cause notwithstanding the time already expired on the "Initial Term", "Subsequent Term" or "Subsequent Terms", whichever term/s be applicable at the date of termination.
>
> You shall be entitled to all and any amounts that you may have been entitled to had the agreement been renewed for the applicable "Initial Term", "The Subsequent Term" or "Subsequent Terms" at the relevant time.
>
> This amount is in addition to the amount may be entitled to receive under clause 8.2.

14 Clause 8.2 related to severance pay in the event of redundancy.

15 Clause 13 stated:

> **13. Variation**
>
> This agreement can only be varied by:
>
> (a) agreement in writing signed by or on behalf of both parties; or
> (b) changes or additions to the Company's policy that have been generally communicated to all parties.

16 One such communication apparently occurred in about October 2008 when Mr Coghill attended meetings with David Evans, Ross Hill and Jeremy Snaith, the other executive directors of IRL. At the meeting, Mr Evans said that because of the global financial crisis, the company could not continue to pay such high executive salaries and all those present, including Mr Coghill, agreed to a salary cut — in Mr Coghill's case, at least, of 50% (to USD10,000 per month). Mr Evans said words to the effect that "we all have to take less money as salaries until the company raises more funds". He said "you will catch up on the arrears at our next capital raising".

17 Although there was a capital raising in about November 2009 (and another the following month), the salary arrears were never paid.

18 IRL admitted the agreement to accept a salary cut but otherwise denied Mr Coghill's allegations. It pleaded that at or about the end of September 2008 Mr Coghill agreed to a variation of his salary to a monthly remuneration of USD10,000, effective from September 2008 and continuing until IRL was listed on the ASX via an initial public offering ("IPO") (something that never occurred). It also pleaded that it was a term of the agreement that:

> the parties would agree terms of a new employment contract to apply to [Mr Coghill's] employment with [IRL] commencing from the date of the IPO that would, among other things, include more commercially sustainable terms including a rate of remuneration between that provided by the Contract and the agreed varied rate provided for …

19 On 21 June 2010 Mr Hill called Mr Coghill into the boardroom of the company's headquarters in Bligh Street, Sydney and presented him with a letter, inviting him to read it. I received the letter into evidence but limited the use that could be made of it to proof of what it said, not of the truth of its contents on the basis that there was a danger that to receive it for all purposes might be unfairly prejudicial to Mr Coghill in circumstances of this case where his accusers elected not to defend their position in court and he had no opportunity to cross-examine them (see *Evidence Act 1995* (Cth), s 136). The letter, which was signed by Mr Ross, began with a statement that IRL had determined to terminate Mr Coghill's employment immediately without notice and without payment in lieu of notice in accordance with cl 8.1 of his employment contract. The letter contained a series of allegations of "serious misconduct" and stated that IRL had determined that Mr Coghill had made untrue statements signifying his dishonesty sufficient to justify summary dismissal.

20 On or about December 2010 another company, Indochine Mining Limited ("IML"), was listed on the Australian Stock Exchange. IRL was never listed. Following a restructure of the corporate group IML became the holding company and IRL became a wholly owned subsidiary of IML.

THE CLAIM

21 In his written outline of submissions filed on 28 August 2015 signed by his solicitor, Mr Coghill identified three separate claims. The first was described as a liquidated claim for contraventions of ss 90(2), 99 and/or 117 of the FW Act amounting to a total of USD33,923.08. The second was said to be a liquidated claim for back salary from December 2008 (*sic*) until December 2010 amounting to USD275,090. The third was referred to as "an unliquidated claim for damages arising under the Common Law from the unlawful termination of the written employment contract" amounting to USD1,578,760.59 plus AUD10,448.91.

22 This was not, however, the way the case was argued.

23 In fact, the claim under the FW Act was put in the alternative, lest for some reason the contract claim failed, and the so-called unliquidated claim for damages for wrongful termination morphed into a liquidated damages claim.

24 As the case was argued, IRL was said to have breached its contract of employment by failing to:

(1) pay Mr Coghill the shortfall in his salary payments and superannuation from October 2008 in accordance with its oral agreement to do so;

(2) pay him his motor vehicle allowance from 1 May 2008, contrary to cl 3.3(b);

(3) pay him USD150 per day in overseas living allowance while he was working in Cambodia, instead paying him only USD50 per day, contrary to cl 3.4;

(4) meet the costs of his club memberships of USD3,300 per year from 1 May 2008, contrary to cl 3.8;

(5) pay him his reasonable business expenses, contrary to cl 4;

(6) pay him his accrued annual leave entitlements on termination of employment, contrary to cl 6; and

(7) pay him five years' of salary, superannuation and allowances as liquidated damages, contrary to cl 8.1.

25 The pleading included a claim for $100,000 for "hurt, stress and suffering", but this claim was not pressed. Neither did Mr Coghill press an unparticularised claim for "payments on termination of $50,886".

26 The amounts for those claims that were pressed are particularised in the statement of claim as follows:

(1)	Salary payments		
	(a)	arrears from 1 October 2008–December 2010	$307,685
	(b)	5 years' salary from 22 June 2010	$2,124,813
(2)	Superannuation		
	(a)	arrears from 1 May 2008 to 21 June 2010	$36,879
	(b)	5 years of benefits from 22 June 2010	$191,233

(3)	Motor vehicle allowance		
	(a)	arrears from 1 May 2008 to 21 June 2010	$50,494
	(b)	5 years of allowance from 22 June 2010	$117,967
(4)	Overseas living allowance		$8,734
(5)	Costs of club memberships		
	(a)	arrears from 1 May 2008 to 21 June 2010	$8,011
	(b)	5 years of club memberships from 22 June 2010	$18,716
(6)	Reasonable business expenses		$1,574.91
(7)	Annual leave		
	(a)	accrued paid leave on termination	$90,764
	(b)	5 years' annual leave from 22 June 2010	$245,170
(8)	Insurances from 22 June 2010 to 21 June 2015		$39,133
(9)	Mobile phone bill from 22 June to 21 June 2015 (*sic*)		$15,660

27 Presumably these figures were in Australian dollars. Certainly, there is nothing in the statement of claim to suggest that damages should be awarded in foreign currency. More of this, however, later.

THE CLAIM FOR BREACH OF CONTRACT

28 With respect to his contract claim, broadly speaking the issues are:

(1) Did IRL fail to make the payments itemised in the statement of claim?

(2) If so, did this constitute a breach of Mr Coghill's contract of employment?

(3) What is the measure of Mr Coghill's loss?

Did IRL fail to make the payments itemised in the statement of claim?

If so, did this constitute a breach of Mr Coghill's contract of employment?

Salary

29 The first claim is for unpaid salary for the period October 2008 to 21 June 2010.

30 Clause 13 of the contract provided for variations if they are generally communicated to all parties. I am satisfied that there was such a variation in about October 2008. Indeed, IRL did not deny that there was a variation. As I explained earlier in these reasons, the dispute

concerned the nature of the variation. Mr Coghill's uncontradicted evidence was that Mr Evans informed the executive directors they would have to take a salary cut until the next capital raising but that the losses would be recouped once the capital raising took place. Accordingly, contrary to the allegations made by IRL in its defence, I am satisfied that the variation was only temporary.

31 The evidence is that Mr Coghill was paid USD10,000 per month from October 2008 until his employment came to an end and that, despite two capital raisings in the latter half of 2009, Mr Coghill was never reimbursed for his losses.

32 In the circumstances, I am satisfied that IRL was in breach of the contract by failing to pay the arrears of salary.

33 During the seven months from 1 October 2008 to 30 April 2009 Mr Coghill's salary entitlement under cl 3.1 of the contract was USD240,000 per annum or USD20,000 per month. For seven months of that period, however, Mr Coghill was paid only USD10,000 per month. The shortfall for this period, then, is USD70,000.

34 Under the terms of the contract Mr Coghill's annual salary should have increased by 20%, on 1 May 2009 (see cl 3.1), that is, from USD240,000 to USD288,000 per annum. He was also entitled to CPI increases but, through his counsel, he waived that claim. USD288,000 per annum translates to a monthly salary of USD24,000. But for the 12 month period from 1 May 2009 to 30 April 2010 Mr Coghill was paid only USD10,000 per month, leaving a shortfall of USD14,000 per month or USD168,000 for the year.

35 On 1 May 2010 Mr Coghill's annual salary should have increased by another 20% to USD345,600. That translates to a monthly salary of USD28,800. Once again, Mr Coghill was paid only USD10,000 per month. For the month of May 2010, Mr Coghill suffered a loss of USD18,800.

36 For the month of June 2010, allowing for the termination nine days before the end of the month, Mr Coghill was entitled to USD20,160, but in fact received USD10,000. His loss for June, then, is USD10,160.

37 Accordingly, unpaid salary for the period 1 October 2008 to 21 June 2010, pursuant to cl 3.1 of the contract totals USD266,960.

Superannuation

38 The next claim relates to unpaid superannuation.

39 Mr Coghill's evidence was that he did not receive any superannuation in respect of the unpaid portion of his salary. In other words, his superannuation payments in that period were calculated on the basis of what he was actually paid, rather than the amount he was entitled to be paid. Pursuant to cl 3.2 of the contract, Mr Coghill was entitled to superannuation equal to 9% of his salary. Nine per cent of the unpaid salary of USD266,960 is USD24,026.

40 The failure to pay this sum is a breach of the contract.

Motor vehicle allowance

41 The next claim is for unpaid motor vehicle allowance for the duration of Mr Coghill's employment.

42 Mr Coghill claimed USD44,546, made up as follows:

- For the period from 1 May 2008 to 30 April 2009, USD20,800.
- For the period from 1 May 2009 to 30 April 2010, USD20,800.
- For the period from 1 May 2010 to 21 June 2010, USD2,946, being USD1,733 for May plus USD1,213 for the 21 days he worked in June.

43 The claim was based on an annual entitlement of USD20,800 for each year of his employment.

44 Clause 3.3 of the contract reads:

> In addition to your salary you will at your option:
> (a) be entitled to the use of a Company motor vehicle if available, which shall be maintained by the Company; or
> (b) be entitled to a motor vehicle allowance up to a maximum sum of USD $20800.00 per annum.

45 Mr Coghill testified that during the course of his employment with IRL he was never paid his motor vehicle allowance. He said he used his own car during the course of his employment "from time to time". He did not use a company car because there were no company cars in Sydney (where he spent most of his time) but for a total of about three months during March to October 2008 he was working from Cambodia where he used a company car. When asked

I why, in these circumstances, he was entitled to a motor vehicle allowance he conceded, "[f]or those three months, that's debatable, yes…"

46 Mr Coghill said he did not submit any claim for a motor vehicle allowance because "it would have been part of the package". He said that in August 2008 when, only three months after he started working for IRL, he complained that he had not received his motor vehicle allowance, Mr Snaith told him "you'll be fixed up soon".

47 Mr Robertson of counsel, who appeared for Mr Coghill, argued that para 3.3(b) of the contract should be read in such a way as to require payment to him of the maximum sum for each year of his employment.

48 The argument must be rejected.

49 A contract of employment is to be construed in the same way as any other contract. Its meaning is to be determined objectively and not by reference to the understanding or intention of any individual party. This means that the meaning of the words in question must be determined by considering what a reasonable person in the position of the parties would have understood them to mean. That requires consideration of the text, the surrounding circumstances known to the parties and the purpose and object of the transaction. See *Pacific Carriers Ltd v BNP Paribas* (2004) 218 CLR 451 at [22]. After referring to these principles, the majority of the High Court in *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640 observed at [35]:

> Appreciation of the commercial purpose or objects is facilitated by an understanding "of the genesis of the transaction, the background, the context [and] the market in which the parties are operating". As Arden LJ observed in *Re Golden Key Ltd* [[2009] EWCA Civ 636 at [28]], unless a contrary intention is indicated, a court is entitled to approach the task of giving a commercial contract a businesslike interpretation on the assumption "that the parties … intended to produce a commercial result". A commercial contract is to be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".
>
> (Footnotes omitted.)

50 Despite what was said in both these judgments and the conclusions reached as to their effect by the NSW Court of Appeal in a series of cases, including *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603, it has been argued that evidence of surrounding circumstances is only admissible to construe a written contract if the contractual language is "ambiguous or susceptible of more than one meaning" (see *Codelfa Construction Pty Ltd v*

State Rail Authority of New South Wales (1982) 149 CLR 337 at 352): Prince T, "Defending orthodoxy: Codelfa and ambiguity" (2015) 89 ALJ 491. It is unnecessary to enter the debate in the present case, however, as no attempt was made to lead evidence of surrounding circumstances. One is then left with the text and the purpose and object of the transaction. No submissions were made as to purpose or object and, on the text, Mr Robertson conceded that the words "up to a maximum" could not be ignored. Yet, this was the effect of his submissions.

51 In my opinion, the purpose of the motor vehicle allowance contemplated by para 3.3(b) was to compensate Mr Coghill for the use of his own car. The imposition of a ceiling envisaged that he would make a claim upon the company for his expenses. If they exceeded the ceiling, he would be paid the ceiling. If they did not, he would be reimbursed in full for what he had paid. But Mr Coghill gave no evidence of his expenses or, indeed, of the extent to which he drove whilst in Australia. Absent proof of those expenses, I am unable to conclude that he is entitled to any motor vehicle allowance at any time during his employment.

52 It follows that the failure to pay Mr Coghill a motor vehicle allowance was not a breach of his employment contract.

Accrued annual leave

53 Mr Coghill gave evidence that, at the date of his termination, he was entitled to 52 days' annual leave, which was unpaid accrued annual leave for the period 1 May 2008 to 21 June 2010. In the absence of evidence to the contrary, and noting that Mr Coghill was chief financial officer of the company at the time his employment was terminated, I accept his evidence.

54 Originally, Mr Coghill cast his claim for unpaid accrued annual leave for the period 1 May 2008 to 21 June 2010 based on an annual salary of USD345,600. Mr Robertson resiled from this position during oral argument and invited the Court to calculate the amount based on his starting salary of USD240,000. Since then, however, I have reflected on the question and decided that the salary payable on termination is indeed the salary which should be used to calculate the rate for untaken accrued annual leave. My reasons in short are these. Annual leave is an entitlement to be absent from work without performing work with no reduction in pay. Accrued untaken leave, however, is a different entitlement which crystallises on termination into a debt. The debt arises on termination and so the amount is payable at the rates applicable at termination. In any event, there is a statutory right to be paid at those

rates. It arises from the *Annual Holidays Act 1944* (NSW), which I raised with counsel during argument, but upon which I received no assistance. Section 4 of the Act relevantly provides:

> (1) Where the employment of a worker who has become entitled to one or more annual holidays provided by this Act is terminated, the employer shall be deemed to have given the holiday or holidays (except so much, if any, as has already been taken) to the worker as from the date of termination of the employment, and shall forthwith pay to the worker, in addition to all other amounts due to the worker, the worker's ordinary pay for the period of the holiday or holidays.
>
> (2) Subsection (1) applies to and in respect of an annual holiday (except so much, if any, as has already been taken) whether or not the worker concerned continues to be entitled (apart from this section) to take it, and so applies as if the worker's right to take it had accrued immediately before the date of the termination of the worker's employment.

55 There is no inconsistency with the Commonwealth law such as might give rise to a constitutional question. The requirement in the FW Act to pay employees for "untaken paid annual leave" is ambiguous. It provides that the employee be paid "the amount that would have been payable to the employee had the employee taken that period of leave". It does not say whether the amount is the amount payable at the time the leave fell due or whether it is the amount that would have been payable had the employee taken that period of leave at the time of termination.

56 It follows that the salary rate at which the leave should be calculated is the rate payable from 1 May 2010, which is USD345,600. Mr Coghill's evidence was that he was on call seven days a week. Dividing USD345,600 by 365 produces a daily rate (rounded to the nearest whole number) of USD947. 52 days at this rate amounts to USD49,236.

Overseas living allowance

57 Mr Coghill's evidence was that he was paid only USD50 per day, which, he submitted, (relying on cl 3.4 of the contract) was an underpayment of USD100 per day. He claimed to be owed USD9,100 for unpaid travel allowance. In support of the claim he tendered copies of pages from his passport to show the periods during which he was in Cambodia. They are hard to decipher. Some entries are entirely illegible. A list of dates was given to the Court but I am unable to reconcile them with the exhibit. This makes the task of assessing this head of damage extremely difficult. As it happens, however, I am not satisfied that Mr Coghill has made out a case that he has suffered any loss in respect of this head of damage.

58 Clause 3.4 reads as follows:

> *3.4 Overseas Living Allowance and relocation*
>
> If living away from Australia with your family, in addition to your salary, the Company agrees to meet you and your immediate family's reasonable costs of accommodation, utilities, sustenance, domestic assistance and other general out of pocket expenses.
>
> **Alternatively, the Company agrees to pay you the sum of $USD150 per day which shall be paid to you on a monthly basis if such alternative or other such arrangement is agreed to by you and the Company.**
>
> You shall also be entitled to a one-off relocation allowance of $USD20000.00.
>
> (Emphasis added.)

59 This clause, like several of the clauses in the agreement is inelegantly drafted. As I read it, the primary obligation is to pay living expenses to Mr Coghill if he and his family were living together overseas. Alternatively, the company agreed to pay him USD150 per day "which shall be paid to you on a monthly basis if such alternative or other such arrangement is agreed to by you and the Company". There was no evidence of any agreement. What are the consequences of this?

60 The difficulty here is in determining what is meant by "such alternative or other such arrangement". Prima facie, it is the alternative to pay USD150 per day rather than a different amount. But it could mean payment of the daily allowance each month instead of each day. There is no evidence of who proposed the form of agreement, let alone this form of words, so as to provide a possible basis for the application of the *contra proferentem* rule. Nor is there evidence of the circumstances in which the agreement was struck.

61 Where the language in a contract is open to more than one construction, the construction that will be preferred is the one that will avoid "consequences which appear to be capricious, unreasonable, inconvenient or unjust, 'even though the construction adopted is not the most obvious, or the most grammatically accurate'": *Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1973) 129 CLR 99 at 109 (citing *Locke v Dunlop* (1888) 39 Ch. D. 387 at 393).

62 In the absence of any evidence of the surrounding circumstances, I incline to the view that the words "alternative or other such arrangement" are intended to pick up the effect of the adverb at the beginning of the paragraph. In other words, it relates to the option of the company

paying an allowance, instead of meeting his and his family's costs and expenses, and does not refer to the timing of the payments. Mr Coghill relied solely on the terms of the agreement. He did not contend that he had reached any other agreement or arrangement with IRL. In particular, he did not give evidence of an agreement to accept USD50 a day. But the payment of USD50 per day and the absence of any evidence of contemporaneous complaint rather suggests that there was such an agreement or arrangement. Is that a consequence which is apparently capricious, unreasonable, inconvenient or unjust? I think not. USD50 per day amounts to USD350 per week. Cambodia is an impoverished country. There is no evidence that Mr Coghill was living with family or was supporting anyone else. As I observed earlier, he had the use of a company car there and his salary was a substantial one. Moreover, cl 4 of the agreement required the company to reimburse him for "all reasonable business expenses" he incurred "for and on behalf of the Company" including accommodation, mobile phone costs and entertainment expenses "and so on".

63 I am not satisfied that Mr Coghill has proved that, by paying him only USD50 a day, IRL was in breach of its contract.

Club memberships

64 Clause 3.8 of the contract states that "[t]he Company shall meet the costs of club memberships for you of your choosing up to $USD 3300 per annum". The claim was for USD7,063. It is unclear, however, how this sum was derived, as the evidence to support it consisted of receipts from Australian businesses presumably paid in Australian dollars.

65 Mr Coghill's evidence was that he did not receive any payment from IRL for any club memberships during his period of employment. In contrast to the position he advanced in relation to his claim for a motor vehicle allowance, Mr Coghill accepted that it was necessary to prove his club memberships and their costs and he did so.

66 The evidence was that he had paid AUD3,200 on 1 May 2008 for membership and annual subscription fee to the Union, University & Schools Club of Sydney. IRL breached its contract with him by not paying this sum.

67 The other evidence related to fees paid to Fitness First over the period 11 December 2008 to 23 October 2014 – well beyond Mr Coghill's time with IRL. Rounded off to the nearest dollar, in the first year of Mr Coghill's employment (1 May 2008 to 30 April 2009) those fees

were AUD456, in the second year (1 May 2009 to 30 April 2010) AUD1,255, and in the last two months (1 May 2010 to 21 June 2010) AUD150.

68 The total cost of Mr Coghill's club memberships for his first year with IRL amounts to AUD3,656. The maximum amount payable in any one year is USD3,300. While there was no evidence of the exchange rates in 2008, I am prepared to accept that the amounts paid in Australian dollars were less than the contractual maximum.

69 By failing to meet these costs IRL breached cl 3.8 of the contract.

70 I therefore find that Mr Coghill is entitled to AUD5,061for club membership costs incurred during his employment.

Reimbursement for business expenses

71 Clause 4 of the contract states:

> In addition, to your remuneration, the Company shall reimburse you for all reasonable business expenses incurred by you for or on behalf of the Company including such matters as business class travel, accommodation, entertainment expenses, mobile phone costs and so on, subject to you providing relevant receipts or invoices.

72 Mr Coghill gave evidence that IRL has not paid his mobile phone bill for the period 24 May to 23 June 2010. He produced an invoice from the phone company for AUD261.62. He contended that he was entitled to be reimbursed for this amount. That is true if they were "reasonable business expenses" he incurred "for or on behalf of the Company" but the evidence fell far short of establishing that they were. I considered whether it was the intention of the clause to pick up personal as well as business calls, but reading the clause as a whole I am not satisfied that it was. No evidence was led to show that any or all these expenses were incurred for or on behalf of IRL. That said, the bill includes AUD69.36 for international calls, all of which (with the exception of one call to the United Arab Emirates), were to Cambodia. I am prepared to infer that those calls were made for or on behalf of the company.

73 Receipts for certain other expenses incurred by Mr Coghill were said to total AUD1,574.91. Mr Coghill's evidence was to the effect that these were business expenses incurred for or on the company's behalf and I accept that evidence, but I do not accept the submission as to the total amount. The receipts that were tendered only add up to AUD1,293.34.

74 Accordingly, Mr Coghill has established an entitlement under this head of damage to AUD1,363.62, which I will round up to AUD1,364.

The damages claimed for the 5 years since termination

75 Mr Coghill submitted that, because the employment contract was terminated "for no proper cause" during the Initial Term of the Agreement (as defined in cl 1), IRL is liable under the terms of cl 8 of the contract to pay Mr Coghill the entirety of the "Initial Term" of the contract, that is 5 years' remuneration, or an "Initial Term" (that is, a 5 year period) beginning on the date of the termination (21 June 2010). In essence, he contended, cl 8 is a liquidated damages clause, the amount to be determined by the formula described in the clause. That is to say, it was an agreed damages clause.

76 Clause 8 is not a liquidated damages clause but it may include such a clause. The paragraphs of the clause Mr Coghill invoked were the following:

> In addition, where this agreement is terminated by the Company for no proper cause, wherein proper cause can only arise from a breach of this agreement, the Company shall be liable to pay you the entirety of the "Initial Term", "The Subsequent Term" or "Subsequent Terms" contract i.e. 5 years from the date of the termination without proper cause.
>
> **For the avoidance of doubt**, if the agreement is so terminated by the Company without proper cause at any time during the "Initial Term" of five (5) years or, any "Subsequent Term" or "Subsequent Terms", **you shall have the entirety of the contract term, i.e. five (5) years, paid out from the date of termination without proper cause notwithstanding the time already expired** on the "Initial Term", "Subsequent Term" or "Subsequent Terms", whichever term/s be applicable at the date of termination.
>
> You shall be entitled to all and any amounts that you may have been entitled to had the agreement been renewed for the applicable "Initial Term", "The Subsequent Term" or "Subsequent Terms" at the relevant time.
>
> (Emphasis added.)

77 This is another clause which suffers from inelegance of drafting. But I accept Mr Robertson's submission as to its meaning. That gives rise to a question as to whether this is penal in nature.

78 The purpose of an agreed damages clause is to facilitate the calculation of the loss and so dispense with the need for the aggrieved party to prove it. In order to determine whether cl 8 includes a provision for liquidated damages, it is necessary to consider whether it provides for a genuine pre-estimate of loss or damage, that is, whether it is truly compensatory, or,

instead, imposes a penalty. Agreed damages are binding unless they constitute a penalty: Sneddon NC, Bigwood RA and Ellinghaus MP, *Cheshire and Fifoot Law of Contract* (10th ed, LexisNexis Butterworths Australia, 2012) [23.45]. In that event, they are unenforceable. The question must be decided "upon the terms and inherent circumstances of [the] contract, judged of (*sic*) as at the time of the making of the contract": *Dunlop Pneumatic Tyre Company Limited v New Garage and Motor Company Limited* [1915] AC 79 ("*Dunlop*") at 86–7.

79 Mr Robertson submitted that on a proper reading of the clause IRL was bound to pay Mr Coghill USD2,307,890, made up as follows:

> 16.1 Five years' salary for the period 22 June 2010 to 21 June 2015 (waiving any claim for increase pursuant for CPI) in the amount of US$1,785,984. This is comprised of:
>
> i. Year 1 (22 June 2010 to 21 June 2011), the amount of US$240,000; this is the starting salary set in clause 3.1 of the Employment Agreement, which is to increase by 20% each year.
> ii. Year 2 (22 June 2011 to 21 June 2012), the amount of US$288,000;
> iii. Year 3 (22 June 2012 to 21 June 2013), the amount of US$345,600;
> iv. Year 4 (22 June 2013 to 21 June 2014), the amount of US$414,720;
> v. Year 5 (22 June 2014 to 21 June 2015), the amount of US$497,664.
>
> 16.2 Five years' superannuation, pursuant to cl 8 of the Employment Agreement, totalling US$160,739. This is calculated as 9% of the salary for the 5 year period following termination, ie 9% of US$1,785,984.
>
> 16.3 Five years' motor vehicle costs, pursuant to cl 8 of the Employment Agreement, in the amount of US$104,000 (ie 5 x US$20,800).
>
> 16.4 Five years' club memberships, pursuant to cl 8 of the Employment Agreement, in the amount of US$16,500 (ie 5 x US$3,300).
>
> 16.5 Five years' annual leave, pursuant to cl 8 of the Employment Agreement, totalling US$206,167. This is comprised of:
>
> i. Year 1, 6 weeks' salary of US$240,000, totalling US$27,692;
> ii. Year 2, 6 weeks' salary of US$288,000, totalling US$33,323;
> iii. Year 3, 6 weeks' salary of US$345,600, totalling US$39,877;
> iv. Year 4, 6 weeks' salary of US$414,720, totalling US$47,852;
> v. Year 5, 6 weeks' salary of US$497,664, totalling US$57,423.
>
> 16.6 Five years' reimbursement for insurance premiums, pursuant to cl 8 of the Employment Agreement, totalling US$34,500 (ie 5 x US$6,900)

80 If this is correct, the damages in the event of termination "without proper cause" are extremely generous. But as Professor Carter points out in *Contract Law in Australia* (6th ed,

LexisNexis Butterworths Australia, 2013) at [37–12], it has never been the law that merely because a clause provides for payment of a sum which exceeds the damages recoverable at common law the clause is necessarily penal rather than compensatory. An agreed damages clause may not be penal even if it produces a windfall: *Bartercard Ltd v Myallhurst Pty Ltd* [2000] QCA 445. The test is whether the sum payable is "out of all proportion" to the loss, "extravagant, exorbitant or unconscionable" (*AMEV-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 190; *Esanda Finance Corporation Limited v Plessnig* (1988) 166 CLR 131 ("*Esanda*") at 141) "in comparison with the greatest loss that could conceivably be proved to have followed from the breach": *Dunlop* at 87. The distinction between a penalty and liquidated damages may be one of degree, depending on the circumstances of the particular case.

81 The mere fact that the damages are not specified does not preclude a finding that the damages are liquidated. The clause in question in *Esanda* did not provide for an agreed sum but a formula for calculating the sum. The question of construction must be determined as a matter of substance, not form: *O'Dea v Allstates Leasing System (WA) Pty Ltd* (1983) 152 CLR 359 at 400.

82 So what is the position in this case?

83 Here, the contract was for a fixed term of five years renewable for successive five year periods. Mr Coghill is not a young man. The parties may have reasoned or assumed or proceeded on the basis that it was likely he would be employed for successive terms and that upon the termination of his contract, having regard to his age, he might not have been able to find other work. In those circumstances it is conceivable that his loss could have been as great as that for which the clause provided. In any event, the onus of showing that the clause is a penalty is on the party seeking to avoid its enforcement: see, for example, *Robophone Facilities Ltd v Blank* [1966] 3 All ER 128 at 142; *Multiplex Constructions Pty Ltd v Abgarus Pty Ltd* (1992) 33 NSWLR 504 at 527. IRL did not plead that the clause in question was a penalty, let alone discharge its onus of proof.

84 Taking all these matters into account, I accept Mr Robertson's submission that the provision in question is a liquidated damages clause rather than a penalty. I also accept his calculations as to the amount of those damages.

Summary

85 IRL is liable to pay damages to Mr Coghill as follows:

Item	**USD**	**AUD**
Salary from 1 October 2008 to 21 June 2010	266,960	
Superannuation from 1 October 2008 to 21 June 2010	24,026	
Motor vehicle allowance from 1 October 2008 to 21 June 2010	Nil	
Accrued annual leave	49,236	
Overseas living allowance	Nil	
Club memberships		5,061
Reimbursement for business expenses		1,364
Liquidated damages	2,307,890	
TOTAL	**2,648,112**	**6,425**

Interest

87 Mr Coghill claimed interest at 8.5% per annum on all these sums. No submission was made in support of the rate. There is no provision in the contract for interest and Mr Robertson did not appear to press a claim for interest at this rate. But there is no reason why Mr Coghill should not recover pre-judgment interest under s 51A of the *Federal Court of Australia Act 1976* (Cth). Nor is there any apparent reason why the rates referred to in Practice Note CM 16 should not be applied. But interest should be payable on half the amount only to allow for the fact that the loss has occurred progressively.

THE CLAIM UNDER THE *FAIR WORK ACT*

88 In the circumstances, it is strictly unnecessary to consider this claim, which is based on non-compliance with the minimum standards prescribed by the Act. Since Mr Coghill has succeeded in his claim for damages for breach of contract, it falls by the wayside as the contractual entitlements are far greater. Nevertheless, I was asked to set out my findings on this part of the case "for abundant caution".

89 The issues raised by the pleadings are:

(1) Did Mr Coghill have a period of untaken paid annual leave owing to him at the time his employment was terminated?

(2) If so, did IRL fail to pay him his outstanding annual leave when it terminated his employment?

(3) Was Mr Coghill entitled to written notice of termination or payment in lieu? In other words, was his employment terminated for "serious misconduct"?

90 Before dealing with these issues, it is necessary to say something about the legislation said to give rise to the entitlements.

91 There was no dispute that the FW Act applied to Mr Coghill's employment. IRL admitted in its defence that it is a national system employer as defined in s 14 of the Act and that Mr Coghill was a national system employee within the meaning of s 13. This is unsurprising since IRL is an Australian trading corporation with employees and "national system employer" as defined in s 14 includes "a constitutional corporation, so far as it employs, or usually employs an individual". A constitutional corporation is defined in s 12 to mean a corporation to which para 51(xx) of the Constitution applies. One such corporation is a trading corporation formed within the limits of the Commonwealth.

92 This means that the minimum standards contained in Pt 2–2 of the Act (the National Employment Standards) applied to Mr Coghill's employment and could not be displaced: FW Act, s 61(1).

93 Division 6 of Pt 2–2 of the FW Act deals with annual leave. All employees except for casuals are entitled to four weeks paid annual leave for each year of service unless they are shiftworkers of the kind referred to in s 87(1)(b) of the Act, in which case they are entitled to an extra week per year: s 87 read with s 86. The entitlement accrues progressively during a year of service according to the employee's ordinary hours of work and accumulates from year to year: s 87(2).

94 If an employee has a period of untaken paid annual leave when the employment comes to an end, the employer must pay the employee the amount that would have been payable had the employee taken that period of leave: s 90(2).

95 Subdivision A of Div 11 of Pt 2–2 deals with notice of termination or payment in lieu of notice.

96 Section 117(1) provides that an employer must not terminate an employee's employment unless the employer has given the employee written notice of the day of the termination. If

not, the employer is obliged to pay to the employee (or someone on his or her behalf) "payment in lieu of notice of at least the amount the employer would have been liable to pay … at the full rate of pay for the hours the employee would have worked had the employment continued until the end of the minimum period of notice": s 117(2)(b). Section 117(3) includes a table for working out the minimum period of notice. The minimum period of notice for an employee who has been continuously employed for more than one year but not more than three years is two weeks. Employees over 45 years, who have completed at least two years of continuous service, are entitled to an additional weeks' notice. No evidence was led as to Mr Coghill's age but he was self-evidently over the age of 45.

97 Subdivision C (s 123), however, excludes the operation of Div 12 for certain employees. Its effect for relevant purposes is that an employer is not obliged to give notice to an employee or to make a payment in lieu of notice if the employee's employment is terminated because of "serious misconduct": s 123(1)(b).

98 I now turn to consider the issues.

Did Mr Coghill have a period of untaken paid annual leave owing to him at the time his employment was terminated?

If so, did IRL fail to pay him his outstanding annual leave when it terminated his employment?

99 Mr Coghill alleged that he had a period of untaken paid annual leave owing to him and was not paid the amount to which he was entitled under s 90(2) when his employment was terminated. In its defence IRL did not admit that he had any untaken paid annual leave and denied that it had not paid what was due to him.

100 As I have already observed, Mr Coghill's evidence, which I have accepted, was that he had accrued 52 days of untaken paid annual leave at the time his employment was terminated, the value of which he has never received.

101 I therefore find that IRL contravened s 90(2) of the FW Act by failing to pay Mr Coghill $49,236, being the amount that would have been payable to him had he taken that leave.

Was Mr Coghill entitled to written notice of termination or payment in lieu?

102 The substance of IRL's pleaded case was that Mr Coghill was guilty of serious misconduct entitling the company to terminate his employment without notice or payment in lieu. There is, however, no evidence to support it. Thus, Mr Coghill had an entitlement under the Act to

three week's written notice of the day of the termination of his employment and IRL contravened s 117 of the Act by failing to give him that notice or pay him at least the amount it would have been liable to pay had the employment continued until the end of the minimum period of notice.

CONCLUSION

103 It follows that there will be judgment in favour of Mr Coghill. IRL should pay him damages for breach of his employment contract, together with interest.

ORDERS

104 Most of the amounts in question are payable in American dollars. Where a defendant owes money to a plaintiff payable in a foreign currency the House of Lords held in *Miliangos v George Frank (Textiles) Ltd* [1976] AC 443 at 462–3, 497, 500, 502 that judgment could be given in the foreign currency. In *PT Thiess Contractors Indonesia v PT Arutmin Indonesia* [2015] QSC 123 Jackson J reviewed the authorities and concluded (at [95]) that this was the position in Australia, pointing out that:

> In *Australian and New Zealand Banking Group Limited v Cawood* [[1987] 1 Qd R 131] and *European Asian Bank Aktiengesellschaft v Katsikalis* [[1987] 1 Qd R 45] this court accepted … that it could pronounce judgment in a foreign currency upon a claim to recover a loan made in a foreign currency. Recent statute law relating to the registration of foreign judgments also proceeds on that basis [referring to the *Foreign Judgments Act 1991* (Cth), s 6(11)(a) and *Uniform Civil Procedure Rules* (Qld), r 947E(c)(vii)]. Such a claim is not distinguishable in nature from the plaintiff's claim in this case; as a further example, *Miliangos v George Frank Textiles Ltd* was a claim for the price of goods sold in a foreign currency.
>
> (Footnotes omitted.)

105 This is the course Mr Robertson proposed in the present case and I am prepared to accept his proposal. Accordingly, IRL should be ordered to pay Mr Coghill USD2,648,112 and AUD10,081, together with interest and costs. The interest component needs to be calculated. For this reason, as foreshadowed during argument, I will not pronounce judgment at this time.

106 The originating application included a claim for declarations in relation to the contraventions of the FW Act but no submissions were made about them or their form.

107 The originating application also included a claim for costs. No submissions were made about this question either. The application was filed in the Fair Work Division. Section 570(1) of

the FW Act provides that a court may not make an order for costs against a party to proceedings in a court exercising jurisdiction under the Act save in accordance with subs (2) or s 569 or 569A.

108 In the circumstances I invite further submissions in writing on:

(1) the amount of interest to be included in the judgment;

(2) whether declarations should be made;

(3) if so, the proper form of the declarations; and

(4) whether Mr Coghill is entitled to all or part of his costs and, if so, the basis for that entitlement.

I certify that the preceding one hundred and eight (108) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Katzmann.

Associate:

Dated: 17 September 2015