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Update Summary

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COMMERCIAL CONTRACT CLAUSES

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Update Summary

Joshua Thomson SC has provided updated commentary. Highlights include the following.

Construction and interpretation of commercial contracts

Objectivity

A consequence of the objective theory of contractual interpretation is that there is only one true construction. Hence, an appellate court is to determine the objectively applicable construction of a contract for itself, and is not required to consider and identify error in the reasoning process of the judge below: *AIG Insurance Australia Ltd v McMurray* [2023] WASCA 148 at [145]-[146], *Quasar Resources Pty Ltd v APG AUS No 3 Pty Ltd* [2023] WASCA 171. See [1150].

Clauses creating debt and money obligations

Consideration not paid

A future promise to pay wholly nominal consideration could be implied from the acknowledgement that an amount had previously been paid for the grant of the option. Where consideration is nominal, a statement in a contract that the consideration is an amount which has been paid should be construed, in the event the amount has not been so paid, as meaning the consideration was a promise to pay the amount. The acknowledgment of payment implies that the parties did not intend that the commencement of an enforceable contract between them depended upon future payment of consideration, where they had acknowledged that this had already occurred: *Townsville Pharmacy No 4 Pty Ltd v V Quattro Pty Ltd* [2023] QSC 105. See [10130].

Indemnity clauses

Causal connection

It seems that the construction of the words “arising out of” or similar phrases may have now settled into a pattern which is to give them a wide interpretation only requiring a weak causal relationship, which may be less proximate than the relationship required by the phrase “caused by”: *Classics for a Cause Pty Ltd v Grays Ecommerce Group Ltd* [2023] NSWSC 967. See [30290].

Essential and non-essential time stipulations

Other circumstances

A particular indication that time is not of the essence for performance of the requirements of a contractual term is that the time limit for performance of the term is left open and impliedly governed by a requirement to perform within a reasonable time, and the contract does not prescribe a particular date or fix a time by reference to a formula which enables the date to be defined precisely. That is so, even where the contract generally provides that “time is of the essence”, but without specifying a time limit: *Eleven 17 Ocean Street Pty Ltd v Evangelista Pty Ltd* [2023] QCA 170. See [65510].

Exclusion of liability and exclusive remedy clauses

Limits upon exclusion of fraud or operation of statutory provisions

“No representation” clauses and “no reliance” clauses can have an evidentiary effect that negates an integer of liability in relation to misleading or deceptive conduct. They may alter the character of a representation made, or render conduct not misleading or deceptive. They may assist in reaching the conclusion, as an evidentiary matter, that a person did not rely upon any conduct or did not suffer loss because of the other party’s conduct. The entirety of the relevant conduct must be assessed as a whole: *Viterra Malt Pty Ltd v Cargill Australia Ltd* [2023] VSCA 157. See [115130].

