

CASE IN BRIEF

Interpreting written contracts - the Victorian Supreme Court's view on the 'true rule'

By Lucy Na

Siemens Gamesa Renewable Energy Pty Ltd v Bulgana Wind Farm Pty Ltd [2020] VSC 126

The Victorian Supreme Court has confirmed the so-called *true rule* of contract construction, confirming that there needs to be ambiguity in a contract before evidence of surrounding circumstances can be used to construe the contractual terms.

Background

Bulgana Wind Farm Pty Limited (**Bulgana**) engaged Siemens Gamesa Renewable Energy Pty Limited (**Siemens**) to design and construct a large wind farm in Western Victoria. The parties entered into an Engineering, Construction and Procurement Contract (**the ECP Contract**). The ECP Contract required practical completion of the works by 16 August 2019, and provided that Siemens would pay delay liquidated damages (**DLDs**) at the agreed rate until practical completion was achieved. The ECP Contract further provided that Bulgana could recover the amount of the DLDs by deducting the amount from any certified progress claim or by calling on the two unconditional bank guarantees that Siemens had provided as security.

Siemens failed to meet this date and was thereby liable to pay DLDs. As payment, Bulgana asserted its right to draw on the bank guarantees and subsequently the parties fell into a dispute. On 30 September 2019, Siemens and Bulgana entered into an agreement where Bulgana would not make a demand under the Performance Securities and would instead offset the claim for DLDs against monthly payment claims (**the Second Agreement**). The Second Agreement was finalised by a three-paragraph letter that included this sentence: *[Bulgana] will accordingly not exercise its rights to draw on the Performance Securities in its possession in relation to this matter.*

Despite the Second Agreement, Bulgana informed Siemens that it intended to call on the bank guarantees. The matter came before Justice Riordan of the Victorian Supreme Court.

The true law of contractual construction

The issue in disagreement was what the phrase *in relation to this matter* meant: Was Bulgana prohibited from calling on the bank guarantees in relation to the August DLDs only, or all future DLDs as well? Bulgana said that the agreement related to the August DLDs only, and asked the Court to look at the *surrounding circumstances* to support its construction of the Second Agreement.

Justice Riordan determined that the key issue was whether any ambiguity existed in the meaning of the



Second Agreement. If so, according to the *true rule* of contract construction in *Codelfa*,¹ evidence of surrounding circumstances would be admissible to assist in the interpretation of the contract. Justice Riordan accepted that the words *this matter* in the Second Agreement were not clear, and was prepared to consider the surrounding circumstances (but not to the extent they demonstrated subjective motivations).

Ultimately, Justice Riordan found in favour of Siemens, saying that *a reasonable businessperson in the position of the parties would have understood the subject matter of the Second Agreement to be the General Dispute*.

In making this finding, Justice Riordan confirmed that the *true rule* as established in *Codelfa* was still good law.

See the Court's decision [here](#).

End Notes

¹ *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24.

ABOUT THE AUTHOR



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