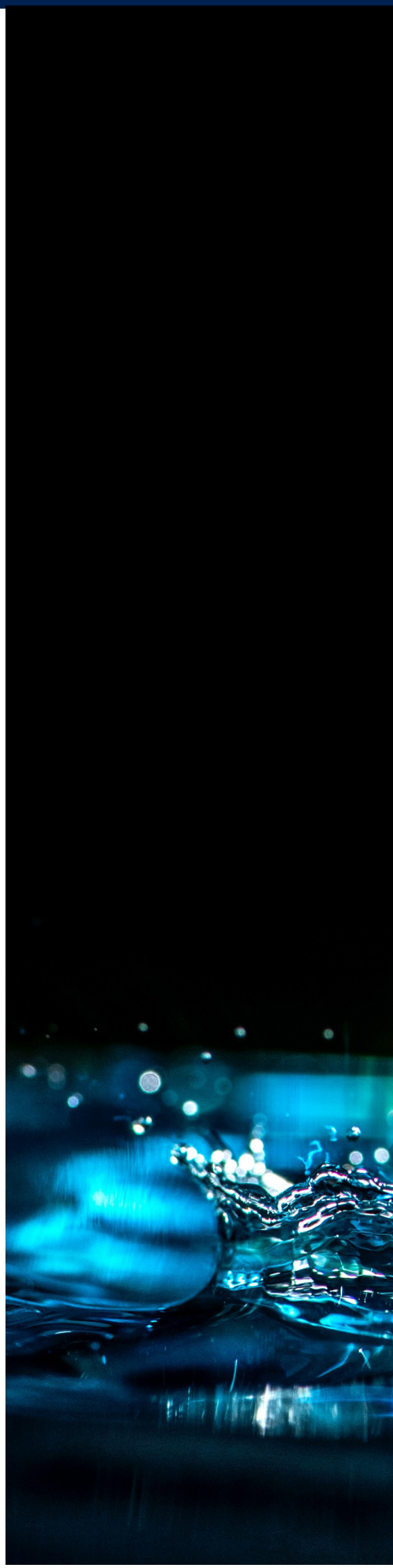
Testing the waters: New South Wales Supreme Court considers the prevention principle

By Hannah Aziz



Court provides further confirmation that the prevention principle can be excluded by the terms of a contract

Introduction

Following our recent commentary comparing the operation of the prevention principle in New South Wales and Victoria (https://www.buildingdisputestribunal.co.nz/buildlawissue42/), the Supreme Court of New South Wales has in *MP Water Pty Ltd v Veolia Water Australia Pty Ltd*[1] continued the line of authority that the application of the prevention principle can be excluded by the terms of a contract.

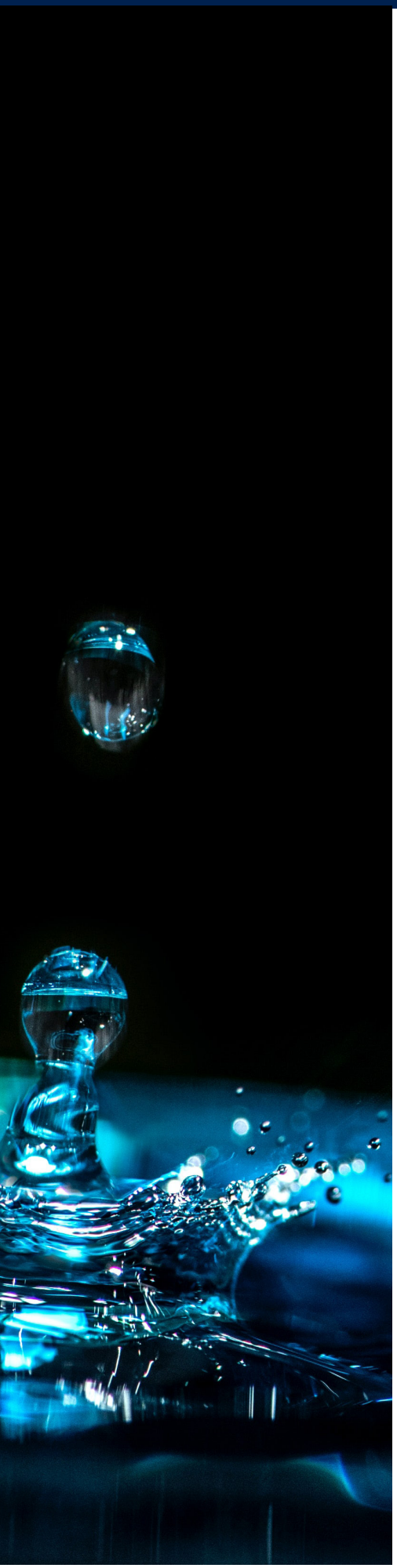
The facts

In November 2017 MP Water Pty Ltd (**MP**) entered into a Design and Construct Contract (the **Contract**) and a Services Provider Agreement (**SPA**) with Veolia Water Australia Pty Ltd (**Veolia**) for the operation and maintenance of a water treatment facility in Lithgow, New South Wales (the **Facility**).

In accordance with the SPA, Veolia was required to treat water delivered from two underground coal mines at the Facility. Veolia was also required to meet certain flow and capacity obligations as part of operating the water treatment system, including the continuous and uninterrupted acceptance of the water from the coal mines at an agreed rate, with capacity for occasional acceptance of the water at a higher rate (the **Guarantees**). If the Guarantees were not met, they could be deemed a major service failure. Any major service failure would entitle MP to issue default notices.

Deficiencies were identified in an existing storage pond, and MP undertook to rectify the deficiencies. Veolia advised that it could not meet the Guarantees without the storage ponds operating at their promised capacity. On 7 May 2021 the Facility failed to process and accept water from the mines for 48 hours.

1 (No 3) [2021] NSWSC 1023.



MP issued a default notice on 11 May 2021 in relation to that failure on the basis that it constituted a major service failure under the Contract. MP issued a direction requiring Veolia to remedy the alleged default by 12 pm on 12 May 2021. MP also issued a step-in notice. Veolia rejected the step-in notice as unlawful. Veolia argued that it was unable to provide the services because MP had failed to rectify the deficiencies in the storage pond. On this basis, Veolia argued that the prevention principle was enlivened and thus precluded MP from relying on the default notice.

The decision

Justice Williams held that the prevention principle has two elements:

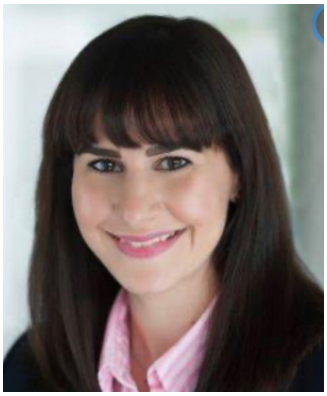
- wrongful conduct (assessed by reference to the terms of the contract); and
- the consequences of wrongful conduct.

She also held that the operation of the prevention principle may be modified or excluded by contract. Justice Williams held that this was just such a situation as the SPA excluded the operation of the prevention principle. As the contract required only the mere existence of a relevant service failure for a default notice to be issued, the rationale behind why the service was not provided was immaterial.

Conclusion

This decision provides further confirmation of New South Wales' expansive approach in considering the operation of the prevention principle, particularly when compared to that of its neighbour, Victoria. This case serves as an important reminder to parties when considering the drafting of contracts. The prevention principle can be excluded by virtue of clear, well-drafted contractual terms.

ABOUT THE AUTHOR



Hannah is a commercial litigation solicitor by background and qualified in England and Wales. Hannah has experience advising clients across various sectors including energy, banking and retail and she also has experience in regulatory matters and IP litigation. Prior to moving to New Zealand, Hannah worked in house for a European insurer. She now works as a Knowledge Manager in NZDRC's Knowledge Management Team, which provides technical support to the Building Disputes Tribunal.