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**JURISDICTION** : SUPREME COURT OF WESTERN AUSTRALIA

**TITLE OF COURT** : THE COURT OF APPEAL (WA)

**CITATION** : THE STATE OF WESTERN AUSTRALIA -v-  
LEICESTER [2018] WASCA 153

**CORAM** : MURPHY JA  
MITCHELL JA  
BEECH JA

**HEARD** : 18 JULY 2018

**DELIVERED** : 4 SEPTEMBER 2018

**FILE NO/S** : CACV 7 of 2018

**BETWEEN** : THE STATE OF WESTERN AUSTRALIA  
Appellant

AND

GLEN BRIAN LEICESTER  
Respondent

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**ON APPEAL FROM:**

**Jurisdiction** : DISTRICT COURT OF WESTERN AUSTRALIA

**Coram** : SCHOOMBEE DCJ

**Citation** : LEICESTER -v- THE STATE OF WESTERN  
AUSTRALIA [2017] WADC 162

**File Number** : CIV 1084 of 2017

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*Catchwords:*

Contract - Construction - Whether agreement between appellant and respondent's insurer included settlement of claims by insurer against appellant in respect of insureds not identified in the settlement agreement - Whether terms of settlement were constituted by draft deed of settlement created after settlement agreement entered into

*Legislation:*

Nil

*Result:*

Leave to appeal refused  
Appeal dismissed

*Category:* B

**Representation:**

*Counsel:*

Appellant : Mr G R Hancy  
Respondent : Mr D J Williams QC

*Solicitors:*

Appellant : Gilchrist Connell  
Respondent : Mason Black Lawyers

**Case(s) referred to in judgment(s):**

Black Box Control Pty Ltd v TerraVision Pty Ltd [2016] WASCA 219  
Electricity Generation Corporation v Woodside Energy Ltd [2014] HCA 7;  
(2014) 251 CLR 540  
Ermogenous v Greek Orthodox Community of SA Inc [2002] HCA 8; (2002)  
209 CLR 95  
Leicester v The State of Western Australia [2017] WADC 162  
Masters v Cameron [1954] HCA 72; (1954) 91 CLR 353

Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd [2015] WASCA 21;  
(2015) 47 WAR 547

**JUDGMENT OF THE COURT:**

1 This is an appeal against a decision of Schoombe DCJ in *Leicester v The State of Western Australia*.<sup>1</sup> That decision concerned the determination of a preliminary issue in proceedings brought by the respondent (Mr Leicester) against the appellant (the State) in respect of damage to Mr Leicester's house and property as a consequence of a prescribed burn in the Margaret River region in November 2011. It was common ground that Mr Leicester's claim was brought pursuant to rights of subrogation by Westpac General Insurance (Westpac). The preliminary issue was whether Westpac, by agreement, had previously released the State from such a claim. The judge found that, although the State had entered into an agreement with Westpac to release a number of other insureds in relation to the fire, the agreement did not apply to Mr Leicester. The State appeals against that decision. Leave is required.

2 For the reasons which follow, leave to appeal should be refused and the appeal dismissed.

**Background**

**March 2016**

3 On 22 March 2016, Mr Teoh, a solicitor whose firm acted on behalf of Westpac, sent a letter to Mr Hubbard, a solicitor acting on behalf of (relevantly, for present purposes) the State. Mr Teoh's letter stated, in effect, that:

1. his firm acted for Westpac and he understood that Mr Hubbard acted for RiskCover, the self-insurance scheme of the government of Western Australia;
2. two fires had escaped containment lines during prescribed burns conducted on behalf of the State in the Margaret River region in November 2011 and had damaged various properties;
3. following the delivery of the Keelty report on 27 January 2012, he understood that the State had decided to accept all reasonable claims for losses arising out of the fires; and
4. two property owners (which Mr Teoh named) had suffered loss and damage to their property as a result of the fires, against

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<sup>1</sup> *Leicester v The State of Western Australia* [2017] WADC 162 (primary decision).

which Westpac had indemnified them under policies of insurance with Westpac.

4 The letter concluded:

11. Westpac and its insureds holds ... the Government of WA liable for the loss to their respective properties.
12. We are instructed to advise you that our clients intend to claim their respective losses from the Government of WA.
13. We are currently clarifying our clients' position on their quantum of loss, and once settled, we will provide you with all Proof of Loss documents substantiating our clients' Claims shortly.
14. In the meantime, please provide us with your client's admission of liability with respect to our clients' Claims by no later than 29 March 2016.

#### **April 2016**

5 On 1 April 2016, Mr Hubbard, on behalf of the State, replied to Mr Teoh. He advised that RiskCover did not admit liability in respect of 'the Fire'. He also requested Mr Teoh to submit, for RiskCover's consideration, a quantified list of Westpac's losses and supporting documentation for each loss.

6 On 28 April 2016, Mr Teoh wrote again to Mr Hubbard. He advised, in effect, that Westpac had indemnified a further three named property owners who had also suffered property loss and damage from the Margaret River fires. He also advised that Westpac was exercising its rights of subrogation in respect of the indemnities provided to those owners. Mr Teoh enclosed a schedule entitled 'Summary of Claims' setting out the loss and damage suffered by the five named property owners, who Mr Teoh described as the 'insured'. They did not include Mr Leicester. Westpac's claims totalled well in excess of \$250,000.

#### **May 2016**

7 On 19 May 2016, Mr Hubbard replied to Mr Teoh's letter of 28 April 2016. Mr Hubbard:

1. attached a schedule which set out the amounts claimed against the State 'by Westpac in relation to each of its subrogated recovery claims', his firm's assessment of the quantum of 'each

of the claims', and his firm's assessment of a fair and reasonable offer 'in respect of each of the claims'; and

2. advised, in effect, that in respect of Westpac's claims, the State's offer was \$221,778.65.

8 Mr Hubbard's letter of 19 May 2016 included, relevantly:

6. *It is a term of the settlement offers made in relation to each of the claims that:*

- 6.1 *Risk Cover, on behalf of the State of Western Australia, will pay Westpac the sum of \$221,778.65 in full and final settlement of any rights it has or may have against any person - including, without limitation, the State of Western Australia - arising out of the Fire or the indemnification of its insureds, or any of them, with respect to the Fire ('Subject Matters').*

...

- 6.4 *The terms of the agreement to be formed upon acceptance are to be reflected in a settlement agreement to be executed by Westpac and the State of Western Australia ('Agreement').*

- 6.5 *The Agreement may be pled in bar to any proceedings brought by or on behalf of Westpac (whether in its own name or in the name of any of its insureds) in relation to the subject claim, or the losses which are the subject thereof.*

7. This offer is made in accordance with the principles enunciated in *Calderbank v Calderbank* [1975] 3 All ER 333. (emphasis added)

9 On 25 May 2016, Mr Teoh replied to Mr Hubbard's letter of 19 May 2016. Mr Teoh rejected the State's offer, and queried the basis upon which the State had applied a reduction to each of the five claims listed in the schedule attached to the letter of 19 May 2016. Mr Teoh reiterated the strength of his client's claims. Mr Teoh then said (by way of counter-offer):

6. [W]e are instructed to propose to settle our principal client's claim in the amount of \$311,000.00 'all in'. This offer is open for acceptance by 4 pm 2 June 2016 and is made in accordance with the principles enunciated in *Calderbank v Calderbank* [1975] 3 All ER 333.

7. *We otherwise agree with paragraph 6 of your letter dated 19 May 2016. Please confirm that you will prepare draft Terms for our consideration. (emphasis added)*

### 10 June 2016

10 On 10 June 2016, Mr Hubbard wrote to Mr Teoh and rejected Mr Teoh's counter-offer of 25 May 2016. He set out in some detail why he considered that the risk to the State of being found liable was not high, and said that the State had 'good prospects of defending this claim'. Mr Hubbard concluded with a further counter-offer:

#### Counter-Offer

11. Notwithstanding the above, in the interests of a commercial resolution our client hereby offers to pay your client the sum of **\$250,000** (two hundred and fifty thousand dollars) in full and final satisfaction of its claim for all losses resulting from the Fire.
12. This offer is:
- 12.1 *Made on the same terms as those set out in paragraph 6 of our letter of 19 May 2016 (save in respect of the settlement sum);*
- 12.2 *Made in accordance with the principles set out in **Calderbank v Calderbank** [1975] 3 All ER 333; and*
- 12.3 *Open for acceptance for a period of 14 days. (emphasis added)*

### 17 June 2016

11 The judge found, in effect, that on 17 June 2016 there was an oral acceptance by telephone of the State's offer conveyed by Mr Hubbard's letter of 10 June 2016.<sup>2</sup>

### 20 June 2016

12 On 20 June 2016, Mr Teoh emailed Mr Hubbard, with reference to the telephone conversation on 17 June 2016, and said:

I confirm that the matter is now settled in principle and you will provide a draft Deed of Release for our client's consideration.

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<sup>2</sup> Primary decision [33] - [37].

13 Later on 20 June 2016, Mr Hubbard, in a letter counter-signed by a partner of his firm, said:

2. I confirm that your client has accepted the offer made by my letter of 10 June 2016.
3. As requested, please find attached a draft settlement agreement for your client's review and, if satisfactory, execution.
4. Once the agreement has been executed and returned to us, we will forward it to our client for execution. We will then provide you with a fully executed copy for your client's records.

14 The draft settlement agreement included the following:

**BACKGROUND**

- A. Westpac is an insurer carrying on the general insurance business and was the insurer of both real and personal property and business operations within the Margaret River area of Western Australia, including (without limitation) property and businesses owned by the individuals specified in Schedule A hereto.
- B. On or around 23 and 24 November 2011, the Fire caused damage to the persons, property and businesses insured by Westpac in the Margaret River area, including (without limitation) the property and businesses owned by the individuals specified in Schedule A hereto.
- C. Consequent to the Fire, Westpac made payments to its insureds in respect of the Fire and losses claimed to have been incurred in connection with the Fire.
- D. Westpac, pursuant to its rights of subrogation, sought recovery from the State of Western Australia with respect to the Indemnified Loss.
- E. Westpac has alleged that the State of Western Australia is liable for the Fire in respect of the Indemnified Loss.
- F. The State of Western Australia does not admit that either Westpac or any of its insureds have suffered any loss, or that the State of Western Australia is liable to Westpac in respect of the Indemnified Loss or any other loss or damage.
- G. The Parties have agreed to resolve the Claim, without any admission of liability on behalf of the State of Western Australia on the terms set out in this Settlement Agreement.



**OPERATIVE PROVISIONS**

**1 SETTLEMENT OF CLAIM**

- 1.1 The State of Western Australia will pay to Westpac the sum of \$250,000 (two hundred and fifty thousand dollars).
- 1.2 The State of Western Australia will pay the Settlement Sum within 14 days of the execution of this Settlement Agreement.

**2 RELEASE**

- 2.1 In consideration of the payment of the Settlement Sum, Westpac:
  - 2.1.1 waives all actions, suits, claims, demands and causes of action and the costs thereof that it has or, but for the execution of this Settlement Agreement, may have against any person (including, without limitation, the State of Western Australia) arising directly or indirectly out of or in connection with the Claim, the Loss or the Indemnified Loss; and
  - 2.1.2 releases and discharges the State of Western Australia from all or any claims it has or may have against the State of Western Australia arising out of or in connection with the Claim, the Loss or the Indemnified Loss.

**3 BAR TO PROCEEDINGS**

- 3.1 This Settlement Agreement may be pleaded in bar to any action or proceedings:
  - 3.1.1 raising the Claim, the Loss, the Indemnified Loss or any matter the subject of the Claim, the Loss, the Indemnified Loss or this settlement; or
  - 3.1.2 which arises directly or indirectly out of the Claim, the Loss, the Indemnified Loss or this settlement; and
  - 3.1.3 whether commenced by Westpac or anyone in its name or on its behalf against the State of Western Australia or any servant, agent, employee, director or insurer of the State of Western Australia.

**4 NO PREJUDICE TO RIGHTS OF INSURED PERSONS**

- 4.1 For the avoidance of doubt, this settlement and the releases and bars to proceedings provided in clauses 1 to 3 hereof:

4.1.1 *do not relate to any loss or damage which any person insured by Westpac has incurred but has not been indemnified for; and*

4.1.2 *are without prejudice to any rights which any person insured by Westpac may have in relation to such losses.*

...

### 13 DEFINITIONS

13.1 In this agreement, unless excluded by or contrary to the context, the following definitions will apply:

**Claim** means any and all claims by Westpac against the State of Western Australia arising out of the Loss or the payment by Westpac of the Indemnified Loss.

**Fire** means the fire or series of fires that commenced in the Margaret River area on or around 23 and 24 November 2011, subsequently affecting surrounding real and personal property and businesses, including but not limited to the property and businesses owned by the individuals specified in Schedule A hereto.

**Indemnified Loss** means any and all sums paid by Westpac to its insureds following claims for indemnity received by it arising out of and in consequence of the Fire, including without limitation the claims specified in Schedule A to this Agreement.

**Loss** means the loss or damage suffered by Westpac directly or indirectly arising out of its payment of the Indemnified Loss.

**Parties** means the Parties to this Agreement.

**Settlement Sum** means \$250,000 (two hundred and fifty thousand dollars) (emphasis added)

15 Schedule A to the draft settlement agreement listed each of the five insureds as 'Insured Party', and gave their addresses.

### 22 - 29 June 2016

16 On 22 June 2016 Mr Teoh responded by email to the draft settlement agreement and stated that he proposed the following amendments:

Clause 4.1.2 ... are without prejudice to nay [sic] rights which any person insured by Westpac and not specified in Schedule A hereto may have in relation to such losses.

Clause 13.1 Indemnified Loss means any and all sums paid by Westpac to its insureds following claims for indemnity receiving [sic] by it arising out of and in consequence of the Fire ~~as including without limitation the claims~~ specified in Schedule A of this Agreement.

17 Mr Hubbard replied by email on the same day saying that his client had no objection to the proposed amendment to cl 4.1.2, but did not agree to the amendment proposed by cl 13.1. He also stated:

It was an express term of my client's offer of 10 June 2016 that the settlement was to cover any and all claims your client had or may have arising from the fire, including the indemnification of any of its insureds. The definitions in the deed should therefore not be limited to merely those insureds who have been identified to date.

18 On 23 June 2016 Mr Teoh sent another email to Mr Hubbard which stated:

We agree with the contents of your email below.

Could we have a final version of the Terms so that we can have our client sign and exchange?

19 The 'email below' was the email from Mr Hubbard of the previous day (referred to at [17] above).

20 On 28 June 2016 Mr Hubbard sent a letter attaching an 'amended settlement agreement'. The amended settlement agreement included the proposed amendment to cl 4.1.2, but left cl 13.1 in its original terms. It appears that the letter and amended settlement agreement were emailed to Mr Teoh on 29 June 2016.

21 On 29 June 2016 Mr Teoh informed Mr Hubbard by email that he would 'work on getting signed Terms'.

### **Subsequent events**

22 Westpac did not execute the amended draft settlement agreement. Nor did the State. There was an exchange of correspondence between the parties in August 2016 which led to the dispute the subject of the preliminary issue.

### **The judge's findings**

23 The judge found, in effect, that:

1. an agreement of release had been reached as between Westpac and the State on 17 June 2017;
2. the agreement covered the five specified insureds of Westpac, not including Mr Leicester; and
3. accordingly, Mr Leicester's claim had not been released by Westpac.

### **Grounds of appeal**

24 There are two grounds of appeal, as follows:

1. The [judge] erred in law in holding that the terms of a contract made on 17 June 2016 between [the State and Westpac] did not prevent Westpac from bringing a subrogated action for damages against [the State] in [Mr Leicester's] name.
2. The [judge] erred in law in failing to find that the terms of a Settlement Agreement document to be executed by [the State] and Westpac and that were agreed between the lawyers for parties by 28 June 2016 were binding in contract.

### **Ground 1 - arguments and disposition**

25 The undisputed finding is that an agreement was reached on 17 June 2016 by oral acceptance of the offer conveyed by Mr Hubbard's letter of 10 June 2016. That offer was to settle for the total sum of \$250,000 on the terms, relevantly, of par 6 of Mr Hubbard's letter of 19 May 2016. The offer was expressed to be made in accordance with *Calderbank v Calderbank*.

26 The provisions of par 6 of Mr Hubbard's letter of 19 May 2016 have been set out in [8] above. Nevertheless, it is convenient at this stage to set out the most material provision in dispute, par 6.1:

Risk Cover, on behalf of the State of Western Australia, will pay Westpac the sum of \$221,778.65 in full and final settlement of any rights it has or may have against any person - including, without limitation, the State of Western Australia - *arising out of the Fire* or the indemnification of its insureds, or any of them, with respect to the Fire ('Subject Matters').

27 The State accepts that the reference to 'insureds' in the second last line of par 6.1 quoted above is a reference to the five named insureds referred to in the letter of 19 May 2016.<sup>3</sup>

28 The State's contention is to the effect that:

1. the italicised words which precede the word 'or' are used in the alternative to the words 'the indemnification of its insureds or any of them, with respect to the Fire', which appear in the last part of the clause;
2. the italicised words must accordingly have a meaning different from the meaning to be given to the remainder of the clause after the use of the disjunctive 'or';
3. it is significant that the release is in respect of any rights Westpac 'has or *may have*';
4. the italicised words can only reasonably be taken to refer to any claim whatsoever that Westpac has or may have as an insurer arising out of the fire against any person - including the State. The reference (in effect) to the five named insureds at the end of the clause is a reference to a limited class of persons falling within the broader class of persons encapsulated by the words 'against any person - including ... the State'. The italicised words are to be understood as meaning rights arising from indemnification of any insureds;<sup>4</sup> and
5. that construction is confirmed when regard is had to the incorporation of par 6 of the letter of 19 May 2016 in par 12 of the State's counter-offer of 10 June 2016, preceded by the reference in par 11 of that counter-offer to the payment of \$250,000 'in full and final satisfaction of its claim *for all losses* resulting from the Fire' (emphasis added).

29 The language of par 6.1 of Mr Hubbard's letter of 19 May 2016, read in the context of Mr Teoh's letter of 25 May 2016 is, it may be accepted, ambiguous. The relevant principles of contractual construction were not in dispute.<sup>5</sup>

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<sup>3</sup> Appeal ts 5 - 6.

<sup>4</sup> Appeal ts 5.

<sup>5</sup> See, for example, *Black Box Control Pty Ltd v TerraVision Pty Ltd* [2016] WASCA 219 [42].

30 We are unable to accept the State's contentions for the following reasons. First, and as a general observation, on the State's construction, the words in the second part of the paragraph, including and after the word 'or', are tautologous because they fall within the broader and comprehensive expression 'settlement of any rights [Westpac] has or may have against any person ... arising out of the Fire'. That in itself removes much, if not all, of the force of points 1 and 2 in [28] above.

31 Secondly, the broader context includes, relevantly:

1. The dispute between the parties emerged in the correspondence of 22 March 2016, 1 April 2016 and 28 April 2016. It involved, in substance, a dispute as to the State's liability for the loss and damage suffered by five specified insureds of Westpac. Mr Teoh effectively particularised each such claim in his letter of 28 April 2016.
2. Mr Hubbard's letter of 1 May 2016 responded to each particular claim, and offered an overall settlement sum on the basis of the State's stated assessment of each such claim.
3. The scope of the dispute did not change between 19 May 2016 and 10 June 2016.

32 Thirdly, par 6.1 of the letter of 19 May 2016 is also to be read in the context of par 6.5 of the letter of 19 May 2016, which referred to the proposed (formal) Agreement that 'may be pled in bar to any proceedings brought by or on behalf of Westpac (whether in its own name or in the name of any of its insureds) in relation to the subject claim, or the losses which are the subject thereof'. By both its language and subject matter, as confirmed by its broader context, par 6.5 refers to the proceedings at least implicitly threatened by Westpac in respect of the losses suffered by the five named insureds in relation to the fire.

33 Fourthly, par 7 of the letter of 19 May 2016, and par 12.2 of the letter of 10 June 2012 are strong pointers against the State's contention. The making of a Calderbank offer would not, at least ordinarily, be understood to apply to proceedings commenced by or in the name of other insureds beyond the five specified insureds. A Calderbank offer that includes a term requiring the compromise of additional unidentified claims not yet made is very unlikely to produce any favourable costs consequences for the offeror. By contrast, on our construction, the offer of 10 June 2016 could sensibly and conventionally operate as a Calderbank offer.

34 Fifthly, par 11 of the letter of 10 June 2012 tends to detract from, rather than support, the State's contention. The relevant reference is the payment of the settlement sum to Westpac in full and final satisfaction 'of its claim for all losses resulting from the Fire' (emphasis added). Westpac's 'claim' for losses resulting from the 'Fire' had been articulated in the earlier correspondence from its solicitors, which made no mention of losses with respect to other insureds.

35 Sixthly, the scope and effect of the words 'has or may have' in par 6.1 of the letter of 19 May 2016 no doubt depend upon their textual and other admissible context. The words 'has or may have' are commonly used in the context of the settlement of litigation, or proposed litigation, in order to provide a protection against not only claims which have been articulated or foreshadowed in the dispute as it has emerged, but also any claims connected with the dispute not previously made or foreshadowed. It may be accepted that the words 'has or may have' are intended to have that additional reach, but it is difficult to attribute to them, in this context, the more general purpose of settling unidentified and unarticulated insurance claims arising out of the Fire unconnected with the dispute as it had emerged in the correspondence between the parties' solicitors.

36 Seventhly, when par 6.1 of the letter of 19 May 2016 is read as a whole, it appears that the settlement of Westpac's rights against 'any person ... arising out of the Fire ...' (emphasis added), is intended to be a reference to any claims Westpac has not only against the State directly, but also against persons for whom the State might be or become liable. In other words, the focus here is to protect the State against the prospect of claims pursuant to which it might incur indirect liability. The point is neutral on the meaning to be given to the words in par 6.1 which follow, but, as part of the broader context, it should be observed that this part of par 6.1 provides no support for the State's contentions.

37 Finally, the words 'arising out of the Fire', when read in contrast to 'the indemnification of its insureds', are not, on their face, tautologous. They are wide enough to cover, in addition to any losses suffered by Westpac from its indemnification of the five insureds (1) any losses incurred directly by Westpac as a result of the Fire, and (2) any losses connected with the five insureds but unconnected with Westpac's indemnity of the insureds. This would include any losses for breach of contract for failing to indemnify the insureds to the full extent as required under the relevant policies. It is true that on the facts, it is

difficult to discern the intended practical effect of this additional protection in favour of the State. Nevertheless, it appears, objectively, to have been included as an abundance of caution. When par 6.1 is read as a whole, and in context, the words 'arising out of the Fire' are not, on the better view of it, directed to claims arising out of the possible indemnification by Westpac of other, unspecified, insureds in relation to other, unknown, losses.

38 In our view, a reasonable businessperson<sup>6</sup> would have understood the chain of correspondence referred to at [3] - [10] above to concern only the settlement of claims related to damage to the property of the five insureds specified in the schedule to the letter of 19 May 2016. In the schedule to that letter, the State quantified each claim in specified amounts totalling \$221,778.65, in a context where Westpac, by its letter of 28 April 2016, had previously quantified the same claims in specified amounts totalling well in excess of \$250,000. The amount of the State's offer was explicitly derived from an assessment of the losses of the five insured. Subsequent counter-offers to settle for gross sums of \$311,000 and \$250,000 were made in the letters of 25 May 2016 and 10 June 2016 respectively. In that manner, the State and Westpac presented each other with differently quantified claims in respect of damage to the property of the five insureds, and ultimately agreed on an intermediate gross settlement sum. A reasonable businessperson would have understood the settlement agreement to concern only liabilities or potential liabilities related to that damage. In that context, a reasonable businessperson would not have understood the reference in cl 6.1 of the letter of 19 May 2016, to rights Westpac:

had or may have against any person ... arising out of the Fire or the indemnification of its insureds, or any of them, with respect to the Fire.

as comprehending subrogated claims not related to the damage to the property of the specified five insureds which was the subject of the settlement negotiations.

39 For these reasons we would dismiss ground 1 of the appeal.

## **Ground 2 - arguments and disposition**

40 By ground 2, the State contends, in effect, that the terms of the contract between the parties were to be found in 'a Settlement Agreement document that was to be executed by the State and Westpac ... which arose from a series of letters, oral communications and emails

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<sup>6</sup> See *Electricity Generation Corporation v Woodside Energy Ltd* [2014] HCA 7; (2014) 251 CLR 540 [35].



ending by letter dated 28 June 2016'.<sup>7</sup> The State submits that the parties' respective solicitors reached agreement as to the terms of the Deed, and had authority to do so.<sup>8</sup> Reference is made to a number of cases, including *Ermogenous v Greek Orthodox Community of SA Inc*;<sup>9</sup> *Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd*<sup>10</sup> and *Masters v Cameron*.<sup>11</sup>

41 This ground should be dismissed.

42 The State accepts that:

1. There was a binding agreement reached on 17 June 2016 upon the oral acceptance of the State's offer contained in Mr Hubbard's letter of 10 June 2016.<sup>12</sup>
2. There was no variation to that binding agreement.<sup>13</sup>
3. The parties' solicitors had no authority to execute a formal settlement Agreement pursuant to par 6.4 of the letter of 19 May 2016 as incorporated into the binding agreement reached on 17 June 2016.<sup>14</sup>

43 Once the above matters are accepted, it is impossible for the terms of the agreement between the parties to be other than those contained in the agreement reached on 17 June 2016. None of the cases referred to by the State assist the State in this regard, or point to a contrary conclusion.

44 Ground 2 should be dismissed.

### **Conclusion**

45 For these reasons, leave to appeal should be refused and the appeal should be dismissed.

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<sup>7</sup> Appellant's written submissions, par 5.1.

<sup>8</sup> Appeal ts 11 – 12, 14 – 15.

<sup>9</sup> *Ermogenous v Greek Orthodox Community of SA Inc* [2002] HCA 8; (2002) 209 CLR 95, 105.

<sup>10</sup> *Vantage Systems Pty Ltd v Priolo Corporation Pty Ltd* [2015] WASCA 21; (2015) 47 WAR 547 [97] - [102].

<sup>11</sup> *Masters v Cameron* [1954] HCA 72; (1954) 91 CLR 353, 360.

<sup>12</sup> Appeal ts 3.

<sup>13</sup> Appeal ts 4, 15.

<sup>14</sup> Appeal ts 11, 15.

*JUDGMENT OF THE COURT*

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

CL  
ASSOCIATE TO THE HONOURABLE JUSTICE MURPHY

4 SEPTEMBER 2018