WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION

CITATION	**:**	2016 WAIRC 00731
CORAM	**:**	SENIOR COMMISSIONER S J KENNER
HEARD	**:**	FRIDAY, 5 FEBRUARY 2016, THURSDAY, 3 MARCH 2016, FRIDAY, 1 APRIL 2016
DELIVERED	**:**	TUESDAY, 30 AUGUST 2016
FILE NO.	**:**	B 93 OF 2015
BETWEEN	**:**	NATHAN BRADLEY Applicant AND BINDER GROUP PTY LTD Respondent

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Catchwords	**:**	*Industrial Law (WA) - Contractual benefits claim - Whether contractual entitlement to payment of costs associated with obtaining permanent residency - Whether contractual entitlement to a bonus or commission payment - Whether payments were discretionary - Principles applied - Application dismissed*
Legislation	**:**	*Industrial Relations Act 1979* (WA)
Result	**:**	Application dismissed

Representation:

Counsel:

Applicant	**:**	Mr P Mullally as agent
Respondent	**:**	Mr M Cox of counsel

Solicitors:

Respondent **:** MDC Legal

Case(s) referred to in reasons:

Biotechnology Australia Pty Ltd v Pace (1988) 15 NSWLR 130

B.P. Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings (1977) 180 CLR 266

Codelfa Construction Pty Ltd v State Rail Authority (1982) 149 CLR 337

Fernandes v Bollinger & Co Pty Ltd (2016) 96 WAIG 485

Hawkins v Clayton (1988) 164 CLR 539

McDermott v Black (1940) 63 CLR 161

Mineralogy Pty Ltd v State of Western Australia [2005] WASCA 69

Pepe v Platypus Asset Management Pty Ltd [2013] VSCA 38

Russo v Westpac Banking Corp [2015] FCCA 1086

Rymark Australia Development Consultants Pty Ltd v Draper [1977] QdR 336

Silverbrook Research Pty Ltd v Lindley [2010] NSWCA 357

Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd (2004) 219 CLR 165

Woolworths Ltd v Kelly (1991) 22 NSWLR 189

Case(s) also cited:

Australian & New Zealand Banking Group Ltd v Frost Holdings Pty Ltd [1989] VR 695

Australian Medic-Care Ltd v Hamilton Pharmaceutical Pty Ltd (2009) 261 ALR 501

Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd (1982) 149 CLR 600

Commonwealth Bank of Australia v Barker [2014] HCA 32

Devefi Pty Ltd v Mateffy Pearl Nagy Pty Ltd (1993) 113 ALR 225

Dovura Pty Ltd v Wilkins (2000) 105 FCR 476

Hugh Sutherland Rogers v J-Corp Pty Ltd [2015] WAIRC 00862

Lau v Bob Jane T-Marts Pty Ltd [2004] VSC 69

Major v Bretheton (1928) 41 CLR 62

Masters v Cameron (1954) 91 CLR 353

Masterton Homes Pty Ltd v Palm Assets Pty Ltd [2009] NSWCA 234

Matthews v Cool or Cosy Pty Ltd IAC 1 2004

Media Entertainment & Arts Alliance, Re; Ex parte Hoyts Corp Pty Ltd (1993) 178 CLR 379

Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234

Secured Income Real Estate (Aust) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596

Stilk v Myrick (1809) 2 Camp 317

Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd (1992) 27 NSWLR 326

Reasons for Decision

1 The applicant, Mr Bradley, was employed by the respondent, Binder Group Pty Ltd, as the Western Australian Industrial Sales Manager, and later the National Sales Manager, from 25 July 2011 to 17 April 2015. The company is engaged in the business of designing, manufacturing and supplying pipe support systems and associated equipment to the mining and gas industry. Mr Bradley was based in the Western Australian office of Binder. The company also has offices in Queensland and Victoria.

2 Mr Bradley was employed under two written agreements. The first employment contract for the position of WA Industrial Sales Manager was dated 14 March 2011. The second and final employment contract for the position of National Sales Manager was dated 17 May 2012. As a result of events prior to and during Mr Bradley's employment, he claimed that Binder has denied to him contractual entitlements in the total sum of $221,081.44. A summary of them now follows.

Relevant principles

3 The relevant principles applicable to contractual benefits cases are not controversial. In the recent case of *Fernandes v Bollinger & Co Pty Ltd* (2016) 96 WAIG 485 I said at par 5:

> The principles applicable to this aspect of the Commission's jurisdiction are well settled. The onus is on Mr Fernandes to establish that at the material time he had a contractual entitlement to the benefit claimed and that it has been denied. Specifically, the claim must relate to an industrial matter; Mr Fernandes must be an employee; the benefit claimed by him must be a contractual benefit, that being one due under the contract; the relevant contract must be a contract of service; the benefit claimed must not arise under an award or order and finally, it must have been denied by the employer: *Hotcopper Australia Ltd v David Saab* (2001) 81 WAIG 2704.

Permanent residency costs

4 Mr Bradley maintained it was an oral term of his employment contract with Binder that the company would sponsor him to work in Australia under a Temporary Business Visa (Long Stay) (subclass 457), and pay the costs associated with obtaining permanent residency. He said the agreement was reached during a meeting with the directors of the company in early May 2011. Mr Bradley maintained he would not have accepted a position with Binder otherwise, as he had already completed 16 months employment with his previous employer, and was only a few months away from being able to apply for permanent residency through them. His previous employer had agreed to meet all

of the costs associated with obtaining a Permanent Work Visa (subclass 186). Mr Bradley claims he is owed $8,043 being the costs associated with obtaining permanent residency for himself and his family. Mr Bradley conceded in evidence that Binder did not agree to pay all the costs of his permanent residency. He accepted that Binder indicated it would "sponsor" him to permanent residency.

5 Binder submitted that in order to lawfully employ Mr Bradley, it understood it would have to take over sponsorship of his Temporary Business Visa (Long Stay) (subclass 457). It was a precondition of Mr Bradley's employment with the company. Binder maintained that during a meeting with Mr Bradley in early May 2011, Mr Paul Bennett, the Group Managing Director, agreed to arrange to transfer the sponsorship of Mr Bradley's 457 Visa to the company, and pay the costs associated with the transfer. He never agreed to pay for Mr Bradley's permanent residency costs. Binder did not nominate Mr Bradley for his permanent residency. Mr Bennett further said that when Mr Bradley raised the issue of costs for his permanent residency with him in January 2013, the company refused to pay for this because Mr Bennett considered that it had been raised well after the event. Binder submitted the employment contract was otherwise complete, and contained all of the express contractual terms and conditions that were to bind the parties. Specifically, Binder denied the contract contained an oral term that it was to pay the costs associated with Mr Bradley obtaining permanent residency status in Australia.

6 Mr Bradley gave evidence that in order to apply for a Permanent Work Visa (subclass 186) he needed to work for one employer for a minimum of two years. Mr Bradley also said that it was a condition of the oral agreement, that if he left employment with Binder within two years, he would be required to repay the visa costs expended by the company. Binder submitted that objectively, the condition could only refer to recovering costs associated with the 457 Visa, as Mr Bradley could only apply for a Permanent Work Visa (subclass 186) after the two year period had expired.

7 As a person from the United Kingdom, the only basis on which Mr Bradley was able to work in Australia at the material time was through sponsorship for a subclass 457 Visa. A requirement of the migration legislation is for an employer to "sponsor" a prospective employee. It is unlawful for an employer to employ any such person unless a subclass 457 Visa sponsorship is in place.

8 It was common ground in this matter that Mr Bradley, in his prior employment, was so sponsored. Therefore, self-evidently, for Mr Bradley to accept an offer of employment with a new employer, such as Binder, Binder had to become Mr Bradley's sponsor. It was not necessary for an express agreement in these terms. As a requirement of the migration legislation, and thus an obligation of

law on Binder, I agree with Binder's submissions that if no express reference was made to such matters, then the circumstances would satisfy the tests for the implication of a term to this effect, into Mr Bradley's contract of employment, applying the principles established in *B.P. Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266.

9 No reference was made to the issue of visa or permanent residency sponsorship in Mr Bradley's letter of appointment as the WA Industrial Sales Manager for Binder, the copy of which in evidence was dated 14 March 2011. Reliance was placed by Mr Bradley on the discussions between himself and Mr Bennett and Mr Davey. Neither Mr Bennett nor Mr Davey confirmed Mr Bradley's version of events as to this issue. They both maintained that Binder only agreed to take over the costs of the subclass 457 Visa as Mr Bradley's sponsor. Reference was also made by Mr Bradley to the involvement of Mr Bell, the prior State Manager of Binder. The evidence was, however, as confirmed by Mr Bell himself, that he played no direct role in the appointment of Mr Bradley or the terms and conditions of employment finally agreed between the parties. The only role seemingly played by Mr Bell, was that he introduced Mr Bradley to Mr Bennett as a possible candidate for the State Manager position, prior to Mr Bell's departure from the company. Nor did Mr Bell it seems, have any authority to enter into contracts on behalf of Binder, even if it could be said that he did take part in some way, in the terms and conditions finally agreed between the parties.

10 Further reference was made by Mr Bradley to the role played by Ms Patterson. Ms Patterson was a recruitment consultant involved in the recruitment process for Mr Bradley's appointment at the early stages. In her witness statement, Ms Patterson asserted that she was involved in the "negotiation process" for Mr Bradley's appointment. Precisely what level of involvement Ms Patterson had in that regard was not clear on the evidence. It was common ground however, that she was not present at the meetings between Mr Bradley and Messrs Bennett and Davey when discussing the possibility of him joining the business. Ms Patterson could not have been privy to those discussions and what was agreed. Therefore, any assertions by Ms Patterson, and for that matter Mr Bell, as to what may have been agreed between the parties in relation to visa issues generally in relation to Mr Bradley, was necessarily hearsay. Additionally, such evidence could also be categorised as evidence of pre-contractual statements which are generally not of assistance as to the interpretation of terms of a contract as finally agreed.

11 Furthermore, if, as Mr Bradley maintained, the payment of costs for his permanent residency was so important to him, and was agreed to by Mr Bennett prior to his appointment, it is surprising to say the least, that he did not seek

written confirmation of this either in the letter of offer made by Binder, or by a separate document. Whilst Mr Bradley made reference to his intentions on taking up the new appointment, and the period of time remaining to qualify for permanent residency under his previous employment, these are considerations which I cannot have regard to for the purposes of construing the terms of any contractual arrangement. Additionally, Mr Bradley appeared to base his claim at least to an extent, on what he perceived to be the position in his discussions with Mr Bennett. In his mind, as revealed in his evidence, any "sponsorship" of him by Binder in relation to his permanent residency, necessarily meant Binder paying all of the costs associated with it. However, there was no direct evidence of an agreement to this effect, or that was what Binder had in mind too.

12 Having regard to all of the evidence in relation to this issue, I am not persuaded that Mr Bradley has established, given the persuasive burden falls on him, that it was a term of his contract of employment that Binder was responsible for all of Mr Bradley's permanent residency costs.

Bonus payment for years ending 30 June 2012 – 30 June 2014

13 As part of his employment, Mr Bradley maintained he was also entitled to a bonus payment for each of the above financial years. He claimed a total of $213,038.44 was due to him under his contract of employment with the respondent.

Bonus payment for the year ending 30 June 2012

14 On 6 December 2011, Mr Ian Davey, the respondent's Sales and Marketing Director, sent an email to Mr Bradley and the other State Sales Managers, outlining the terms of a bonus scheme arrangement for the financial year ending 30 June 2012. The email confirmed what was discussed in a sales meeting in November 2011. A copy of the email was annexure IBD-3 to Mr Davey's witness statement. Given the importance of its terms, I reproduce the email as follows:

> I Want[sic] to confirm the bonus scheme arrangements and get you[sic] final feedback before we announce to all of the sales team. The details are as follows:
>
> - The bonus will be worked on the annual results for the Group and will be paid annually.
> - It is based on the full financial year accepted Budgets and ends at the completion of the financial year
> - All bonus calculations are based on the achievement or over achievement of Gross Profit dollars ($)

- Anyone leaving or resigning for any reason before the end of the financial year will not be entitled to or considered for any bonus
- Anyone who joins the company and has not completed a full year will be entitled to a pro rata bonus providing their tenure is greater than their probationary period. I.E if the financial year completes and the incumbent has not completed their probationary period then no bonus is payable

The payment structure for the bonus is:

Internal Sales Person - $5,000 on achievement of gross profit dollar ($) budget (for the branch)

External Sales - $10,000 on achievement of gross profit dollar ($) budget – (Individual Budget)

Branch/Sales Manage[sic] - $15,000 on achievement of gross profit dollar ($) budget (for the branch)

East Coast Manager - $10,000 on achievement of gross profit dollar ($) budget (for each branch)

In addition 20% of any gross profit $ above budget for the branch will be paid to the branch for distribution to everyone at the branch. Distribution to be agreed between the Sales Director and/or managing director and the relevant sales/branch manager and the east coast manager if applicable.

Please provide your feedback o[sic] the above.

15 Mr Bradley maintained that in accordance with the bonus scheme, he was entitled to a payment of $15,000 for achieving sales over and above the gross profit target set for WA, and $106,604.44, being his share of a payment representing 20% of any gross profit above budget for the branch.

16 Binder submitted that under the first employment contract, Mr Bradley had no contractual entitlement to participate in a bonus scheme. It was not included as a term of the contract, and the scheme was not accompanied by any change in Mr Bradley's employment duties or status, or any other form of consideration. Further, Binder argued the second limb of the bonus scheme, which provided that *"…20% of any gross profit $ above budget for the branch will be paid to the branch for distribution to everyone at the branch"* meant "everyone" and not simply the five members of the sales team as alleged by Mr Bradley. In any event, the company claimed the distribution of the bonus was subject to agreement between the Sales Director and/or Managing Director. As there was no such agreement, it was incomplete, to the extent that it would require a future agreement to be enforceable. Binder submitted that it reserved to itself a discretion in respect of the second limb of the bonus scheme, and exercised its discretion having regard to its commercial circumstances, and other factors.

17 Although it denied that it was liable to pay Mr Bradley any amount by way of a bonus payment, Binder contended that Mr Bennett agreed to pay $40,000 to Mr Bradley, in full and final satisfaction of his claim to a bonus for the financial

year ending 30 June 2012. As to this contention, Mr Bradley gave evidence that he felt vulnerable, and accepted this payment as he was afraid he could lose his job and visa if he pushed Binder too hard. He said he did not consider the payment discharged Binder's liability to pay the full bonus.

18 The bonus payment for the June 2012 financial year was based on the email from Mr Davey set out above. The scheme was introduced some six months after Mr Bradley became employed. There was no reference to the bonus scheme in Mr Bradley's original letter of appointment. Therefore for Mr Bradley to succeed in relation to this claim, he must establish that the contract was varied in or about December 2011 to incorporate the terms of Mr Davey's email of 6 December 2011 in relation to bonuses.

19 As noted, Binder maintained as a threshold position that Mr Bradley could not establish that the 2012 bonus scheme was a contractual benefit because Mr Bradley offered no fresh consideration for its terms. Binder contended that Mr Bradley worked in accordance with his established duties and responsibilities as from the commencement of his employment. In accordance with relevant contractual principles, the submission was made by Binder that Mr Bradley had therefore failed to establish that this bonus was enforceable: Carter JW, *Contract Law in Australia* (6th ed, 2012) pars 6.02, 6.04, 6.07 and 6.11; *Woolworths Ltd v Kelly* (1991) 22 NSWLR 189.

20 For the following reasons I am not persuaded to this view. In the absence of any specified performance benchmarks in Mr Bradley's contract of employment, or reference to the scheme providing for the same, Mr Bradley's contribution to the two levels of performance specified in the 2012 bonus scheme constituted consideration necessary to support the terms of the scheme having contractual effect. The obligations imposed on Mr Bradley to perform to achieve bonus targets, were sufficient consideration to give contractual effect to the promises made by Binder to him.

21 In large part the determination of Mr Bradley's claim in relation to the June 2012 bonus scheme is a matter of construction of the terms of the scheme itself. There were two elements to it. The first element required the meeting or exceeding of Binder's overall gross profit on a group basis. This included all of the branches they being Western Australia, Victoria and Queensland. If, as a part of this overall group result, a branch achieved its gross budget, payments were payable to the staff as set out. This occurred for the WA Branch. In Mr Bradley's case, as the Sales Manager, $15,000 was payable. He was plainly entitled to that amount. If the Commission concludes this was the only entitlement due to Mr Bradley under the June 2012 scheme, the payment made by Binder to Mr Bradley in the sum of $40,000, following his disputing his entitlement under the scheme with Mr Bennett and Mr Davey fully discharged its liability to Mr Bradley.

22 The contentious aspect of the June 2012 scheme was the second part. This dealt with the 20% gross profit above budget for a branch. Again, there was no dispute that the WA Branch well exceeded its gross profit target. On the evidence, the target gross profit for the WA Branch was $1,642,500 and the actual gross profit was $4,307,611.

23 In accordance with the ordinary and natural meaning of the words used in Mr Davey's email of 6 December 2011, there are two limbs to the second part of the 2012 bonus scheme. The first is a reference in the first sentence, to the payment of 20% of gross profit in excess of a branch budget to be paid to "everyone at the branch". The second limb is the reference in the second sentence to the words "Distribution to be agreed …".

24 It is trite to observe that in the interpretation of provisions of a contract, the modern approach requires not only reference to the text of the contract, but also to the "purpose and object of the transaction" and "what a reasonable person" would understand the terms to mean: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165 at par 40 per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ. It is also not appropriate to fasten on one part only of a contract. The text needs to be considered as a whole. One part of a contract taken in isolation may have quite a different meaning when considered in the context of all of the contract's component parts. At the end of the day, interpretation is a text based activity.

25 As noted, Mr Bradley submitted that the first limb of the 20% bonus provision should be construed to mean only those in Binder's sales team of five employees, including Mr Bradley, were recipients. On this basis, each member of the sales team was eligible to receive $106,604.44. Adding to this Mr Bradley's $15,000 payment for the "achievement bonus", would lead to a total of $121,604.44 owing to him, from which the amount paid of $40,000 should be deducted. In particular, Mr Bradley referred to Mr Davey's email of 6 December 2011 being addressed to the Sales Team Managers. The submission was that because it was sent to these staff of Binder in sales, this supported the contention that the bonus scheme recipients should be limited only to this group.

26 For the following reasons, I prefer the interpretation of the 2012 bonus scheme as contended by Binder in relation to the first limb of the second part of the scheme. The words used by Mr Davey in his email "everyone at the branch" are clear and unambiguous. The language used in the second last par, is quite different to and stands in contrast to the language used in the par above, dealing with the "achievement bonus" part of the scheme. In this part the relevant staff members were clearly identified. Reference was made to the specific sales personnel to receive the bonus, and, in addition, the "East Coast Manager". However, in the next par, the language is expressed in general terms. Reference to the word

"distribution" is also an indicator of the wider scope intended by this part of the scheme. To "distribute" means to "deal out, give a share of to each of a number; spread about, scatter, put at different points …" (the Shorter Oxford English Dictionary).

27 If, as contended by Mr Bradley, the first limb meant only the five sales staff were to receive a bonus distribution, then it is difficult to immediately see what the necessity of the next sentence would be to the operation of the scheme. That is, if the distribution was as contended by Mr Bradley, then the remaining words in the paragraph in relation to "distribution to be agreed" would appear to be somewhat redundant and have no work to do: *Mineralogy Pty Ltd v State of Western Australia* [2005] WASCA 69 at par 52.

28 As a consequence of my conclusion as to the meaning of the words used in the second limb of the 2012 scheme, is the question of the lack of agreement as to the distribution. The last sentence of the par refers to the need for an agreed distribution between the Managing Director or Sales Director and the relevant Branch Manager. Mr Bennett testified that this part of the scheme was inserted to enable a distribution to be made only if it was considered appropriate, having regard to the overall health and profitability of the business.

29 In the case where the operative part of an agreement leaves some aspect to be decided, or the subject matter to be further agreed, the terms of the bargain, to that extent at least, would be incomplete: Seddon NC, Bigwood RA and Ellinghaus MP, *Cheshire and Fifoot: Law of Contract* (10th ed, 2012) par 6.8. In this case there was no evidence that the steps outlined in the second limb of the 2012 scheme took place. This part of the contract remained unfulfilled. It is not for the Commission to rewrite the terms of the agreement reached between the parties to provide what it may consider to be a fair outcome. I am not therefore persuaded that Mr Bradley has established his entitlement under the 2012 scheme as claimed.

"Settlement" of dispute

30 Given my conclusions about the 2012 bonus, whilst it is strictly unnecessary to determine the issue, in the event I am incorrect, a question as to whether a payment made by Binder to Mr Bradley in settlement of a dispute about his bonus for 2012 arises.

31 It was common ground that Mr Bradley and Binder had a dispute as to Mr Bradley's entitlement under the 2012 bonus scheme. Mr Bradley spoke to Mr Davey about the matter and it was proposed by Mr Davey that Mr Bradley be paid a total of $20,000, including the $15,000 from the first limb of the scheme. Mr Bradley was not happy with this. He raised the matter further with

Mr Bennett. Given the results for the WA Branch, Mr Bradley felt that a $20,000 bonus was completely inadequate. Both Mr Bradley and Mr Bennett met to discuss the matter on 2 or 3 October 2012.

32 The upshot of this meeting was an offer by Mr Bennett to pay Mr Bradley $40,000 for the 2012 financial year bonus. Mr Bennett testified that the performance of the WA Branch was not just the result of the sales team efforts alone. Also, the WA Branch sales figures contained sales made prior to Mr Bradley joining Binder and sales made by others, including Mr Davey. Mr Davey testified that some $900,000 of the sales were made by him and contributed to the WA Branch results over the relevant period. Mr Bennett also referred to the fact that although the WA Branch sales performance was good, this was not the case for both Queensland and Victoria.

33 Mr Bradley testified that he felt pressured to accept the $40,000 from Mr Bennett because, given his visa status, he considered himself to be vulnerable. In the course of this case, Mr Bradley maintained that he did not agree to accept the $40,000 from Mr Bennett to finally resolve his claim. As such, Mr Bradley denied that there was any "accord and satisfaction" in relation to this leg of his contractual benefits claim: *McDermott v Black* (1940) 63 CLR 161 per Dixon J.

34 Importantly for present purposes, on 3 October 2012, shortly after the meeting with Mr Bradley, Mr Bennett sent an email to the company's Commercial Manager, Mr Marshall, in relation to the payment to be made to Mr Bradley. The email was copied to both Mr Bradley and Mr Davey. It said as follows:

> Graeme
>
> I've agreed a final bonus with Nathan of $ 40,000 for financial year 2011-12. Can you please arrange to pay at your earliest convenience,
>
> At this stage there is no bonus for 2012-13 for anybody, Nathan is going to work up a proposal for Ian and I to review.
>
> Regards
>
> Paul

35 Mr Bradley did not object to the content of Mr Bennett's email or respond to it at all. It was Mr Bennett's uncontradicted evidence that the issue of the $40,000 payment to Mr Bradley or the "final bonus" for 2012 was not raised by Mr Bradley with Mr Bennett at any time over the remainder of Mr Bradley's employment. I consider this to be significant, in particular the email. Had Mr Bradley not accepted the $40,000 payment as a compromise of his dispute with Binder at the time, he had an obligation to at least communicate this to Binder. A reply by Mr Bradley to Mr Bennett's email to Mr Marshall of

3 October 2012 was the perfect opportunity to do so. Mr Bradley's failure to respond at all to this was telling. All Mr Bradley had to say was that he was reserving his position in relation to the second limb of the 2012 scheme. Whether, in light of such a reservation, Mr Bennett would have still agreed to pay the $40,000 to Mr Bradley is merely conjecture. However, Mr Bradley could not have it both ways. He could not take the substantial sum of $40,000 without there being some communication to Binder of any reservations he may have then had: *Rymark Australia Development Consultants Pty Ltd v Draper* [1977] Qd R 336 at 344.

Bonus payment for the year ending 30 June 2013

36 Mr Bradley was promoted to the position of National Sales Manager in May 2012. He gave evidence that he specifically requested the inclusion of a bonus scheme in his contract dated 17 May 2012. The contract, in part set out below, provided as follows: *"a performance bonus scheme will be paid in addition to the agreed salary. Details are provided separately and subject to changes at the Managing Director's discretion"*. Mr Bradley maintained that he approached Mr Davey about the bonus scheme in August 2012, and was instructed to propose a new scheme for the 2013 financial year. Mr Bradley submitted a proposal for a revised bonus scheme on 1 November 2012, however received no response to it despite contacting Mr Davey on a number of occasions. Mr Bradley maintained that in the absence of a new structure being agreed for the 2013 financial year, the parties were bound by the first bonus scheme as provided in the email dated 6 December 2011. It was contended that the terms of the 2012 scheme should be implied into the contract applying the principles in *BP Refinery* or, the less stringent approach as set out in *Hawkins v Clayton* (1988) 164 CLR 539. Accordingly, Mr Bradley claims $98,934.44 under his contract of employment for the financial year ending 30 June 2013.

37 Binder submitted that in exercising his discretion, Mr Bennett decided not to make any bonus payments in the 2013 financial year, and therefore, decided not to implement a bonus scheme for that financial year at all. The company maintained that the bonus clause of the contract (set out above) is so uncertain and so dependent on the initiatives and discretion of one party, that it did not create an enforceable contractual obligation.

38 Binder argued there was no basis for Mr Bradley to assume the first bonus scheme would continue to operate in the 2013 financial year, as Mr Davey had rejected his proposal to work to the terms of the 2012 financial year bonus scheme. If the first bonus scheme was found to apply, Binder submitted that

Mr Bradley would not be entitled to a bonus payment as the respondent did not meet its budget overall in the 2013 financial year.

39 As noted above in May 2012, Mr Bradley was promoted to the newly created position of National Sales Manager. As part of the discussions about the new appointment, Mr Bradley requested and Mr Bennett agreed to include reference to a bonus scheme in Mr Bradley's letter of appointment to the new position. A copy of the letter dated 17 May 2012 was attachment 3 to Mr Bradley's witness statement. The relevant part, dealing with the bonus, appeared under the heading "Remuneration Basis" in the following terms:

> Remuneration Basis:
>
> - Your salary will be $140,000 per annum.
> - Superannuation of 9% is also applicable.
> - A vehicle allowance of $18,000 PA will be paid as part of this role.
> - A performance bonus scheme will be paid in addition to the agreed salary. Details are provided separately and subject to changes at the Managing Directors discretion.
>
> Salary reviews take place yearly in the month of October. As discussed we are very focussed on the performance in this role and will review performance after 6 months with you. Performance will be based on the achievement of agreed goals.
>
> Performance Reviews are conducted annually in September.

40 To the extent that Mr Bradley relies on the 2012 bonus scheme as an implied term to support his 2013 claim, is, at least in part, recognition that the terms of the letter of appointment of itself, did not provide the basis for Mr Bradley's claim. On the evidence in this matter, there was no scheme finally agreed and introduced for 2013. Mr Bennett's testimony was that as he said in his 3 October 2012 email, there would be "no bonus for anyone" in the 2012/13 financial year. According to Mr Bennett, this was because of the problems resulting from the first bonus scheme, and the fact that several months of the 2013 financial year had then already passed and he felt it was too late to develop a second scheme.

41 Mr Davey testified that he understood the email of 3 October 2012 from Mr Bennett to be a directive that there would be no bonus scheme for anyone in 2012/13. Mr Davey denied the contentions made by Mr Bradley, that he spoke to Mr Davey in August 2012 and requested consideration be given to a scheme and that he, Mr Bradley, would otherwise be happy to work under the 2012 bonus scheme. Mr Davey said that he did not ask Mr Bradley to come up with a new one. While Mr Davey did accept he received some emails from Mr Bradley in

relation to the issue of a bonus scheme for 2013, he considered any such proposals would have been for the following year in 2014. This was because according to Mr Davey, Mr Bennett had made it clear that there would be no bonus scheme for the 2013 financial year.

42 It is of importance to note that Mr Bradley and Binder entered into a new contract in May 2012 for the new position of National Sales Manager. There is no basis in my view, in Mr Bradley's letter of offer, to conclude that the terms of the 2012 financial year bonus scheme would simply carry over. The 2012 bonus scheme set out in Mr Davey's email of 6 December 2011, contained no reference, of course, to Mr Bradley's new position of National Sales Manager. It did not then exist. The positions to which the scheme expressly applied were State based positions and they were set out in Mr Davey's email. Regardless of there being no scheme details being "provided separately", as referred to in the 17 May 2012 letter, and therefore no scheme having express application for that year, the 2012 scheme itself, could not apply to a position not then in contemplation.

43 As to the contention advanced by Mr Bradley that the 2012 scheme should apply as an implied term, I am not persuaded to this view. I am not persuaded that the implication of the 2012 scheme would be necessary or reasonable for the effective operation of the contract for the new position of National Sales Manager: *Hawkins*. The contract could operate quite effectively without it. A further problem arises with the implication argument. That is to imply the 2012 bonus scheme into the new contract for the 2012/13 financial year, would be inconsistent with the express terms of the May 2012 contract letter on two bases. The first I have already touched on. That is, in my view, the 2012 scheme, properly construed, did not extend to the new position created by Mr Bradley's promotion and preceded the restructuring to bring the position about. The second difficulty for Mr Bradley is the express terms of the 17 May 2012 letter set out above. It refers to "Details are provided separately …" They were not provided in this case. It would be inconsistent with this express term to imply the terms of the 2011/12 scheme, having application to the prior financial year, and set some months prior by Mr Davey.

44 If it was intended to simply roll over the 2011/12 bonus scheme into Mr Bradley's new contract for the National Sales Manager position, it would have been a simple thing to just say that in the letter of 17 May 2012.

45 It is also strongly arguable that the terms of the contract for the National Sales Manager position in relation to a bonus, irrespective of the implication argument, were uncertain, illusory and unenforceable: *Biotechnology Australia Pty Ltd v Pace* (1988) 15 NSWLR 130.

46 The next issue arising in connection with this claim and indeed for the next one too is whether the exercise of the discretion by Mr Bennett, was in all the circumstances reasonable. This is so because it is to be accepted that in cases where the terms of a contract confer discretion to do something, such as in this case, to have, change or pay a bonus, the discretion is to be exercised reasonably. In *Silverbrook Research Pty Ltd v Lindley* [2010] NSWCA 357, the Court of Appeal of New South Wales considered the terms of a contract dealing with a discretionary bonus scheme for a senior employee of the appellant company. In considering the terms of the contract there under consideration, Allsop P (Beazley JA agreeing), made some general observations as follows at pars 5 and 6:

> **[5]** The task then is to value that loss of opportunity or chance. This process begins with a proper understanding of the contractual content of the obligations and entitlements arising out of cl 4 and in particular cll 4.2 and 4.3. That the decision as to whether the respondent should receive the bonus was "entirely within the discretion of" the appellant should not be construed so as to permit the appellant to withhold the bonus capriciously or arbitrarily or unreasonably; it should not be construed so as to give the appellant a free choice as to whether to perform or not a contractual obligation. The relevant discretion should be understood against the proper scope and content of the contract. This was a bargained for bonus to be assessed against set objectives. Such a clause should receive a reasonable construction and not permit the appellant to choose arbitrarily or capriciously or unreasonably that it need not pay money the set objectives having been satisfied: *Greaves v Wilson* (1858) 25 Beav 290 at 293 ; 53 ER 647 at 650; *Stadhard v Lee* (1863) 3 B & S 364 at 371-372 ; 122 ER 138 at 141; *Gardiner v Orchard* [1910] HCA 18 ; 10 CLR 722; *Carr v J A Berriman Pty Ltd* [1953] HCA 31 ; 89 CLR 327; *Selkirk v Romar Investments Ltd* [1963] 1 WLR 1415 at 1422-1423; *Godfrey Constructions Pty Ltd v Kanangra Park Pty Ltd* [1972] HCA 36 ; 128 CLR 529 at 538, 543, 547 and 549-555; *Pierce Bell Sales Pty Ltd v Frazer* [1973] HCA 13 ; 130 CLR 575.
>
> **[6]** The discretion is to be exercised honestly and conformably with the purposes of the contract. There may be many circumstances in which it would be legitimate, and conformable with the purposes of the contract, not to pay the bonus. There may be financial stringency or misbehaviour by the respondent or some other consideration. It is unnecessary to explore the possibilities in detail. What, however, would not be permitted is an unreasoned, unreasonable, arbitrary refusal to pay anything, come what may. This would be a denial of the very clause that had been agreed. If these parties wished to make payment under the clause entirely gratuitous and voluntary such that payment could be withheld capriciously, notwithstanding the compliance with solemnly set objectives they needed to say so clearly.

47 I note that in *Silverbrook*, the performance objectives set out in the bonus scheme had been met. In the further case of *Russo v Westpac Banking Corp* [2015] FCCA 1086 reference was made to the principles discussed in *Silverbrook*. However, in this particular case, the court referred to admissions made by the employer as to various breaches of its own policies, that it acted irrationally and unreasonably and relied upon impermissible matters in refusing to pay the bonus in that case: per Lloyd-Jones J at par 200.

48 Additionally too, in both *Silverbrook* and *Russo*, the courts were considering claims for damages for breach of contract. Damages were assessed by reference to the loss of an opportunity to obtain a bonus payment, as a consequence of the employer's breach of the contract. By way of contrast, in these proceedings, for a denied contractual benefit, it is for Mr Bradley to establish the entitlement to the bonus existed, as a benefit under the contract, before it can be established that the employer failed to provide it to him: *Hotcopper*.

49 In this case, there was no evidence on which the Commission can make any findings that Mr Bennett acted in bad faith or acted arbitrarily, capriciously or with any lack of honesty. On the contrary, on the evidence, Mr Bennett flagged in his email of 3 October 2012, a copy of which Mr Bradley received, that there would be no bonus for the financial year 2012/13.

50 Even if the 2012 scheme could be said to have applied in the 2013 financial year, it would suffer the same problems, at least in relation to the second limb, as I have set out earlier in these reasons when dealing with Mr Bradley's 2012 bonus claim. As to the first limb, if, contrary to my conclusions, the 2012 bonus scheme did "carry over" to the 2013 financial year, then the first "trigger" for the payment of a bonus would have to be met. This was that the Binder group as a whole achieved its gross profit target for the 2012/13 financial year.

51 Binder contended that the group gross profit result for the 2012/13 financial year fell short of the budgeted figure. Evidence in relation to Binder's financial performance for the years 2012, 2013 and 2014 was given by Mr Marshall. Additionally, Mr Marshall gave evidence in relation to a disputed transaction involving a company, "Karara Mining", which I will comment on further below.

52 According to Mr Marshall, who annexed the profit and loss statements and the audited financial results for the Binder group for the 2014 financial year to his witness statement, the "standard" (as opposed to "actual") cost sales measure, which Mr Bradley contended was the correct measure, fell short for the 2013 financial year by $375,701. However in relation to the disputed transaction involving Karara, for $642,268.60 plus GST, which resulted from a pricing error made by Mr Bradley in the 2012 financial year, Mr Bradley contended that it should have been in the company's 2013 results. If it was, he maintained that the overall group result would have achieved its gross budget figure.

53 Mr Marshall dealt with this issue in some detail in his testimony. Mr Marshall said that Mr Bradley under-priced this particular job by the amount in question in the 2012 financial year. Mr Bradley subsequently invoiced Karara Mining for the correct figure in the 2012 financial year. The payment was then due in the following year 2013. Karara Mining did not pay the correct amount but only the

incorrectly quoted figure provided by Mr Bradley. Karara refused to pay the disputed figure.

54 The dispute was dealt with by Mr Davey and was resolved in the 2014 financial year. Mr Marshall referred to the payment being finally made by Karara in August 2013. This payment was received in Binder's bank account, which showed three payments received in August 2013, set out as annexure GM4 to Mr Marshall's witness statement.

55 According to Mr Marshall, there are a number of reasons why it would be wrong to include the disputed payment made by Karara in the 2012/13 financial year. Firstly, this was not the year in which the payment was made. Secondly, in accordance with proper accounting practice, Mr Marshall said he issued a credit note for the 2012 financial year reflecting the disputed amount, to indicate the error made by Mr Bradley and that the pricing for the job for Karara had to be revised downwards. Thirdly, when the payment was actually made by Karara, it was properly credited to the 2014 financial year, being the year in which the money was received by Binder. Finally, Mr Marshall said it would be contrary to accepted and proper accounting practice to retrospectively credit the amount to an earlier year and effectively "reopen" the books of account for Binder. He said this accounting record would be artificial.

56 Mr Marshall also referred to the audited financial statements of Binder for the 2014 financial year, annexed as GM5 to his witness statement. He said the revenue figure for 31 March 2014 included the disputed amount paid by Karara to Binder in that financial year.

57 I have carefully considered the evidence as to the disputed transaction. I accept Mr Marshall's evidence. It would not be appropriate, either from an accounting point of view or from a practical one, to regard the payment made by Karara in August 2013, as being credited to the 2012/13 financial year gross profit result. To do so would have constituted in my view an inaccurate record, not truly reflecting the financial position of the Binder group as at the end of that financial year and not reflecting, in accounting parlance, its "true state of affairs" as at that time.

58 Accordingly, it follows, even if the terms of the 2012 bonus scheme could be said to have applied to the 2013 financial year in Mr Bradley's case, as he maintained, then its terms were not met, in order to trigger any bonus payment entitlement.

Bonus payment for the year ending 30 June 2014

59 Mr Bradley maintained that a new bonus scheme was introduced for the financial year ending 30 June 2014. The new scheme, set out in an email from Mr Davey

dated 31 July 2013, provided for a bonus payment if (1) Binder achieved its overall budget; and (2) each branch achieved its individual budget. The email from Mr Davey setting out the scheme, as annexure IBD-7 to his witness statement, was in the following terms:

> Nathan/Steve,
>
> Please find attached a proposed bonus scheme that has been run by the directors and we have preliminary approval for. Although somewhat difficult to achieve I have tried to keep it as simple as possible, self-funded and worthwhile if achieved.
>
> Given the current structure of the business I felt that keeping the payment specific to each sector was more relevant and could drive individual performance more successfully that[sic] paying out on combined results.
>
> It is formulated on Individual GP$ results but there is the caveat that the overall business GP$ must be achieved to trigger any bonus payment. This protects the business from being in the situation where we achieve GP$ budget in say 1 or two states in 1 product area but have a poor result in the other areas placing the company in the situation where we are paying a bonus but the business has made a loss for the year.
>
> Page 1 of the spread sheet shows the overall bonus scheme and details the trigger points for payment and the associated payment for each step of achievement. This is done by National Sales Manager and both Industrial and Building Services BDM level.
>
> Page 2 summarises the cost of the scheme so is largely irrelevant to our discussions on the bonus structure etc.
>
> Some of the rules:
>
> 1) All payment decision [sic] determined by P Bennett, I Davey and G Marshall- Management decision is final.
>
> 2) Trigger for bonus is (1) Overall Group Budget Achievement and (2) Branch GP$ Budget achieved
>
>   1. Therefore: For the Financial Year 2013/2014 the first trigger is a gross profit dollar result of $5,539,109.
>
>   2. The second trigger is at branch level where overall GP$ must be achieved - Vic = $822,273, QLD = $1,849,000, WA = $3,363,000
>
> 3) It is an annual bonus calculated and paid annually
>
> 4) Bonus recipients must have been in the sales position for a minimum of 6 months and then the payment is pro rata for the appropriate time they have been participating
>
> 5) If people quit through the course of the year they lose any right to a bonus.
>
> 6) Freight will be calculated as a cost of the sale. Therefore freight recovery will impact. For example if Freight is under recovered for the year(a loss) this loss is deducted from the gross profit $ in the calculation of any bonus.
>
> 7) The National Sales Manager bonus for budget GP$ result is discretionary and will be decided by the Management panel- considering how the budget was achieved and other factors.

8) Close is NOT achievement· The trigger points are 5%, 10% and 15% - no pro rata or portion will be paid for say 14% over (this will only attract the 5% and 10% bonus payment)

The bonus payment to BDM's is triggered by achievement of an above GP$ budget result with the first trigger being Budget GP$ plus 5%. If the overall GP$ result is achieved and the sector (industrial or Building Services) then the bonus payment is triggered. The level of bonus payment is straight forward @ budget GP$ plus 5%, plus 10%, plus 15% and greater than 15%.

Have a look through this and we can discuss at Fridays telecon.

Regards

Ian Davey

60 Attached to Mr Davey's email were two pages in tabular format, setting out the performance objectives for each branch by division, they being Industrial and Building Services. The third area, "Kwicksmart" was also specified. The key terms of the scheme are repeated in "Notes" at the bottom of the second page. At point (1), the "trigger" points are noted again, in that the first trigger was the achievement of overall group budget and the second being the achievement of individual branch budgets.

61 Mr Bradley gave evidence that he was concerned about the Victorian budget as this branch did not have a full-time Business Development Manager and that this would impact on the branch's performance. He said that when he communicated his concern to Mr Davey during a meeting in his office, Mr Davey told him "not to worry about the individual branches". Mr Bradley said that Mr Davey reassured him that the bonus for National Managers would be paid, as long as the overall gross profit target for the Group and for the Industrial division were achieved.

62 Mr Bradley said he accepted this as a variation to the bonus scheme, such that the failure by the Victorian branch to reach its gross profit target would not be fatal to an entitlement to be paid a bonus. Mr Bradley claimed the Industrial team achieved a gross profit of $6.5 million, well above the overall Industrial target of $3,598,200 and the overall combined (Industrial and Building Services) gross profit target of $5,539,109. As the total Industrial target was exceeded by more than 15%, Mr Bradley claimed $32,500 under his contract of employment for the 2014 financial year.

63 As to the alleged change to the 2014 scheme, Mr Davey strongly denied any such conversation as contended by Mr Bradley took place. Furthermore and in any event, it was Mr Davey's evidence that no such change would have been agreed by him for a number of reasons. Firstly, in his view, the 2014 scheme was at the time of his email only a "proposal", and had not been finally approved for

implementation. Secondly, Mr Davey did not have any authority to make such a change to the bonus scheme, without the approval of Mr Bennett, which did not occur. Thirdly, the operation in Victoria for the Industrial division was Mr Bradley's responsibility, as National Sales Manager. Any problems in underperformance were his to resolve, even if the 2014 scheme was effective and in force. Finally, the budget figure for Victoria was set at a low level and should have been achievable. In Mr Davey's view too, it would not have been fair to reward Mr Bradley by waiving the scheme conditions, but not do the same for the other Sales Manager, Mr Palmer.

64 As a result of this, Mr Bradley lodged a formal grievance under the company grievance process. Following an investigation instigated by Mr Bennett, it was found that contrary to Mr Bennett's view, the 2014 bonus scheme was "valid". Mr Bennett said that Mr Bradley, and other staff for that matter, were not entitled to a bonus as the triggers under the scheme were not met. In addition to Mr Bradley, two other managers lodged grievances, they being the Business Development Manager for Western Australia, Mr Williams and the Business Development Manager for Queensland, Mr Gett. Mr Bennett said that he met with each of them to discuss their grievances. Resulting from these discussions, both Messrs Williams and Gett were offered and they accepted, on an ex gratia basis, an amount that reflected what they both thought they were entitled to under the 2014 scheme.

65 In the case of Mr Bradley, Mr Bennett said he also met with him and offered $10,000 on an ex-gratia basis to resolve his claim. Mr Bradley declined to accept it. Mr Bradley testified that not much more was said apart from him explaining to Mr Bennett that the WA team had worked hard for the results they achieved. Mr Bennett testified that he told Mr Bradley that he would withdraw the offer and Mr Bradley would have to go and see Mr Davey and attempt to persuade him to take it up again and put another proposal to Mr Bennett. Mr Bennett said he tried to get the issue "off the table" and resolved, despite the overall group result not having been met under the 2014 scheme. Mr Bennett also made the point that although the WA result had been very strong, a focus of the business had been to reduce reliance on this State and develop the other States, such as Victoria, as it was recognised that the "mining boom" in this State would not continue indefinitely. The need for Mr Bradley to focus on all States, and not just WA, was the subject of commentary by Mr Davey in Mr Bradley's performance appraisal discussion on 8 July 2014, which was the subject of some evidence. (Tab 7 exhibit R1).

66 It was Binder's position that under the new scheme, the entitlement to a bonus payment would not be triggered unless all of the respondent's areas of operation and branches in Victoria, Queensland and WA achieved their gross profit budget

both individually and collectively. It added that the payment was at all times, subject to the discretion of senior management. Binder further argued that although the Western Australian branch met its gross profit budget for the 2014 financial year, the respondent as a whole did not. The Victorian branch did not make its Industrial gross profit target. Accordingly, no bonus payment was payable for the 2014 financial year. Binder strongly denied it varied the bonus scheme so that a bonus would be payable if the Industrial stream met its budget overall, as opposed to each branch being required to meet its Industrial budget individually.

67 Further, irrespective of this, as to Mr Bradley's contention that the discussion said to have taken place between Mr Bradley and Mr Davey meant the 2014 scheme was varied, Binder submitted that no fresh consideration was provided by Mr Bradley for any such variation. Nor was there any objective intention to do so, on the evidence: *Codelfa Construction Pty Ltd v State Rail Authority* (1982) 149 CLR 337*; Pepe v Platypus Asset Management Pty Ltd* [2013] VSCA 38 at 27. Although it is unnecessary to finally decide the point, there is some merit in this submission in my view.

68 In relation to this aspect of Mr Bradley's claim, firstly, I am not persuaded that the scheme was varied as contended by Mr Bradley. I accept Mr Davey's evidence on this issue. In particular, I find it difficult to accept that such a major change would have been made without Mr Davey at least discussing the issue with Mr Bennett, to secure his agreement. This is also to be seen against the backdrop of the disputes about the earlier bonus schemes. The terms of the 2014 bonus scheme were clear and unambiguous. Decisions about it were to be made by the three senior managers and not any of them unilaterally. From the terms of the scheme set out above, it would be inconceivable in my view that Mr Davey would agree to such a major change on the strength of a discussion with Mr Bradley alone. Arguably in any event, given that Mr Bennett was the Managing Director of Binder Mr Davey's contention that he had no authority to make such a change has considerable strength.

69 From the terms of the 2014 scheme, it was made plain in the covering email from Mr Davey of 31 July 2013 and in the notes to the attachments, that both overall group profit and achievement of branch profit targets for Binder were conditions needing to be met, to trigger an entitlement to a bonus. It was not in dispute that this did not occur. Whilst one can understand Mr Bradley's sense of disappointment, given the very strong WA sales result for the 2014 year, this was not the only factor to consider under the scheme. The managers must have known this from Mr Davey's email of 31 July 2013. The requirements were, in my view, crystal clear.

70 While Mr Bradley contended, in effect, that Mr Bennett had been unfair in not exercising his discretion to award Mr Bradley his full bonus for 2014 this puts the issue of discretion somewhat the wrong way around. There was, at the time of the meeting, no triggered bonus benefit arising to Mr Bradley on the plain terms of the 2014 scheme. Mr Bennett did make Mr Bradley an ex-gratia offer which he rejected. While it was not all of what he wanted, it was not an insubstantial proposal to settle Mr Bradley's grievance. Had it been the case that the scheme triggers for 2014 were fully met, and despite this Mr Bennett declined to exercise his discretion in favour of Mr Bradley, as in cases such as *Russo* for example, Mr Bradley may have been on stronger ground.

Conclusion

71 For the foregoing reasons I am not persuaded that Mr Bradley has established his claims for denied contractual benefits. The application must be dismissed.