# FEDERAL COURT OF AUSTRALIA

## Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3) [2017] FCAFC 102

| | |
|---|---|
| Appeal from: | *Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3)* [2016] FCA 1453<br>*Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 4)* [2017] FCA 120 |
| File number: | TAD 2 of 2017 |
| Judges: | **ALLSOP CJ, RARES AND MCKERRACHER JJ** |
| Date of judgment: | 4 July 2017 |
| Catchwords: | **CONTRACT** – employment contract breached by failing to comply with Workplace Harassment and Discrimination Policy (**Policy**) – nature of the term – whether the Policy was incorporated into the employment contract as an essential term – test of essentiality – whether conduct evinced an intention to only fulfil the contract in a manner substantially inconsistent with contractual obligations amounting to repudiation – whether there was a sufficiently serious breach of a non-essential term to justify termination – affirmation and election – whether conduct consistent with acceptance of repudiation or renunciation<br><br>**DAMAGES** – foreseeability of the consequences of breach – remoteness – whether damages were the natural and probable consequence of the breaches or within the reasonable contemplation of the parties when they entered into the contract<br><br>**COSTS –** whether nominal damages warrant an award of costs where claim pursued for substantial damages – where part of claim settled by way of a deed in which sum of money was received – where remaining claims not established after execution of settlement deed – partial costs awarded up to the date of executing settlement deed |
| Legislation: | *Federal Court of Australia Act 1976* (Cth) s 43<br>*Federal Court Rules 2011* (Cth) r 25.14(1) |
| Cases cited: | *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310<br>*Beaumont v Greathead* (1846) 135 ER 1039<br>*Byrnes v Jokona Pty Ltd* [2002] FCA 41 |

*Champtaloup v Thomas* [1976] 2 NSWLR 264

*Cohen v iSoft Group Pty Ltd* (2013) 298 ALR 516

*Concut Pty Ltd v Worrell* (2000) 176 ALR 693

*European Bank Limited v Evans* (2010) 240 CLR 432

*Federal Commissioner of Taxation v Sara Lee Household & Body Care (Aust) Pty Ltd* (2000) 201 CLR 520

*Fox v Percy* (2003) 214 CLR 118

*Galafassi v Kelly* (2014) 87 NSWLR 119

*Hadley v Baxendale* (1854) 156 ER 145

*House v R* (1936) 55 CLR 499

*Immer (No 145) Pty Limited v The Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26

*Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850

*Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622

*Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115

*Motium Pty Ltd v Arrow Electronics Australia Pty Ltd* [2011] WASCA 65 (S)

*Nikolich v Goldman Sachs JB Were Services Pty Ltd* [2006] FCA 784

*O'Connor v SP Bray, Limited* (1936) 36 SR (NSW) 248

*Rhodium Australia Pty Ltd v Deputy Commissioner of Taxation* [2012] FCAFC 17

*Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCA 439

*Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403

*Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 2)* [2015] FCAFC 26

*Ruddock v Vardalis (No 2)* (2001) 115 FCR 229

*Sargent v ASL Developments Limited* (1974) 131 CLR 634

*State of New South Wales v Stevens* (2012) 82 NSWLR 106

*Tramways Advertising Pty Ltd v Luna Park (NSW) Limited* (1938) 38 SR (NSW) 632

*Westpac Banking Corporation v Wittenberg* (2016) 242 FCR 505

Date of hearing: 17 May 2017

Registry: Tasmania

Division: General Division

| | |
|---|---|
| National Practice Area: | Employment & Industrial Relations |
| Category: | Catchwords |
| Number of paragraphs: | 109 |
| Counsel for the Appellant: | Mr B McTaggart SC |
| Solicitor for the Appellant: | Ogilvie Jennings |
| Counsel for the Respondent: | Mr F Parry QC with Mr M Rinaldi |
| Solicitor for the Respondent: | Piper Alderman |

# ORDERS

**TAD 2 of 2017**

| | |
|---|---|
| **BETWEEN:** | **LISA ROMERO**<br>Appellant |
| **AND:** | **FARSTAD SHIPPING (INDIAN PACIFIC) PTY LTD (ACN 105 011 989)**<br>Respondent |

**JUDGES:** **ALLSOP CJ, RARES AND MCKERRACHER JJ**

**DATE OF ORDER:** **4 JULY 2017**

**THE COURT ORDERS THAT:**

1. Subject to order 2, the appeal be dismissed.
2. The orders made on 20 February 2017 be varied by replacing order 1 with a new order 1 as follows:
    1. The respondent pay 80% of the applicant's party and party costs incurred prior to 18 December 2015 and the applicant pay the respondent's party and party costs incurred thereafter.
3. The appellant file submissions of no more than three pages, if any, in relation to costs on the appeal within 14 days.
4. The respondent file any submissions of no more than three pages in response within 14 days.
5. Costs be resolved on the papers, unless the Court otherwise orders.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

# REASONS FOR JUDGMENT

## THE COURT:

### INTRODUCTION

1 The parties have been involved in extensive disputation following events of 2011 in the course of **Farstad** Shipping (Indian Pacific) Pty Ltd's employment of Ms Romero. Ms Romero has pressed numerous claims for a variety of forms of relief, including claims for substantial damages as a result of her treatment by Farstad. The relevant **events** were described in detail in *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* (2014) 231 FCR 403 (**Full Court (No 1)**) (Allsop CJ, Rares and McKerracher JJ). In addition to the claims in this Court, Ms Romero has pursued claims for workers' compensation in the Administrative Appeals **Tribunal**.

2 By a decision of the Tribunal and a **Deed** of Release entered into between the parties, Ms Romero was awarded compensation of $580,000 in respect of a mental condition she sustained as a result of the events. Over and above this compensation, she pursued claims in the proceeding under appeal for additional damages, primarily in respect of costs of retraining.

3 The initial proceedings advanced by Ms Romero following an investigation into the events led to claims under the *Disability Discrimination Act 1992* (Cth) (**DD Act**) and s 14(2) of the *Sex Discrimination Act 1984* (Cth) (**SD Act**) and claims for alleged breaches of her **contract** of employment. Specifically in relation to her contract claim, Ms Romero asserted that Farstad had failed to comply with various provisions of its Workplace Harassment and Discrimination **Policy** which, she argued, had been incorporated into her contract. Initially her claim was dismissed, both under the SD Act and at contract. The judge in the initial proceeding (the **first judge**) held that the Policy did not form part of Ms Romero's contract and even had it done so, Farstad's departure from it did not constitute any breach of the Policy or the contract and did not constitute a repudiation of the contract: *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] FCA 439.

4 On appeal, this Court in Full Court (No 1) held that the Policy did form part of Ms Romero's contract, Farstad had not complied with it and had therefore breached the contract. Orders were made remitting the question of "repudiation and any associated questions such as affirmation or election and the question of damages … to a judge of the Court for rehearing".

Costs of the remittal hearing were ultimately reserved by the Full Court to be determined by the judge to whom the remitted questions were referred (*Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 2)* [2015] FCAFC 26).

5 The rehearing before the primary judge was delayed due to the progress of the proceedings in the Tribunal where Ms Romero brought a claim seeking workers' compensation under the *Seafarers Rehabilitation and Compensation Act 1992* (Cth) (**SRC Act**). **Settlement** of this claim occurred in November 2015. Orders were made by the Tribunal on 17 December 2015, giving effect to the settlement. The terms of the settlement were reflected in the Deed.

6 Ms Romero now appeals against the primary judge's award in her favour of nominal damages only in *Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 3)* [2016] FCA 1453 (the **damages judgment**). In the damages judgment, the primary judge rejected the contentions advanced for Ms Romero as to the nature of the breach and the consequential damages. Additionally, Ms Romero appeals against the costs orders made by the primary judge in a supplementary decision in *Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 4)* [2017] FCA 120 (**costs judgment**). In the costs judgment the primary judge made costs orders adverse to Ms Romero. His Honour refused to award her any costs and ordered that she pay Farstad's party and party costs incurred after 18 December 2015. In the costs judgment his Honour also rejected costs claims made by Farstad. Farstad does not appeal from those rulings.

## PRIMARY JUDGMENTS

### The damages judgment

7 In the damages judgment, close consideration was given to the terms of the Policy. The primary judge noted that the parties had relied on evidence adduced at the original trial before the first judge in relation to Mr Romero's past and future financial loss, including study costs associated with her retraining as a lawyer, and to Ms Romero's likelihood of continued employment. Before the primary judge, the parties also relied on additional evidence not adduced at the first trial. This included evidence both in support of the damages claim and evidence in support of Farstad's contention of affirmation of the contract after its breach. The latter included correspondence between Ms Romero and her solicitor with Farstad in July and August 2012 and February 2013 concerning Ms Romero's insistence that Farstad make payments relating to her employment. It also included a payment advice of September 2012, which included an allowance for industrial clothing. Ms Romero objected to Farstad's

reliance on some of this material, which had not been before the first judge. The objection was disallowed. Ms Romero complains that the primary judge failed to deal with her objection to the leading of additional evidence on affirmation. We will address that below.

8 Ms Romero's claim for what has been described as training costs was a total of $115,759.71 made up as follows:

- Study costs incurred in study for a Master's certificate prior to November 2011 - $20,000.
- Income lost during the period during which Ms Romero was undertaking the study prior to November 2011 - $40,000.
- Study costs for a law degree undertaken by Ms Romero between March 2013 and March 2016 - $35,759.71.
- Estimated costs of completion of her law degree and undertaking pre-admission practical legal training - $20,000.

9 The primary judge noted that there was no claim for any award of damages for stress, disturbance and psychological disability because, as a result of consent orders made on 17 December 2015 in the Tribunal and pursuant to the Deed, Farstad was required to pay Ms Romero a substantial sum to compensate her for "an adjustment disorder and/or depressive anxiety condition and/or major depressive disorder" arising out of her employment by Farstad. Farstad agreed to make such payment without admission of liability. It was a condition of the Deed that Ms Romero release Farstad from any common law claim for damages in respect of these conditions.

10 After discussing the principles upon which damages may be awarded, the primary judge referred to Ms Romero's contention, which relied on the second limb of the statement of principle expressed in *European Bank Limited v Evans* (2010) 240 CLR 432 (at 438 [12]-[13]), that it must have been in the contemplation of the parties that, if the obligations imposed on Farstad by the Policy were not fulfilled, she would have wasted her costs incurred in studying for her Master's Certificate and would incur further costs in retraining for another career. The primary judge then referred to *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 310 where McHugh JA discussed the distinction between reasonable foreseeability and reasonable contemplation and the role the distinction between those concepts played in the important consideration of remoteness of damage. His Honour

observed that while parties need not contemplate the degree or extent of the loss or damage suffered, or the precise details of the events giving rise to it, damage would not be too remote if it were of the *kind* of loss or damage suffered.

11 The primary judge accepted that Ms Romero would be entitled to claim for damage occasioned by her unwillingness to render further service to Farstad such that it would be necessary for her to obtain further employment. However, each of Ms Romero's heads of damage were predicated upon her losing confidence, not only in Farstad, but also in all maritime industry employers. His Honour said that foreseeability of this broader loss of confidence was not explained. Had Ms Romero changed employers, but remained in the maritime industry, her training towards a Master's Certificate would not have been thrown away. The loss of wages during that training would not have been in vain. It would have been unnecessary for her to study for a law degree or to undertake any pre-admission practical legal training. Each head of damage arose only because Ms Romero made a choice to embark on a completely different career.

12 Following an examination of the relevant evidence, the primary judge held that the nature and character of the financial losses of the kind claimed by Ms Romero would not have been regarded as a probable consequence of Farstad's breach of contract. His Honour examined the evidence in support of that conclusion, observing in particular that Ms Romero had not even sought to work with another maritime employer on or off-shore.

13 The primary judge concluded that Ms Romero was entitled to nominal damages only for the breaches of contract identified by the Full Court and assessed an award of $100 as being appropriate in the circumstances.

14 As a consequence of the terms of the remittal by the Full Court, it was then necessary for the primary judge to turn to Ms Romero's claim that Farstad had repudiated the contract by the breaches of the Policy. It was necessary to do so because of the terms of the remittal by the Full Court. The primary judge cited what the Full Court said (at 435-436; [111]-[118]) in Full Court (No 1) and observed that Ms Romero had contended that she had acquired a right to terminate the contract either on the basis that Farstad's conduct amounted to a repudiation or that the breach was sufficiently serious to justify termination by her. She did not suggest that the breaches found by the Full Court evinced an actual intention by Farstad not to be bound by the contract as whole, but rather, that the necessary repudiatory intention was to be found in the breaches of "fundamental obligations" which fell on Farstad. His Honour

discussed the characterisation of the breached term (namely the contractual term that there would be compliance with the Policy). He noted that the possible characterisation of contractual terms were identified by the Full Court as being "warranty, condition or intermediate term … ". These categories were identified in the joint judgment of Gleeson CJ, Gummow, Heydon and Crennan JJ in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115. In dealing with the concepts of conditions and warranties (at 137-139 [47]-[52]), their Honours quoted with approval from the judgment of Jordan CJ in *Tramways Advertising Pty Ltd v Luna Park (NSW) Limited* (1938) 38 SR (NSW) 632 (at 641-642) where his Honour said that:

> The question whether a term in a contract is a condition or a warranty, ie, an essential or non-essential promise, depends upon the intention of the parties as appearing in or from the contract. The test of essentiality is whether it appears from the general nature of the contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor. If the innocent party would not have entered into the contract unless assured of a strict and literal performance of the promise, he may in general treat himself as discharged upon any breach of the promise, however slight. If he contracted in reliance upon a substantial performance of the promise, any substantial breach will ordinarily justify a discharge.

15 The primary judge noted that the "intermediate" category emerged from later case law. As the plurality explained in *Koompahtoo* (at 138-139 [48]-[50]):

> 48 What Jordan CJ said as to substantial performance, and substantial breach, is now to be read in the light of later developments in the law. What is of immediate significance is his reference to the question he was addressing as one of construction of the contract. **It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and (in a case such as the present) the commercial purpose it served, that determines whether a term is "essential", so that any breach will justify termination.**
>
> 49 The second relevant circumstance is where there has been a sufficiently serious breach of a non-essential term. In *Hongkong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd*, the English Court of Appeal was concerned with a stipulation as to seaworthiness in a charterparty. Breaches of such a stipulation could vary widely in importance. They could be trivial or serious. The Court of Appeal held that to the accepted distinction between "conditions" and "warranties", that is, between stipulations that were in their nature essential and others, there must be added a distinction, operative within the class of non-essential obligations, between breaches that are significantly serious to justify termination and other breaches. This was a recognition that, although as a matter of construction of a contract it may not be the case that *any* breach of a given term will entitle the other party to terminate, some breaches of such a term may do so. Diplock LJ said that the question whether a breach by one party relieves the other of further performance of his obligations cannot always be answered by treating a contractual undertaking as either a

> "condition" or a "warranty". Of some stipulations "all that can be predicated is that some breaches will and others will not give rise to an event which will deprive the party not in default of substantially the whole benefit which it was intended that he should obtain from the contract; and the legal consequences of a breach of such an undertaking, unless provided for expressly in the contract, depend upon the nature of the event to which the breach gives rise".
>
> 50 In this way Diplock LJ set the policy of the law favouring certainty of outcome through the classification of terms as conditions against that which encourages contractual performance and favours restriction of the right to terminate to cases where breach occasions serious prejudice. As it is put in the eleventh edition of *Treitel*:
>
> > "[T]he policy of leaning in favour of classifying stipulations as intermediate terms can be said to promote the interests of justice by preventing the injured party from rescinding on grounds that are technical or unmeritorious."
>
> Perhaps the adoption of other taxonomies for contractual stipulations might achieve similar outcomes. However, *Hongkong Fir* was decided in 1961 and has long since passed into the mainstream law of contract as understood and practised in Australia.
>
> (Original italic emphasis; citations omitted, bold emphasis added.)

16 As noted by the primary judge, the terms of Ms Romero's contract which the Full Court found had been breached were all found in the Policy. The Policy was not specifically referred to in Ms Romero's letter of engagement. Whether the provisions of the Policy were incorporated in Ms Romero's contract was in dispute at both trial and on appeal. The first judge was not persuaded that they were so incorporated. The Full Court disagreed. The primary judge considered it was an issue on which different views were legitimately open: see the observations of Buchanan J in *Westpac Banking Corporation v Wittenberg* (2016) 242 FCR 505 (at 525-527 [102]-[112]), with whom McKerracher and White JJ relevantly agreed. The primary judge noted that:

- the Policy did not appear to have been in the parties' contemplation at the time at which the contract was entered into and that, had they turned their minds to the issue at that time and sought advice, it is likely that they would have been told that some uncertainty attended the question as to whether the Policy was incorporated in the contract;
- it is also to be borne in mind that it was not the Policy, as a whole, which was found to have been breached. Rather, Farstad was found to have failed to comply with a small number of procedural requirements contained in it;
- Farstad's principal breach was its conduct of a formal inquiry when Ms Romero had not asked for one. Ms Romero had made serious allegations of bullying and

harassment. Farstad treated them seriously. Although Ms Romero had not asked for a formal inquiry of the kind contemplated by the Policy she had certainly requested and expected that her complaints would be investigated. She advised Farstad, in her email on 7 December 2011, that she welcomed an investigation of her complaints and, on 29 January 2012, expressed dissatisfaction at the time it had taken for her to be advised about the outcome of that investigation. When told of the findings which had been made she did not complain that an investigation had taken place but rather that her expectation of a "proper and fair investigation" had not been satisfied; and

- there was, therefore, on both sides, a view that an inquiry should have been instituted. What was disputed was the form of the inquiry established by Farstad. It should not have been a formal inquiry under the Policy. Farstad did not, however, refuse to do something which the Policy required it to do. Nor did it do something which the Policy expressly prohibited it from doing. It embarked on the formal inquiry on the mistaken assumption that Ms Romero had requested it to conduct such an inquiry.

17 The primary judge observed that Farstad's conduct of the investigation was found by the Full Court (at 436 [117]) to be "entirely inconsistent with the Policy" as the details of Ms Romero's complaints had not been put to Captain Martin, all relevant witnesses had not been interviewed and detailed records had not been kept. The investigation had also taken into account the allegations made against Ms Romero by Captain Martin. This admixture of issues had led Ms Romero to consider that Farstad was not taking her allegations seriously and was using Captain Martin's complaints to undermine her; it was, therefore, according to the Full Court on the limited evidence before it, possible that Farstad's shortcomings in investigating her complaints "engendered in Ms Romero an objectively justified view that Farstad had not complied, and would not thereafter comply, with its contract with her" (at 435). The primary judge also considered that it was notable that despite the mixing of issues, the investigation report made no adverse findings relating to Ms Romero's competency as a second officer.

18 However, the primary judge observed that notwithstanding Ms Romero's complaints against Captain Martin and his reflections on her professional competence, Farstad, on a number of occasions, made it plain to Ms Romero that it wished her employment with it to continue. Alternative postings were proposed. Although the investigation miscarried there was no

allegation that the managers responsible for its conduct sought to use it as a vehicle to bring about the termination of Ms Romero's employment.

19 His Honour therefore concluded that there was nothing in Ms Romero's contract (including the terms of the Policy) or in the relevant terms themselves to support a conclusion that, had the terms not been incorporated, Ms Romero would not have entered into the contract. Compliance with the Policy was not an "essential" promise. Indeed, on the evidence, his Honour observed that it appeared from [2]-[3] of Ms Romero's affidavit of 24 January 2014 that her first encounter with the Policy was during her induction process aboard the *Far Scandia*, that is, after she had already commenced casual employment with Farstad. At the time Ms Romero entered into the casual contract, she had not even seen the Policy. His Honour considered that tended against compliance therewith being treated as essential. While the position was different when she entered into her permanent contract, his Honour considered there was little reason, in this particular case, for thinking that, whereas compliance with the Policy was a non-essential element of the casual contract, it became essential in the subsequent permanent contract.

20 The primary judge also observed that it is sometimes the case (as the Full Court noted (at 420-421 [59])) that employers have an ability to unilaterally vary workplace policies. In such a circumstance, it would be difficult to suggest that compliance with any particular term of the Policy was essential.

21 Whether the policies were amenable to variation or not, his Honour could not accept that the term requiring compliance with policies was, or the relevant terms of the Policy themselves were, sufficiently important that "*any* breach [would] justify termination" (*Koompahtoo* (at [48])).

22 His Honour then turned to the question of whether the breaches found by the Full Court were sufficiently serious as to provide justification for termination by Ms Romero of her contract on the basis that Farstad had repudiated it. On this topic his Honour noted that Ms Romero gave evidence that the manner in which Farstad conducted the investigation undermined her faith in Farstad to the point where she felt unable to continue working for it. Her perception was that Farstad's inquiry had called her competence into question and she had not been afforded an opportunity to respond to this slight. She also complained that she was given little chance of discussing in full the events which would have formed the basis of any formal complaint. She claimed to have been put through an "unexpected interrogation under the

guise of an investigation of a complaint." She disputed the inclusion of certain recommendations in Farstad's report, which she perceived as being retribution for the complaints she made against Captain Martin.

23 Ultimately, the investigation report made no findings or assumptions as to Ms Romero's competence, skills or experience.

24 After citing *Byrnes v Jokona Pty Ltd* [2002] FCA 41 (per Allsop J, as his Honour then was) (at [78]-[79]), in regards to assessing the seriousness of the breach, the primary judge concluded there was no repudiation. The primary judge said (at [51]-[53]):

> 51 In assessing whether the breach is sufficiently serious to justify termination, the court will take into account "the nature of the contract and the relationship it creates, the nature of the term, the kind and degree of the breach, and the consequences of the breach for the other party" *Koompahtoo* at 140 (per Gleeson CJ, Gummow, Heydon and Crennan JJ). The majority also added that "the adequacy of damages as a remedy may be a material factor in deciding whether the breach goes to the root of the contract". A breach without any proved loss is less likely to be serious: *Carter v The Dennis Family Corporation* [2010] VSC 406 at [165].
>
> 52 I do not consider that the breaches of the Policy by Farstad even approached the required level of severity. As I have already observed, the allegations made by Ms Romero against Captain Martin were serious and warranted some form of investigation. The deficiencies in the investigation did not lead to any adverse findings against Ms Romero. The conduct of the inquiry and its outcome did not threaten in any way the continuity of her employment with Farstad.
>
> 53 Farstad's conduct did not give rise to a repudiation of the contract

25 Finally, the primary judge also found against Ms Romero on the topics of affirmation and election. (His Honour acknowledged that, given his findings in relation to repudiation, those issues did not arise.) Nonetheless, had it been necessary to do so, his Honour held that Ms Romero had failed promptly to accept any repudiation and terminate the contract in the manner discussed in *Wittenberg* (at 532–535). His Honour discussed the dicta in *O'Connor v SP Bray, Limited* (1936) 36 SR (NSW) 248 per Jordon CJ (at 261-262), *Immer (No 145) Pty Limited v The Uniting Church in Australia Property Trust (NSW)* (1993) 182 CLR 26 per Brennan J (at 30) and finally in *Sargent v ASL Developments Limited* (1974) 131 CLR 634 where Mason J (as the Chief Justice then was) said (at 656):

> A person confronted with a choice between the exercise of alternative and inconsistent rights is not bound to elect at once. He may keep the question open, so long as he does not affirm the contract or continuance of the estate and so long as the delay does not cause prejudice to the other side.

26 The primary judge noted that Ms Romero did not purport to elect to accept Farstad's alleged repudiation until 25 October 2013. In the meantime she commenced the present proceeding and did so on the basis that, at that time (December 2012), she remained an employee of the company. Her originating application included the statement, on p 8, that "[Ms Romero's] relationship to [Farstad] is employee at the time of this application". In March 2013, Ms Romero pleaded, in her statement of claim, that: "[Ms Romero] … has been a permanent employee of [Farstad] since on or about January 2011". The primary judge noted that Farstad had continued to pay her entitlements as an employee, including the full extent of her paid sick leave. In August 2012, she made claims on Farstad for payments relating to her attendance at a medical assessment to assess her fitness for duty. During this period Farstad continued its efforts to facilitate her return to work. The primary judge referred to the statement in *Sargent* (at 656) that a party is not required to make an election immediately. The exercise of contractual rights during a period of consideration does not necessarily constitute affirmation. The primary judge considered an example given in *Champtaloup v Thomas* [1976] 2 NSWLR 265 (per Mahoney JA, with whom Street CJ agreed (at 273-274) that if the lessee of a flat, on learning of the lessor's breach, communicated to the lessor that he or she desired to consider his or her position, and in the meantime continued to occupy the flat and ride up and down in the lift, the lessee may not be found to have affirmed the contract (at least until a reasonable time had passed) even though the right to occupy and ride arose only by virtue of the lease.

27 His Honour observed that what is required for affirmation is that the party act in a manner consistent only with having chosen to rely on one of two alternative rights: *Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622 (at 633). That may be done, for example, by the exercise of contractual rights during a period of delay, so as to induce the other party to believe that performance of the contract was insisted upon: *Champtaloup* per Glass JA, with whom Street CJ agreed, (at 268). It may also be done by unequivocal conduct evincing an intention to affirm the wronged party's obligations to perform: *Galafassi v Kelly* (2014) 87 NSWLR 119 per Gleeson JA, with whom Bathurst CJ and Ward JA agreed (at [88]). His Honour concluded (at [62]-[63]):

> 62 Two points arise from this. The first is that, in my judgment, Ms Romero's conduct after the allegedly repudiatory conduct by Farstad constituted an unequivocal affirmation of her contract of employment. For Ms Romero to assert in documents, lodged in the Court well after the alleged repudiation, that she was in an employment relationship with Farstad can only be an affirmation of her contract of employment.

> 63 The second is that, even if Ms Romero's conduct could be characterised as mere acquiescence in a course of conduct by Farstad, which course of conduct was predicated on its apparent view that the contract remained on foot—that is, the payment of wages and sick leave, etc.—her delay would have "cause[d] prejudice to the other side". The delay was unreasonable. It constituted affirmation of the contract. *A fortiori* where, as here, there was no conduct by Ms Romero that would have indicated to Farstad that she was considering her rights in relation to affirmation or termination of the contract.

**The costs judgment**

28 In relation to costs, the primary judge noted that Ms Romero's originating application of 21 December 2012 sought, in respect of alleged breaches of the SD Act and the DD Act, an apology and compensation for past economic loss of about $127,400, anticipated future economic loss of about $1.8 million (subject to discounts for vicissitudes and net present value), as well as additional general damages for dislocation, pain and suffering, stress, anxiety, depression, humiliation and damage to reputation of $250,000. Ms Romero also sought declaratory relief and orders for payment of compensation pursuant to s 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth) and orders that Farstad undertake various practices to conform with policy, as well as interest and costs and damages for breach of contract.

29 By her statement of claim of 1 March 2013, Ms Romero pleaded contravention of the SD Act, the DD Act and breaches of contract, pleading loss and damage and particularised as follows:

> (1) Offence, humiliation, distress, anxiety and depression (including sleeplessness, loss of motivation and self-esteem);
>
> (2) Dislocation to life;
>
> (3) Loss of income and other benefits as an employee of Farstad;
>
> (4) Damage to personal and professional reputation;
>
> (5) Further particulars to be provided prior to hearing.

30 On 24 September 2013, Farstad made an offer of compromise to Ms Romero under r 25.01(1) of the *Federal Court **Rules*** (Cth) for the payment of $40,000 including costs and interest. That offer was not accepted. Ms Romero then proceeded to submit a claim to Farstad under the SRC Act. On 23 October 2013, the first judge ordered the exchange of contentions of fact and law. Ms Romero's contentions filed on 12 February 2014 were as follows:

> Ms Romero suffered damage and loss as a result of Farstad's breaches of contract including;

i. loss of 25% of her salary from December 2011 until May 2012;

ii. loss of 100% of her salary from May 2012 to the present and ongoing;

iii. retraining expenses;

iv. medical expenses;

Further particulars will be provided prior to trial.

31 Subsequently, on 17 February 2014, Ms Romero applied to the Tribunal for a review of her deemed refusal by Farstad of her claim and under the SRC Act. In this Court, by amended particulars of loss, Ms Romero claimed the following:

(1) Lost wages and superannuation since January 2012: $370,975;

(2) Costs of 2011 study thrown away: $62,542;

(3) Study costs since 2013–February 2014: $19,986.16;

(4) Estimated future study costs: $36,180;

(5) Future wages loss: $1,336,804.

32 Farstad made a further offer to settle the proceedings on 11 March 2014 on the basis of a payment of $10,000, but with no order as to costs or no allowance for costs. The offer was contained in a release and discharge deed forwarded to Ms Romero by an email which contained the subject line “without prejudice” rather than “without prejudice, save as to costs”.

33 As noted, on 30 November 2015, the parties entered into the Deed, as discussed above at [2] and [9].

34 The primary judge noted that the claim in the remitted proceedings before him were as follows:

- Loss of Salary and Superannuation 2012–2016-$860,000 … ;
- Less earnings since March 2013-$13,978.26 … ;
- Continuing loss of salary after graduation at the end of 2016 until Applicant’s salary reaches level of earnings she could have received from Respondent;
- Study costs pre November 2011–$20,000 … ;
- Income lost during study leave pre November 2011-$40,000 … ;
- Study costs for Law Degree since March 2013-$35,759.71 … ;
- Further Study to complete degree and Practical Legal Training–est $20,000 …

…

(It was common ground before the primary judge that the payment of $580,000 received under the Deed would be deducted, although that had not previously been conceded by Ms Romero.)

35 After considering s 43 of the ***Federal Court*** *of Australia* ***Act*** *1976* (Cth) and *Ruddock v Vardalis (No 2)* (2001) 115 FCR 229 (in which Black CJ and French J (as his Honour then was) considered the principle that absent special circumstances, the successful litigant will receive costs, the primary judge considered the following issues:

(1) What bearing, if any, did the award of nominal damages to Ms Romero have on her entitlement to costs?

(2) What was the effect, if any, of the offer made by Farstad under Pt 25 of the Rules?

(3) Could the settlement offer, made by Farstad on 11 March 2014, be taken into account?

(4) If the answer to (3) was "yes", what were the costs consequences (if any) of that offer?

36 On nominal damages, his Honour observed that an award of nominal damages has sometimes been a "peg" upon which costs hung (see *Beaumont v Greathead* (1846) 135 ER 1039 per Maule J (at 1041)), but certainly not always. McColl JA (with whom Ward JA agreed) summarised the guiding principles in *State of New South Wales v Stevens* (2012) 82 NSWLR 106 (at [22]):

> … As Campbell J (as his Honour then was) explained in *Mid-City Skin Cancer and Laser Centre v Zahedi-Anarak* [2006] NSWSC 1149 at [47]–[52] "[i]n an action for breach of contract, if a plaintiff establishes liability, and obtains an order for payment of nominal damages, that plaintiff is usually not to be regarded as the successful party in the action". His Honour repeated this passage of his reasons in his judgment in *Rockcote Enterprises Pty Ltd v FS Architects Pty Ltd* [2008] NSWCA 39 at [100] where it was approved by Handley AJA and myself. One aspect of this passage which warrants repetition is his Honour's citation of Stephenson LJ's explanation in *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 WLR 394 at 401 that costs should be awarded against a plaintiff who has obtained an order for nominal damages because that award:
>
> > "... was not the event at which the plaintiffs were aiming. They were aiming at £82,500, and the mere fact that they ultimately got something—token or nominal damages—does not enable me to regard them as remaining successful plaintiffs."
>
> See also *Motium Pty Ltd v Arrow Electronics Australia Pty Ltd* (at [10]).

37 His Honour cited subsequently and followed *Motium Pty Ltd v Arrow Electronics Australia Pty Ltd* [2011] WASCA 65 (S), in which the Court of Appeal of the Supreme Court of Western Australia (McLure P, Newnes and Murphy JJA) said (at [8] and [10]):

> [8] While the court has a broad discretion as to costs, generally the successful party is entitled to its costs: *Rules of the Supreme Court 1971* (WA), O 66 r 1(1). But it does not follow that a party which is awarded nominal damages is entitled to an order for the costs of the proceedings. The question is whether a party that is awarded nominal damages is to be regarded as the successful party. …
>
> …
>
> [10] While each case must depend upon its own facts, where it is not a primary purpose of proceedings simply to establish or vindicate some legal right but the primary purpose is to recover substantial damages, ordinarily an award of nominal damages will not entitle a party to the costs of the proceedings: see *Thiess Contractors Pty Ltd v Placer (Granny Smith) Pty Ltd* [2001] WASCA 166 [9]. In such a case, the party has obtained something of no real use to them and something which, if they had known it was all that was available, they would not have brought proceedings to recover. It would be contrary to modern notions of the efficient and cost-effective use of judicial resources to enable a party to recover its costs for a pyrrhic victory, having substantively failed in the action.

38 As to the offer to settle, it was clear that Farstad's first offer, communicated on 24 September 2013, was made consistently with the formal requirements of Pt 25 of the Rules and therefore r 25.14(1) was relevant:

> **25.14 Costs where offer not accepted**
>
> (1) If an offer is made by a respondent and not accepted by an applicant, and the applicant obtains a judgment that is less favourable than the terms of the offer:
>
> (a) the applicant is not entitled to any costs after 11.00 am on the second business day after the offer was served; and
>
> (b) the respondent is entitled to an order that the applicant pay the respondent's costs after that time on an indemnity basis.

39 After considering authorities dealing with r 25.14 or its equivalent, the primary judge turned to consider the "without prejudice" or "without prejudice save as to costs" offer of March 2014. His Honour discussed the case law and s 131 of the *Evidence Act 1995* (Cth), considering that the March 2014 settlement "without prejudice" offer could be taken into account. Ultimately, the primary judge did not confer on Farstad any benefit from either offer for reasons discussed below.

40 As to the Deed, the primary judge said that the execution of the Deed in November 2015 was of some moment. His Honour said (at [37]):

> … If, properly construed, the Deed settled a claim for a head of damages that was part of the subject matter of this proceeding, it assumes some importance in determining whether Ms Romero can be said to have been successful in this proceeding, and whether Farstad has bettered its offers. For that reason, it is appropriate to deal with the effect of the Deed before deciding how the competing costs claims should be resolved.

41 His Honour referred to the Deed's recitals from which it was apparent that Ms Romero claimed to have suffered mental harm, in consequence of which Farstad was liable both under the SRC Act and in contractual damages. The compensation claimed related to, amongst other things, lost wages arising from incapacity to work caused by the disabling mental condition. The primary judge dealt with the balance of the Deed noting that Farstad agreed by cl 4 of the Deed to pay to Ms Romero $580,000, on the basis that each party bear its own legal costs and disbursements in respect of the Tribunal application. Clause 5 provided that the settlement amount was paid:

> … in consideration of the Applicant's agreement to the terms of the Deed … and also in consideration of the Applicant releasing the Respondent, its servants and agents from the common law claim, and also in full and final settlement of the common law claim (which settlement also includes payment as part of the settlement amount of damages to the Applicant within the meaning of that term in section 58, including section 58(4) of the SRCA and for the purposes of section 58 including section 58(4), and is not damages referred to in s 58(6)) and also with an express denial of liability by the Respondent in order to avoid the costs and risks of litigation but, subject to the Applicant's representation at 1.1(iv) above and paragraphs 8–10 below, without prejudice to the claim by the Applicant in Federal Court proceeding TAD 72/2012.

42 After referring to s 58 of the SRC Act, his Honour observed that cl 8 of the Deed provided as follows:

> The Applicant agrees with the Respondent that by reason of the terms of this Deed and the provisions of the SRCA the Respondent … has and will have no obligations to the Applicant to make any payments of compensation to the Applicant under the SRCA or any other State compensation law or damages at common law or make any payments under any other statutory enactment or otherwise in respect of any adjustment disorder and/or depression nor any sequelae of any of the same and subject to the provisions of paragraph 5 above release the Respondent … to the extent permitted by law from all claims, demands and suits arising from her employment with the Respondent, including the matters in paragraph (A) of the preamble to this Deed including in respect of the adjustment disorder and/or depression."

43 His Honour concluded that by Ms Romero agreeing that the adjustment disorder and/or depression fell within the exception to the definition of "injury" in s 3 of the SRC Act, it was removed from the purview of that Act. Therefore, it was open to the Tribunal to decide, which it did (by consent), that although Ms Romero had suffered the mental harm arising out of her employment with Farstad, the cause of the mental harm was excluded from the

definition of injury and therefore Ms Romero was not entitled to compensation under the SRC Act.

44 The primary judge concluded (at [46]-[47]):

> 46 The purpose of the Deed, as it appears to me, is to provide for the payment of $580,000 to Ms Romero in exchange for a release by her of Farstad in respect of any claims she may have arising out of the mental harm sustained by her. That includes claims that she may have under the SRC Act (and she acknowledges in the Deed, and the Tribunal decided, that she was not entitled to compensation under the Act in any case). **It comprehends "common law" claims, including a claim for damages for breach of contract. In respect of such claims, she represented that she "[would] not seek damages … in respect of loss arising from the [mental harm]" in this proceeding, and that this proceeding "[did] not include" any claim for such damages**.
>
> 47 It is clear that, **at least up to the date of the Deed**, Ms Romero's claim against Farstad *did* include a claim for such damages, or in any case that her claim for damages was broad enough to encompass a head of damages relating to incapacity for work caused by Farstad's alleged breaches of contract …
>
> (emphasis added)

45 The submission for Ms Romero that she had been "wholly successful on the issue of breach of contract" and that she should have her costs on a party and party basis was rejected. His Honour also rejected a submission that it was clear to Farstad that she:

> was seeking more than a mere monetary sum of damages in these proceedings. [Ms Romero] was seeking vindication of her position and seeking to ensure that [Farstad did] not treat other employees of its organisation [in] the way that [Ms Romero] had been treated.

Further, Ms Romero submitted "[r]ecognition that [Farstad's] actions were unlawful was a significant motivating factor for [Ms Romero] in commencing and continuing with the action." Ms Romero submitted that she had been successful in establishing a breach of contract, a claim which had been disputed by Farstad. She had been vindicated by the declaration with the acknowledgement that she had sought: that the way in which she had been treated by Farstad was unlawful. It was submitted that after that determination:

> the failure of [Farstad] to make any offer which included payment of [her] taxed costs left her and the Court with no choice but to proceed with the June 2016 hearing and assess damages.

46 The primary judge considered that Ms Romero was substantially unsuccessful in obtaining the relief claimed by her in her originating application and statement of claim. As to the contractual breach claim in particular, Ms Romero's claim was that, in consequence of Farstad's breach and (alleged) repudiation, she had sustained loss or damage including those

associated with having been forced to change her profession. While Ms Romero was successful in establishing breach, she did not establish repudiation, and the loss or damage upon which she relied was found to be too remote. Ultimately, having sought damages on the basis of breach and repudiation, Ms Romero established only non-repudiatory breach and received a miniscule percentage of the damages that she sought. His Honour concluded that was not "success". It seemed to his Honour that the observation in *Motium* (at [10]) - that the nominal damages are of no real use to Ms Romero and, had she known that that was all that was available, she would not have brought proceedings - was apposite.

47 His Honour considered Ms Romero's primary purpose was to obtain an award of substantial damages. At least since 18 December 2015 (i.e. after the Deed took effect) Farstad had been successful in its defence of Ms Romero's proceeding. His Honour concluded that Farstad should have its costs on at least a party and party basis.

48 On Farstad's offer to settle, the primary judge did not accept that Farstad was entitled to costs on an indemnity basis. Its reliance on the settlement offer dated 24 September 2013 overlooked the fact that, at that time, Ms Romero's claim for contractual damages arising out of her alleged "adjustment disorder and/or depressive anxiety condition and/or major depressive disorder" (what came to be called in the Deed the "common law claim") was still in issue. Loss of that kind was claimed in Ms Romero's originating application and in her statement of claim, and the Deed had not yet been entered into. Ms Romero had rejected an offer of $40,000 inclusive of costs to settle claims including the "common law claim". As she received $580,000 as part of a settlement of claims including the common law claim, the primary judge concluded that she had not obtained a judgment "less favourable than the terms of the offer".

49 The primary judge concluded that neither party should have costs prior to 18 December 2015 (excepting, of course, the costs of the appeal, which had already been dealt with by the Full Court).

50 His Honour determined that Farstad was the successful party on the remitted hearing, so it should have its costs on a party and party basis from 18 December 2015. The orders made were:

> 1. The applicant pay the respondent's party and party costs incurred on and after 18 December 2015.
>
> 2. All other costs claims be refused.

## GROUNDS OF APPEAL

### The damages judgment

51 In relation to damages, there are four grounds of appeal.

52 The first ground is that the primary judge erred in failing to find that the contractual term requiring compliance with the Policy or the terms of the Policy was essential so that any breach justified termination. Included with this ground was said to be an erroneous finding in relation to whether Ms Romero had seen the Policy at the time she entered into the causal employment contract.

53 The second ground is that the primary judge erred in failing to determine whether Farstad had repudiated the contract of employment by evincing an intention not to be bound by the terms of the contract or by fulfilling it in a manner substantially inconsistent with the contractual obligations.

54 The third is that the primary judge erred in finding that Farstad's breaches of contract were not sufficiently serious to justify termination of the employment contract by Ms Romero, including by:

(a) finding that the investigation made no adverse findings against her and did not threaten in any way the continuity of her employment with Farstad; and

(b) failing to give any or sufficient weight to:

(i) the actual and foreseeable consequences of the breaches;

(ii) the inadequacy of damages;

(iii) the intention evinced by Farstad not to be bound by the terms of the contract or to fulfil it only in a manner substantially inconsistent with the contractual obligations; and

(iv) the behaviour of Farstad.

55 The fourth ground of appeal is that the primary judge erred in failing to find that:

(a) the loss of the benefit of her study costs; and

(b) the loss of her career in the maritime industry;

were each losses that arose according to the usual course of things from the breaches of the employment contract, or that these losses may reasonably be supposed to have been in the

contemplation of the parties at the time they made the contract as the probable result of the breaches.

56 The orders sought by Ms Romero are that the order for nominal damages be set aside and the Full Court assess the damages for which Farstad should be liable to Ms Romero. On appeal, the Court was provided with schedule at which "the upside" of such damages was in excess of $1.6 million, inclusive of the $580,000 awarded pursuant to the Deed and which would be deducted from the total award.

**Costs**

57 Ms Romero also challenges the the award of costs made by the primary judge on the following grounds:

> 5. That [the primary judge] erred in failing to find that [Ms Romero] had been successful on her application and that she should recover her costs.
>
> 6. That [the primary judge] erred in elevating to the status of a principle fettering the exercise of his discretion on costs the court's statement in *Motium* that "*where the 'primary purpose' of litigation is to recover damages rather than vindicate some legal right, the award of nominal damages will not entitle a party to costs*" [at para 56].
>
> 7. That [the primary judge] erred in finding that [Ms Romero's] primary purpose "was to obtain an award of substantial damages" [at para 63].
>
> 8. That [the primary judge] erred in failing to order [Farstad] pay [Ms Romero's] costs up to and including the hearing before Marshall J on the basis that she was ultimately successful on the breach of contract and jurisdictional issues that [his Honour] and the Full Court determined.
>
> 9. That [the primary judge] erred in ordering [Ms Romero] pay [Farstad's] costs from 18 December 2015 when the Full Court had ordered the application be remitted for the hearing of specified questions including damages and the entitlement of [Ms Romero] to receive any damages was not conceded by [Farstad] until during the hearing of the remitted questions and [Farstad] has not offered to pay [Ms Romero] any amount for damages plus her costs.

**CONSIDERATION**

**The damages appeal**

***Whether the terms breached were essential***

58 As discussed by Jordan CJ in *Tramways* (at 641–642), whether terms of a contract are essential terms depends upon the intention of the parties as objectively construed in and from the contract and context. The test of essentiality is whether it appears from the nature of the contract considered as a whole or from some particular term or terms that the promise is of

such importance to the promisee that the promisee would not have entered into the contract unless assured of strict or substantial performance of the promise. The High Court held in *Koompahtoo* (at [47], citing *Tramways*), that if the innocent party would not have entered into the contract assured of a strict and literal performance of the promise, the promisee may in general treat himself or herself as discharged upon any breach of the promise however slight.

59 Ms Romero contends that the reasoning of the primary judge relevant to this ground of appeal involves a finding that Ms Romero's first involvement with the Policy was after she had commenced casual employment with Farstad. She contends this finding is contrary to the evidence that Ms Romero was made aware of the Policy when first employed as part of her induction process. The relevant finding is at the end of [42] of his Honour's reasons:

> There is nothing in Ms Romero's contract (including the terms of the Policy) or in the relevant terms themselves which supports a conclusion that, had the terms not been incorporated, Ms Romero would not have entered into the contract. They were not "essential" promises. Indeed, it appears from [2]–[3] of Ms Romero's affidavit of 24 January 2014 that her first encounter with the Policy was during her induction process or aboard the Far Scandia - that is, after she had already commenced casual employment with Farstad.

60 This finding was correct. In para 2 and para 3 of Ms Romero's affidavit of 24 January 2014 she deposed to the following matters:

> 2. When I was first employed I went through an induction process. I cannot recall the details of what that involved. However, I do recall watching two DVDs, one was about safety and the other took me through the Farstad policies.
>
> 3. When I started aboard the Far Scandia I had to undergo a vessel induction. As part of my vessel induction I was shown a management systems disc ("IMS disc") which contained all of Farstad's policies, procedures and guidelines. I had to demonstrate my familiarity with the disc and the policies and systems documented on the disc. I read through the disc to ensure that I was familiar with all of the policies and procedures set out in the disc. These Farstad policies included [the Policy] a copy of which is annexed hereto and marked "LCR1". I recall seeing [the Policy] during my first swing.

61 The finding and reasoning at [43] of his Honour's reasons, in these terms, is also correct:

> It is to be borne in mind that, at the time Ms Romero entered into the casual contract (cf *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165 at [40]), she had not even seen the Policy. That tends against compliance therewith being treated as essential. Of course, the **position was different when she entered into her permanent contract**, but there seems to **be little reason**, in this particular case, **for thinking that, whereas compliance with the policy was a non-essential element of the casual contract, it became essential in the subsequent permanent contract**.

(emphasis added)

62 Ms Romero contends that this is the only basis upon which his Honour came to the conclusion that there was nothing in the contract, including the terms of the Policy, which supported a conclusion that Ms Romero would not have entered into the contract had the terms not been incorporated into it. Ms Romero reiterates the observations of this Court in Full Court (No 1) (at [55]) where the Court observed that objectively viewed, the parties would be expected to regard terms of a company policy, especially those that go to fundamental conditions of employment (such as the method of compliance with external statutory obligations) as being contractually binding. This, of course, does not answer the question as to whether or not that term was an essential term. It is also incorrect to suggest that the only reason for the conclusion at [42] of his Honour's reasons was the timing at which Ms Romero was shown the Policy. The detail appearing in his Honour's reasons at [36]-[43] is considerably more expansive than this. Moreover, his Honour found (at [45]) and, in our view correctly, that the relevant terms were not sufficiently important that any breach would justify termination, relying upon the passage appearing in *Koompahtoo* (at [48]).

63 Ms Romero contends that the contract could not operate effectively without the terms breached by Farstad; she argues that the Policy was intended to provide peace of mind to Farstad's employees, including Ms Romero. She contends it was foreseeable by the parties that if she was bullied and this was inappropriately dealt with by Farstad that she could suffer stress and disturbance which could lead to a psychological disability and impede the effective operation of the contract. Her mental disability was a severe manifestation of the very type of detriment that the Policy was designed to prevent, she contends, relying on *Nikolich v Goldman Sachs JB Were Services Pty Ltd* [2006] FCA 784 per Wilcox J (at [330]) in which his Honour observed that "it is notorious that stress and disturbance of mind may lead to a psychological disability". Once again, in our view, this merges two concepts. Many employment contracts operate effectively without the employers' policies on various matters being incorporated as terms. The existence of the Policy and its status as being contractual is quite different from the question of whether or not compliance with it is an essential term.

64 Often in employment contracts, the parties, over the course of their relationship will add or vary the original terms, including, as occurs routinely, by changing the remuneration payable to the employee. In general, the relationship will evolve harmoniously by introducing such changes into a contract as variations or additions to the terms of the original contract as

Gleeson CJ, Gaudron and Gummow JJ explained in *Concut Pty Ltd v Worrell* (2000) 176 ALR 693 at 698-699 [18]-[19]: see too *Federal Commissioner of Taxation v Sara Lee Household & Body Care (Aust) Pty Ltd* (2000) 201 CLR 520 at 533 [52] per Gleeson CJ, Gaudron, McHugh and Hayne JJ and *Cohen v iSoft Group Pty Ltd* (2013) 298 ALR 516 at 526-527 [35]-[38] per Rares, Cowdroy and Kerr JJ.

65 Here, even if the terms of the Policy had not comprised the initial terms of Ms Romero's contract, they became terms at the time at which the parties varied or changed their contractual relationship to include those terms. The importance of any additional term falls to be assessed at the time that the addition or variation is made. There will be cases, such as where the employee bargained for, or was offered or accepted, a higher wage or salary or a new position, where the promise of the new level of remuneration or position will be capable of being characterised as an essential term, even though it was not in contemplation when the employment relationship was first established. Likewise, subsequently added or varied terms may not have that character of essentiality.

66 The question which the primary judge addressed was whether he could be satisfied that Ms Romero would not have accepted employment if the relevantly breached terms of, and relating to, the Policy were not part of the contract. The question looked back to the inception of the parties' contractual relationship. In our opinion, it was open to his Honour to find in all the circumstances, as he did, that Ms Romero would still have accepted or continued in her employment without the Policy being part of her contract. That is, it was open to his Honour to find that the relevant terms of the Policy were not essential terms to the contract once, or at the time, it had been varied to include them.

67 Ms Romero has framed her argument on this topic by reference to strict and literal performance of the contractual promise in the Policy. The test of essentiality is not, however, directed to performance, but to the nature of the term itself. The question of a term's essentiality must be "understood in the context of the relationship established by [the] contract and (in a case like the present) the commercial purpose it served, that determines whether a term is "essential", so that any breach will justify termination": *Koompahtoo* at [48]. If that is established, then any failure to strictly comply with such a term may constitute a repudiation of the contract, capable of acceptance by the innocent party: *Tramways* (at 641–642). Having regard to all the evidence, the primary judge was correct to conclude that none

of the terms of the Policy on which Ms Romero relied was so important as to amount to an essential term or a condition by reference to these tests.

68 It follows that the first ground of appeal cannot succeed.

***Repudiation***

69 It is contended for Ms Romero that she acquired a right to terminate the employment contract either on the basis that Farstad's conduct evinced an intention to only fulfil the contract in a manner substantially inconsistent with its obligations or there was a sufficiently serious breach of a non-essential term to give rise to that right. Ms Romero relies upon *Koompahtoo* (at [44]]) where the following discussion appears (footnotes omitted) and [49] (set out above at [15]) :

> 44 In its letter of termination, Koompahtoo claimed that the conduct of Sanpine amounted to repudiatory breach of contract. The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations. **It may be termed renunciation. The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.** (In this case, we are not concerned with the issues that arise where the alleged repudiation takes the form of asserting an erroneous interpretation of the contract. Nor are we concerned with questions of inability as distinct from unwillingness.) Secondly, **it may refer to any breach of contract which justifies termination by the other party.** It will be necessary to return to the matter of classifying such breaches. Campbell J said this was the sense in which he would use the word "repudiation" in his reasons. There may be cases where a failure to perform, even if not a breach of an essential term (as to which more will be said), manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words.
>
> (emphasis added)

70 As Ms Romero observes, a distinction is to be drawn between two types of conduct. First, there may be conduct amounting to a breach which is taken as a repudiation or renunciation in that it evinces the intention of the offending party not to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the defaulting party's contractual obligations. Secondly, there may be a breach of an essential term that itself, or of an innominate term that is of a sufficiently serious nature that it, gives rise to a right to

terminate. In the context of renunciation, the intention or acts of the defaulting party can be relied upon to reach such a conclusion. In *Byrnes* (at [70]-[80]) Allsop J explained that if the degree or nature of the conduct is such as would be described as serious or substantial, it may be that it evinces an intention not to be bound and thus amounts to what Gleeson CJ, Gummow, Heydon and Crennan JJ termed "renunciation". Another way of examining the matter is to assess the extent and gravity of the breach and determine whether the breach or breaches deprive the party not in default of substantially the whole benefit which it was intended that he, she or it should obtain from the contract (see also *Koompahtoo* (at [49]), cited above at [15]).

71 On this topic of the nature of a breach of an innominate term sufficient to give rise to a right to terminate, these points are established from *Koompahtoo* and *Byrnes*:

- There is much to be said for distinguishing categories of repudiation between renunciation and substantial breach warranting termination. In the case of renunciation, the intention or the acts of the defaulting party can be distilled as the relevant factor. There is an evincing of an intention not to be bound by the obligations of the contract, or whilst intending to comply, only to do so in a manner inconsistent with those obligations and in no other way. In the case of substantial failure of performance, one looks to the nature and consequences of the breach(es), which may or may not direct attention to acts of the other contracting party.
- The necessity, in this category of breach, for the effect of the failure or breach to affect the substance of what was intended to be contracted for is reflected in the damages recoverable upon termination: the loss of the benefit of the *whole* contract.
- However one expresses it, the essential element is that it has so changed or departed from the promised performance of the contract that the party not in default can be seen to have been deprived of substantially the whole of the benefit which it was intended that he, she or it would obtain from the contract.

72 Ms Romero argues the primary judge did not deal with her submission that Farstad's conduct evinced an intention to only fulfil the contract in a manner substantially inconsistent with its obligations. Ms Romero argues that the primary judge only determined whether the breach was sufficiently serious in kind to give rise to a right to terminate. Relying upon this Court's observations in Full Court (No 1) (at [115]-[116]), Ms Romero says that Farstad did

objectively evince an intention not to be bound by the obligations of the Policy. In that judgment, we said:

> 115 Ms Romero justifiably considered that she had been treated very unfairly and in a way that expressed to her a view that her employer was either not taking her complaints seriously or was misusing her complaints in a way that her own competence had assumed the major focus. Her reaction was entirely legitimate.
>
> 116 It may be that this engendered in Ms Romero an objectively justified view that Farstad had not complied, and would not thereafter comply, with its contract with her.

73 From this, Ms Romero says it was clear that Farstad's conduct engendered in her an objectively justified view that Farstad had not complied and would not thereafter comply with its contract with her. Consequently, she submits that she acquired an entitlement to terminate the contract.

74 It appears to us that there is a misapprehension of what the primary judge observed at [32] of his Honour's reasons where he said:

> Ms Romero submitted that she had acquired a right to terminate the contract either on the basis that Farstad's conduct amounted to a repudiation or that the breach was sufficiently serious to justify termination by her. As I understood her submissions she did not suggest that the breaches found by the Full Court evinced an intention by Farstad not to be bound by the contract as a whole. Rather, she argued that the necessary repudiatory intention was to be found in the breaches of what were said to be fundamental obligations which fell on Farstad.

75 The primary judge expressly noted his understanding of Ms Romero's submissions as not suggesting "that the breaches found by the Full Court evinced an intention not to be bound by the contract as a whole". It has not been demonstrated that this reflected a misunderstanding of Ms Romero's submission before the primary judge. Importantly, Ms Romero has not challenged the primary judge's stated understanding of her submissions by way of a ground of appeal.

76 There was ample basis on which his Honour could and did correctly proceed on the assumption that the breach of the Policy did not evince an intention not to be bound by the contract as a whole. There were clear indications that Farstad was keen to retain Ms Romero's services after the events giving rise to the breach. Viewed objectively or subjectively Farstad wanted to solve the problem and maintain Ms Romero's services.

77 Farstad also contends that, even if the breaches did constitute repudiatory conduct, the primary judge was correct in finding that he would have held that Ms Romero failed to promptly accept any repudiation and terminate the contract, thereby affirming the contract. It

was not until 25 October 2013 that Ms Romero purported to accept the alleged repudiation. In the intervening 22 months there had been instances of conduct consistent with still being bound by the contract. Affirmation will be addressed further below.

78 Ground 2 cannot succeed.

***Seriousness of the breaches***

79 The third ground of appeal is that the breaches were sufficiently serious to justify termination by Ms Romero. In terms of the relevant principles, Ms Romero relies on the fact that in a substantial failure of performance, one looks to the nature and consequences of the breach, which may or may not direct attention to the acts of the other contracting party. She contends the essential element is the deprivation of a benefit or entitlement or the imposition of a burden, sufficiently serious to change the character of the grant to, or the obligations or entitlements of, the other party to the contract to such a degree that it can be said to be a commercially different bargain. This can arise from the actual breach itself or the actual consequences of the breach or the foreseeable consequences of the breach: *Byrnes* (at [78]) as discussed above (at [70]).

80 That the Policy would be part of the contract might be considered to be a quintessential intermediate term. That is because there would be many ways in which policy might not be followed. It could be a minor departure or a major departure. That being so, it was not possible for the parties to look ahead and determine whether any breach was likely to be serious. Some may, some may not. Assuming that the Policy being contractual was an intermediate term, the question is whether the character of the breach was such, when viewed objectively, to communicate the fact that Farstad was not henceforth going to comply with its contract, or alternatively, that the character of the breach was of sufficient seriousness to warrant termination of the contract. Clearly there was no intention evinced not to comply with the contract as a whole and Ms Romero does not contend this was so. However, Ms Romero contends that the foreseeable consequences of the breach were those which actually occurred, that is, that there was a loss of trust and confidence by her in Farstad and for work at sea generally and the loss of her career at sea.

81 Ms Romero takes issue with the conclusion of the primary judge that the breaches of the Policy "did not threaten in any way the continuity of her employment with Farstad". She contends they did by reason of the fact that they destroyed her trust and confidence in her employer and made her ill, which in turn incapacitated her for employment, not only with

Farstad, but as a seafarer generally or in any other capacity. It has been noted above (at [24]) that at [52] his Honour said:

> I do not consider that the breaches of the Policy by Farstad even approached the required level of severity. As I have already observed, the allegations made by Ms Romero against Captain Martin were serious and warranted some form of investigation. The deficiencies in the investigation did not lead to any adverse findings against Ms Romero. The conduct of the inquiry and its outcome did not threaten in any way the continuity of her employment with Farstad.

82 Ms Romero also takes issue with the finding of his Honour at [39] that there was "on both sides, a view that an inquiry should be instituted". She contends this is inconsistent with the findings of this Court in Full Court (No 1) (at [95]) that Ms Romero's email of 7 December 2011 "made the point expressly … that Captain Martin's behaviour was 'a matter for Farstad to address".

83 His Honour's observation is not inconsistent with Ms Romero's suggestion that it was a matter for Farstad to address. The point has previously been made that she did not register a formal complaint or refer to the Policy and therefore did not expect a formal invocation of the Policy's procedure and structure. But the very sentence on which she relies, where she made clear that it was for "Farstad to address Captain Martin's behaviour", necessarily involved at least an informal inquiry. Farstad could not be expected to act adversely to Captain Martin without conducting a suitable inquiry as to the appropriateness of doing so. It was clear that Farstad had to make some inquiries to consider the allegations which Ms Romero made herself. Again, it must be noted that Farstad did continue its efforts to attempt to facilitate Ms Romero's active return to work. The conduct of inquiries it undertook did not threaten in any way the continuity of her employment with Farstad. Furthermore, when one considers the seriousness of the breach, it is important to recall the unchallenged findings of the first judge that Captain Martin did not behave in the manner for which he was criticised by Ms Romero.

84 In our view, ground 3 cannot be made out.

***Retraining costs and remoteness***

85 Ms Romero contends that she was entitled to recover such damages as would place her in the same situation, as far as money could do, as if the contract had been performed. *Hadley v Baxendale* (1854) 156 ER 145 (at 147) confirms a loss will not be too remote if it:

> may fairly and reasonably be considered either arising naturally, i.e., according to the

> usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach of it.

86 What have frequently been described as the two limbs of *Hadley v Baxendale* are now often viewed as the statement of a single principle: *European Bank Ltd* (at 437-438 [11]-[13]) where French CJ, Gummow, Hayne, Heydon and Kiefel JJ said (footnotes omitted):

> 11 Something immediately should be said respecting the significance for the issues in this appeal of the rule in *Hadley v Baxendale*. The rule is, of course, associated with the assessment of damages in actions for breach of contract. The principle with respect to damages at common law for breach of contract recently was confirmed by this Court in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* as that stated by Parke B in *Robinson v Harman*. The plaintiff is to be placed in the same situation with respect to damages, so far as money can do it, as if the contract had been performed.
>
> 12 As Toohey J remarked in *The Commonwealth v Amann Aviation Pty Ltd* , the rule in *Hadley v Baxendale* does not detract from what was said in *Robinson v Harman*. The rule is concerned with the question of remoteness and marks out the limits of the heads of damage for which the plaintiff is entitled to receive compensation. In the same case, McHugh J said of *Hadley v Baxendale* that the rule is a limit on, rather than a ground of, liability, marking out the boundary of the liability for loss or damage caused by a breach of contract.
>
> 13 The formulation of the rule in *Hadley v Baxendale* states the entitlement of the plaintiff to recover such damages as arise naturally, that is, according to the usual course of things, from the breach of contract, or such damages as may reasonably be supposed to have been in the contemplation of both parties concerned at the time they made the contract as the probable result of the breach. In *The Commonwealth v Amann Aviation Pty Ltd* Mason CJ and Dawson J, with reference to the speeches of Lord Reid and Lord Upjohn in *Koufos v C Czarnikow Ltd* (*The Heron II*), said that the two limbs of the rule in *Hadley v Baxendale* represent the statement of a single principle and that the application of that principle may depend on the degree of relevant knowledge possessed by the defendant in the particular case. Lord Reid had used the expression "on the cards".

87 Ms Romero's case is that the prospect of incapacity for employment with Farstad, wasted training costs, loss of salary spent towards a Master's Certificate and the loss incurred by pursuing a law degree for the purpose of retraining, must have been in contemplation of the parties. She emphasises that the losses need only be of the "kind of loss or damage suffered", which is uncontentious: *Alexander v Cambridge Credit Corporation Ltd* per McHugh JA (at 365-366).

88 As observed, the primary judge made the following finding (at [27]):

> The "kind of loss or damage suffered" (cf [sic] *Alexander*) identified by Ms Romero is loss or damage arising out of a complete change in career. Would the parties have had in contemplation that a (or any) breach of the Policy might lead to an employee suffering loss or damage by having to embark on an entirely new career? In my

judgment, the answer is "no".

89 Ms Romero says this finding was to classify the level of damage which the parties may have contemplated as being the very loss in question or the precise manner of its occurrence, rather than the general kind of loss that may be suffered.

90 The conclusions of the primary judge on this topic were correct. A complete change of career was neither the natural and probable consequence of the breaches of the Policy nor within the reasonable contemplation of the parties as the probable result of the breaches when they entered into the contract. The Policy was designed to deal with rectifying problems within the employment environment. Those damages, beyond the amount awarded pursuant to the Deed were too remote. His Honour was correct to award only nominal damages. (No issue is taken with the amount awarded, if to award nominal damages was correct.) No adequate basis has been put forward to support the contention that it was natural and probable, or in the contemplation of the parties, that in consequence of the breaches, Ms Romero would choose to abandon her chosen career as a seafarer with any employer at all or decline to utilise her skills and qualifications as a shore-based employee in the maritime industry with any employer, but rather, to embark upon a course of study towards a new career in law. The primary judge was correct so to find.

91 Ms Romero contended that the $580,000 received pursuant to the Deed was for her injury (mental damage) whereas the claim surviving pursuant to the litigation in this Court was a claim for loss of her contract, including all future wages. She contends that she had to proceed by way of a compensation claim because s 54 of the SRC Act included any right to bring an action in a court in respect of that injury sustained in the course of employment. As cited above at [46], cl 5 of the Deed provided as follows:

> … in consideration of the Applicant's agreement to the terms of the Deed … and also in consideration of the Applicant releasing the Respondent, its servants and agents from the common law claim, and also in full and final settlement of the common law claim (which settlement also includes payment as part of the settlement amount of damages to the Applicant within the meaning of that term in section 58, including section 58(4) of the SRCA and for the purposes of section 58 including section 58(4), and is not damages referred to in s 58(6)) and also with an express denial of liability by the Respondent in order to avoid the costs and risks of litigation but, subject to the Applicant's representation at 1.1(iv) above and paragraphs 8–10 below, without prejudice to the claim by the Applicant in Federal Court proceeding TAD 72/2012.

92 The difficulty with Ms Romero's claim for extra retraining costs is that she has been compensated for inability to work by reason of her injury. That compensation is based upon the existence of the injury as a fact. To then also seek compensation for loss of future

earnings carries with it the false premise that she is not injured. She would only be entitled to claim those damages if she had not sustained an injury.

93 Ground 4 cannot be succeed.

***Affirmation***

94 In these circumstances, it is unnecessary to consider the question of affirmation and election as there was no repudiation. Were it necessary to consider those topics, the issue was squarely before the primary judge. The topic of affirmation in terms was expressly referred by the Full Court to the primary judge.

95 As discussed at [7] while Ms Romero takes issue with additional matters relied upon for the purpose of affirmation by Farstad when the matter was remitted for rehearing on those topics, no such complaint is open. The remitted topic was unconfined in the manner suggested and the parties were free to adduce evidence and make submissions as they saw fit. Further, as counsel accepted in oral submission before this Court, there were no submissions made as to prejudice being sustained if the additional evidence were admitted.

96 While in light of the rejection of the repudiation argument there is no occasion to consider affirmation, there is equally no doubt that Ms Romero took too long to accept the repudiation. Acknowledging that the onus rested on Farstad to prove affirmation (*Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 885), it is clear that there was sufficient evidence adduced for this purpose. A number of matters are relevant.

97 First, delay was a major factor. Secondly, Ms Romero expressly included in her statement of claim when the proceedings were commenced, that she remained an employee of Farstad after the alleged repudiatory conduct. The statement of claim and the date of it were referred to by the primary judge as being 1 March 2013. As discussed, it was not until 25 October 2013 that Ms Romero purported to accept the alleged repudiation, a delay of some 22 months. During that period Ms Romero was paid sick pay for a period, then on half pay and then continued to receive certain superannuation contributions. Ms Romero also required that she be reimbursed for expenditure on private medical insurance on the basis that the relevant enterprise agreement provided for existing employees to have that benefit. Clearly the employer was attempting to induce Ms Romero back to work. Nonetheless, the position of Farstad was that because she had been absent for a period of over two months, Farstad need to make an assessment of her capacity to perform the inherent requirements of her

seagoing duties. Ms Romero was contacted by Mr Peter Barrow in order to make an arrangement for the medical assessment at Farstad's cost, which Ms Romero agreed to undertake. The purpose of that medical assessment was to assess her fitness for duty and how Farstad might enable her return to work. Ms Romero's express requirement for her attendance at that assessment was that she be paid wages and be reimbursed for "all her out of pocket expenses". There was no actual contractual right to compel her to attend. Essentially, Farstad was making a request, to which Ms Romero acceded. Taken alone, that may not be sufficient to constitute behaviour recognising unequivocally the existence of the contract, but the behaviour continued beyond this point. By requiring the reimbursement of all of her out of pocket expenses as well as payment, she was effectively relying on her status as an employee to claim such a payment. It was a demand that payments be received pursuant to the enterprise agreement, which could only operate in respect of her status as an employee. These points are added into the continuum of conduct, which includes the matters on which the primary judge relied.

98 These actions when taken collectively satisfy the description in *Sargent* (at 656) of being unequivocal in their nature in affirming the contract well after the breaches.

***Re-computing damages***

99 Finally, on the topic of damages, Ms Romero has asked this Court to reassess damages if it considers that she should succeed on only ground 4 of the appeal. She has not succeeded on that ground. The occasion to reassess damages has not arisen.

**The costs appeal**

100 The starting point on any appeal in relation to costs is to recognise that the discretion exercised under s 43 of the *Federal Court Act* is one that is subject to the principles applicable to appeals from discretionary decisions as set out in *House v R* (1936) 55 CLR 499 (at 505). It would be necessary for Ms Romero to demonstrate that the primary judge's decision was wrong in principle, took into account a matter which should not have been considered, failed to take into account a relevant consideration or is plainly unsustainable: see also *Rhodium Australia Pty Ltd v Deputy Commissioner of Taxation* [2012] FCAFC 17 (at [20]) where Marshall, Edmonds and Greenwood JJ said:

> The attack on the primary judge's exercise of discretion is entirely misplaced. It has not been shown that his Honour acted on any wrong principle, took into account extraneous matters or failed to take into account relevant matters; see *House v R* (1936) 55 CLR 499 at 505.

101 The grounds of appeal can be considered together. The two major contentions are that, first, it was wrong in the circumstances of this case to consider that nominal damages should not warrant an award of costs following the event and, secondly, but not unrelatedly, a complaint that the primary judge was wrong to conclude that the principal purpose of Ms Romero's litigation was to recover substantial damages.

102 The costs of the appeal in Full Court (No 1) were awarded in favour of Ms Romero when she successfully established that the Policy was part of her contract. The question of whether its breach constituted a repudiation, whether or not there had been affirmation or election and, if so, the consequence and damages were the matters remitted to the primary judge. All those matters (as well as the claims under the SDA and the credit attack on Captain Martin) were decided adversely to Ms Romero by the first judge.

103 In our view, this is a case eminently suited to the observations of the Court of Appeal in *Motium*. There is no reason to think at any point that the claim by Ms Romero was other than a claim primarily for substantial damages. In recovering only nominal damages after the execution of the Deed, she failed. There are numerous indicators as to the breach of contract claim being for substantial damages. From the outset Ms Romero claimed damages, amongst other things, for $1.8 million. At no time was there any suggestion that she would depart from a claim of this nature. At no time was it suggested that her claim was simply to vindicate some legal right or to obtain an apology. Ms Romero pursued a claim in substantial damages throughout. Even in this proceeding, the Court was presented with a schedule in respect of a claim in damages exceeding $1 million. It would quite unrealistic to consider that Ms Romero was pursuing a claim other than for an extensive award in damages.

104 In relation to the claim for an apology, that remedy was claimed under the SD Act and the DD Act. The claim under the SD Act, like the contract claim, included a claim for substantial damages. That claim was rejected by the first judge. The DD Act claim was not pursued by Ms Romero at trial. The rejection of the SD Act claim was not pursued on appeal, nor was it the subject of any claim in the remitted hearing before the primary judge.

105 The only real question is whether Ms Romero should be entitled to costs up until execution of the Deed. Until that time, she had received no substantial sum as she did pursuant to the Deed. She had received no substantial offer, certainly no offer that matched the sum she received pursuant to the Deed. Until the sum of money was received pursuant to the Deed, the all-embracing claim in damages in the proceeding in this Court included a claim for the

sum awarded by way of compensation under the Deed. It is reasonable to assume, having regard to the history of the litigation, that it was necessary for Ms Romero to persevere, both with this litigation and the compensation claim in tandem in order to achieve the settlement, albeit that the ultimate outcome is that she would have been better off had she stopped after accepting payment under the Deed, rather than pursuing the claim before the primary judge.

106 The effect of the Deed was to notionally preserve whatever remaining claims Ms Romero could establish in the proceeding, liability for which was expressly denied by Farstad. She did not establish any remaining claims of substance after execution of the Deed.

107 In our view, despite a very careful analysis of the situation by the primary judge in the costs judgment, the better view is that there is no reason to consider Ms Romero would have achieved the result under the Deed unless this litigation was also pursued.

108 In our view, Ms Romero is therefore entitled to most of her costs up to the date of executing the Deed. We would deduct 20% to account for claims on which she failed or which she did not press before the first judge, namely on the credit and other complaints against Captain Martin which assertions were rejected and the claims under the SDA and the DDA. We would vary the costs order made by the primary judge to reflect these adjustments.

**CONCLUSION**

109 Subject to a partial variation of the primary judge's order in relation to costs, the appeal will be dismissed. As requested, we will hear the parties on the costs consequences of these orders.

I certify that the preceding one hundred and nine (109) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Chief Justice Allsop and Justices Rares and McKerracher.

Associate:

Dated: 4 July 2017