WHEN SILENCE IS [A] GOLDEN [THREAD]— APPROACHES TO THE CONSTRUCTION OF INDEMNITIES, EXCLUSIONS AND GUARANTEES IN COMMERCIAL CONTRACTS SINCE ANDAR TRANSPORT V BRAMBLES LIMITED

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OVERVIEW

Notwithstanding what has been described as a 'paradigm shift' during the course of the last three decades away from literalism and towards a contextual approach to the construction of commercial contracts, a majority of the High Court in *Andar Transport Pty Limited v Brambles Limited*,[2] considered that an indemnity provision in a commercial contract, consistently with a guarantee in a suretyship contract, should be construed strictly and, in the case of ambiguity, construed in favour of the indemnifier.[3] The provision in question in *Andar* had the potential to operate in favour of the indemnified party in respect of instances of its own negligence (i.e. a reverse indemnity). Absent from the majority judgment was reference to the guidelines for the construction of reverse indemnities adopted by the Privy Council in 1952 in *Canada Steamship Lines Limited v The King*.[4] The Canada SS Rules, as they came to be known, affirmed that unless express words were used to clarify that the indemnity in question was to apply to the negligence of the party in whose favour the indemnity operated, the existence of a possible head of damage other than negligence (so long as that head of damage was not too fanciful or remote) to which the clause could relate, meant that the indemnity should not be construed as applying to the benefit of the negligent party. This was the case even if the wording of the indemnity was prima facie wide enough to embrace such negligence. It has been widely submitted that such an approach to the construction of indemnities accords favourably with commercial reality and the inherent unlikelihood that a party would intend to indemnify another for the consequences of the other's own negligent acts or omissions.

If we can thus find out its meaning, we do not want the maxim: *Taylor v Corporation of St Helens* (1877) 6 ChD 264 at 271 per Jessel MR[1]

The efficacy of the Canada SS Rules was not questioned in Australia until the 1990 decision of the Victorian Court of Appeal in *Schenker & Co (Aust) Pty Limited v Maplas Equipment and Services Pty Limited & Anor*[5] and the 1995 decision of the Full Court of the Supreme Court of South Australia in *Valkonen & Anor v Jennings Constructions Limited & Ors*,[6] neither of which found their way to the High Court. Indeed, the only decision referring in critical terms to the Canada SS Rules in respect of which leave to appeal to the High Court has been granted is the Victorian Court of Appeal's rejection of the Rules in *Andar*. In overturning the Court of Appeal's decision, the High Court made no comment on the status of the Canada SS Rules in Australia. In these circumstances, it is perhaps not surprising that three decisions of the New South Wales Court of Appeal last year relating to the construction of guarantees, exclusions and indemnities in commercial contracts approached *Andar* and the application of the Canada SS Rules in differing ways.

This article considers *Andar* and the Australian courts' treatment of the Canada SS Rules in the context of the movement away from literalism and toward the contextual construction of commercial contracts. In particular, it seeks to explore the conclusiveness of the approach of the High Court in *Andar* in light of the New South Wales Court of Appeal's decisions in *Rava v Logan Wines Pty Limited & Anor*,[7] *BI (Contracting) Pty Limited v AW Baulderstone Holdings Pty Limited*[8] and *Gardiner v Agricultural and Rural Finance Pty Limited*[9] and what significance, if any, attaches to the High Court's silence on the Canada SS Rules in *Andar*.

THE CONTEXTUAL FRAMEWORK

In a recent address, the Chief Justice of the Supreme Court of New South Wales identified a 'paradigm shift' during the course of the last three decades, away from literalist and toward contextual constitutional, statutory and contractual interpretation.[10] In a similar vein, Justice Michael Kirby in a lecture delivered in 2002 stated:[11]

... whether the document is a written contract or an Act of Parliament, a court will tend to ... accept a nonliteral meaning in preference to a wholly unreasonable construction that has only the literal interpretation to commend it.

This view appears to have informed the High Court's approach to the interpretation of statute in *Project Blue Sky Limited v Australian Broadcasting Corporation*[12] where the Court stated:[13]

Ordinarily, [the legal meaning] will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute or the canons of construction may require the words of a legislative provision to be read in a way that does not correspond with the literal or grammatical meaning.

In the context of contract law, in *Darlington Futures Limited v Delco Australia Pty Limited*[14] the Court affirmed that:[15]

The interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause contra proferentem in the case of ambiguity.

Further, in *K & S Lake City Freighters Pty Limited v Gordon & Gotch Limited*, Mason J (as he then was) stated:[16]

The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise ...

There is also support for the proposition that the High Court envisaged the approach to be of general application to commercial contracts, irrespective of their nature, namely the judgment of Gleeson CJ in *McCann v Switzerland Insurance*:[17]

A policy of insurance, even one required by statute, is a commercial contract and should be given a business like interpretation. Interpreting a commercial document requires attention to the language used by the parties, the commercial circumstances which the document addresses, and the objects which it is intended to secure.

These decisions appear to confirm that the contextual approach to the interpretation of commercial contracts has attained ascendancy in Australia.

However, the majority decision in *Andar Transport Pty Limited v Brambles Limited*,[18] which concerned the construction of an indemnity clause in a commercial contract, when viewed in light of these developments, is immediately conspicuous. The question before the High Court was whether the indemnity in question, which was broadly worded, went so far as to apply to the negligence of the indemnified party. The majority found that it

did not. Curiously, in reaching this decision, the majority made no reference to *K & S Lake City Freighters*, *Darlington v Delco* or *McCann v Switzerland Insurance*—particularly in circumstances in which *McCann* dealt with an insurance policy, which, as pointed out by J W Carter, constitutes 'the classic contract of indemnity'.[19] Instead, their Honours had recourse to a suite of more ancient authorities, including the decision of the Barons of the Exchequer in *Mayer v Isaac*.[20] This line culminated, in the Australian context, with *Ankar Pty Limited v National Westminster Finance (Australia) Limited*,[21] which concerned not a general commercial contract, but a suretyship contract in respect of which the Court considered special rules applied. The majority in *Andar* held that indemnity provisions in commercial contracts, consistently with guarantees in suretyship contracts, should be construed strictly and, in the case of ambiguity, construed in favour of the surety/indemnifier.[22] In dissent, Callinan J alone turned to *Darlington v Delco*. Notwithstanding this, his Honour's conclusions do not appear to embrace principles of contextual construction.

Andar has been the subject of academic criticism.[23] Further, recent judgments emanating from the New South Wales Court of Appeal have cast doubt on the proposition that the rules set out in *Andar* are of general application to indemnities in all commercial contracts. In order to determine the conclusiveness of the majority judgment in *Andar*, it will be necessary to consider these decisions. An appropriate starting point is the judgment of Lord Morton in *Canada Steamship Lines Limited v The King*.[24]

THE DEVELOPMENT AND APPLICATION OF THE CANADA SS RULES

The Canada SS Rules are based upon a case which did not involve an indemnity, but rather, a contractual limitation of liability of wide import. *Alderslade v Hendon Laundry*[25] concerned damaged handkerchiefs. The handkerchiefs had been entrusted to a laundry and were lost. The contract between the launderers and the customer provided for a limitation of liability in the event of loss or damage to an amount which, in this instance, was less than the loss claimed by the plaintiff. The issue was whether the limitation of liability clause, which did not specify the nature of the liability that was being limited, extended to claims in negligence against the launderers. Lord Greene MR reasoned that there would be 'no case of lost goods in respect of which it would be necessary to limit liability, unless it be a case where the goods are lost by negligence'.[26] To exclude negligence from the operation of the clause would accordingly be to leave the clause without content.[27] His Lordship enunciated the principle in the following manner:[28]

Where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because it would otherwise lack subject–matter. Where, on the other hand, the head of damage may be based on some other ground than that of negligence, the general principle is that the clause must be confined in its application to loss occurring through that other cause, to the exclusion of loss arising through negligence. The reason is that if the contracting party wishes in such a case to limit his liability in respect of negligence, he must do so in clear terms in the absence of which the clause is construed as relating to a liability not based on negligence.

As a result, the launderers were entitled to rely upon the limitation clause.

Similarly, *Canada SS* concerned the construction of a clause which did not expressly incorporate reference to negligence. However, unlike *Alderslade*, the clause in question was an indemnity contained within a commercial lease which required Canada Steamship to indemnify the Crown in respect of damage to the leased property. The issue for determination was whether the Crown was entitled to the benefit of the indemnity in circumstances in which the damage was negligently caused by its own employees. The Canada SS Rules, as enunciated by Lord Morton, drew upon the test adopted by Lord Greene in *Alderslade* and involved a three–fold approach:

If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called 'the proferens') from the consequences of the negligence of his own servants, effect must be given to that provision …

If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens. If a doubt arises at this point, it must be resolved against the proferens …

If the words used are wide enough for the above purpose, the court must then consider whether 'the head of damage may be based on some ground other than that of negligence' [the Alderslade test] … The other

ground must not be so fanciful or remote that the proferens cannot be supposed to have desired protection against it; but subject to this qualification ... the existence of a possible head of damage other than that of negligence is fatal to the proferens even if the words used are prima facie wide enough to cover negligence on the part of his servants.

As the relevant clauses of the lease did not expressly exempt the Crown from acts of negligence on the part of its employees and made no express reference to negligence, they fell to be construed in accordance with the third test. Because counsel for Canada Steamship was able to identify a number of bases upon which the Crown could have been liable to Canada Steamship other than by way of negligence, the Privy Council held that Canada Steamship was not to be liable to indemnify the Crown in respect of damage resulting from Crown employees' negligent conduct.[29]

The Canada SS Rules have since, with some equivocation, been followed by the English Courts. In *Smith and Ors v South Wales Switchgear Ltd*,[30] Viscount Dilhorne questioned the utility of the Rules' application, citing similar concerns raised by Salmon LJ in *Hollier v Rambler Motors (AMC) Ltd*[31] and Lord Denning MR in *Gillespie Brothers & Co Ltd v Roy Bowles Transport Ltd*.[32]

... while the tests formulated by Lord Morton of Henryton are a useful aid to construing such clauses, they must not be interpreted as if they were provisions in a statute. At the end of the day one must construe the clause in the light, inter alia, of other provisions of the contract.[33]

The House of Lords nevertheless, consistently with the Canada SS Rules, based its decision that the indemnity did not apply to the negligence of the indemnified party on the fact that the clauses in question were not clear and specific and were capable of applying both to the negligence of the indemnifier and its contractors and the indemnified and its contractors.[34]

The Canada SS Rules were also relevant to the facts before the Court in the case of *Photo Production v Securicor*.[35] While the Rules were not referred to in the judgments delivered, they were neither doubted nor rejected. In *Securicor*, the House of Lords was required to determine whether an exclusion clause applied to damage caused by an employee of Securicor who, inexplicably, started a fire on premises the company was contracted to patrol.[36] The relevant exclusion clause was prefaced:[37]

... [u]nder no circumstances shall the company be responsible for any injurious act or default by an employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer ...

Lord Wilberforce expressly referred to the rule 'that if a clause can cover something other than negligence it will not be applied to negligence' (i.e. the test in *Alderslade*) without criticism. However, his Lordship found the clause in question to be sufficiently clear to exclude liability.[38] This, in effect, satisfied the first of the Canada SS Rules without the need to apply the balance of the tests. Lord Diplock agreed, relevantly stating:[39]

In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can

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be most economically borne … it is, in my view, wrong to place a strained construction upon words in an exclusion clause which are clear and fairly susceptible of one meaning only even after due allowance has been made for the presumption in favour of the implied primary and secondary obligations.

The words 'fairly susceptible of one meaning only' are important and are not inconsistent with the Canada SS Rules. Indeed, his Lordship went on to confirm that such an approach to the clause accorded with the likely commercial reality applicable to the contract in question, stating:

[T]his apportionment of the risk of the factory being damaged or destroyed by the injurious act of an employee of Securicor while carrying out a visit to the factory is one which reasonable businessmen in the position of Securicor and Photo Productions might well think was the most economical.

More recently, in *HIH Casualty and General Insurance Limited & Ors v Chase Manhattan Bank & Ors*,[40] the House of Lords confirmed the validity of the Canada SS Rules while emphasising that they comprise broad guidelines as opposed to a rigid test.[41]

THE CANADA SS RULES IN AUSTRALIA

In *Davis v The Commissioner for Main Roads*,[42] the High Court was called upon to determine whether an indemnity clause of wide import in a commercial contract should be construed as applying to the negligence of the indemnified party. Menzies J, with whom Barwick CJ and McTiernan J agreed, found that the clause did so apply. In reaching this conclusion, his Honour considered the Canada SS Rules and held that the facts in the case were 'readily distinguishable' from them as it appeared to him 'plain from its language that [the indemnity clause] does cover the Commissioner against liability for negligence of itself, its servants and agents'.[43] However his Honour did not cast doubt on the Canada SS Rules themselves, referring to them as 'well–established principles'.[44] In fact, it could be contended that his Honour was actually applying the first of the Canada SS Rules. In dissent, Kitto J, with whom Windeyer J agreed, likewise did not cast doubt upon the validity of the Canada SS Rules but held that *Canada SS* did not have a bearing on the facts of the matter at hand.[45] This is a curious conclusion as his Honour went on to assert, consistently with the rationale behind the Canada SS Rules, that it seemed 'impossible to suppose that the parties were intending that the appellant should indemnify the respondent against claims based upon the respondent's negligence',[46] concluding that the indemnity did not apply as a result.

In *Darlington v Delco*, the High Court was required to determine the proper approach to clauses of exclusion and limitation. In the course of argument, both parties identified the relevance of the approach of Lord Wilberforce in *Photo Production v Securicor* and counsel for the respondent made express reference to *Canada SS*.[47]

The judgment delivered by the Court quoted Lord Diplock's comment in *Securicor* to the effect that the court is not entitled to reject an exclusion clause where the words are 'clear and fairly susceptible of one meaning only'.[48] For the reasons set out above, this ought not be construed as a denial of the validity of the Canada SS Rules.

The Court relevantly concluded that:

… the interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause contra proferentem in case of ambiguity.

This decision has been seen by some commentators as complementary to the approach of the House of Lords in *Securicor* and consistent with the Canada SS Rules.[49] Further, in *Graham v The Royal National Agricultural and Industrial Association of Queensland*[50] Connolly J of the Supreme Court of Queensland considered the application of the Canada SS Rules to the interpretation of an exclusion clause of wide import, stating:[51]

The principle stated in Canada Steamship Lines has been regarded as firmly established in cases where the liability sought to be excluded or limited may arise without negligence and, in such cases, to be confined to situations in which negligence is not the cause of action or part of the cause of action. It seems to me, with some hesitation, that the court was not addressing this problem in Darlington Futures and was not intending to reverse a well established principle of construction.

His Honour went on to confirm that *Canada SS* did not fall to be considered in *Darlington v Delco* and, further, that *Securicor*, on which *Darlington v Delco* relied, cast no doubt upon the Canada SS Rules.[52]

It is therefore curious that one year later the Victorian Court of Appeal in *Schenker & Co (Aust) Pty Limited v Maplas Equipment and Services Pty Limited & Anor*,[53]

when considering the appropriate approach to the interpretation of a reverse indemnity, expressed the view that *South Wales Switchgear* and the Canada SS Rules were inconsistent with the decision in *Darlington v Delco*.[54] The decision in *South Wales Switchgear*, whilst equivocal about the inherent value of the Canada SS Rules, nevertheless, adopted them. In *Schenker*, the Court of Appeal regarded the approach in *South Wales Switchgear* to be one of 'strained construction which employed judicial ingenuity to discern ambiguities'[55] and yet the approach in *Securicor* to be one that affirmed the freedom of parties to commercial contracts to agree terms they considered appropriate, notwithstanding that in both cases the courts, inter alia, applied or cast no doubt upon the applicability of the Canada SS Rules. Even more curiously, by way of support for this proposition, McGarvie J quoted Lord Diplock's comments regarding the need for the clause in question to be 'susceptible of one meaning only'.[56] Once again, when read in the context of his Lordship's judgment, this comment ought not be construed as marking a departure from the Canada SS Rules. Further, it cannot be concluded from a reading of *Darlington v Delco* that the requirement to have regard to 'the nature and object of the contract' is somehow subordinate to the 'natural and ordinary meaning' test.

Schenker is not the only Australian case that has questioned the validity of the Canada SS Rules. In *Valkonen & Anor v Jennings Constructions Limited & Ors*[57] the Full Court of the South Australian Supreme Court considered the principles relevant to the interpretation of a reverse indemnity. The appellant was employed by a company of which he was a director, Ceilfix Pty Limited. Ceilfix was subcontracted to Jennings Constructions which in turn had been engaged to construct a supermarket. In the course of working on–site, the appellant suffered an injury and subsequently commenced proceedings against the scaffold contractor and, relevantly Jennings Constructions. Jennings Constructions cross–claimed against Ceilfix pursuant to an indemnity of broad application granted under the subcontract agreement.

Cox J, with whom Matheson and Perry JJ agreed, quoted at length from *Alderslade*, *Canada SS* and *South Wales Switchgear*. Notwithstanding the comments by Connolly J in *Graham v The Royal National Agricultural and Industrial Association of Queensland* his Honour agreed with the decision of the Victorian Court of Appeal in *Schenker* and held that Jennings Constructions was entitled to be indemnified by Ceilfix even though the subcontract agreement made no reference to the negligence of Jennings and other sources of loss to which the indemnity may have applied were available. His Honour relevantly stated:[58]

The first and second of the Canada Steamship Lines tests provide acceptable working rules but the third imposes an artificial and inflexible rule of interpretation that is as likely as not to frustrate the intention of the parties. The solicitude for the indemnifying party which explains the rule's creation will often be inappropriate in modern commercial conditions … there is no sound policy reason for expecting the contract term to conform with an arbitrary judge–made textual requirement before its provisions will be given their natural operation. Indeed, a narrow interpretation of such a term is likely in any given case to benefit only the insurance company which writes the obligatory policy in prudently liberal terms and charges appropriately for it.

Similarly, in *Leighton Contractors Pty Limited v Smith*,[59] the New South Wales Court of Appeal upheld an appeal against a decision of Studdert J to the effect that Leighton was entitled pursuant to the relevant terms of a contract, to be indemnified by a subcontractor in respect of a claim made by an employee of the subcontractor arising from Leighton's own negligence.

At first instance,[60] Studdert J, relying upon the comments of Kitto J in *Davis v The Commissioner for Main Roads* and the House of Lords' approval of *Canada SS* in *South Wales Switchgear*, held that the subcontractor did not assume a contractual obligation to indemnify Leightons against the consequences of its own negligence.[61] In forming this view, his Honour expressly referred to *Darlington v Delco* and found no inconsistency between the High Court's decision in that case and the House of Lords' decisions approving the Canada SS Rules.[62] In upholding Leighton's appeal against the decision of Studdert J, the Court of Appeal stated:[63]

… the modern approach to the construction of commercial contracts is to give them their natural and ordinary meaning. See, for example, Darlington v Delco. If applied to the present case, the approach … would require that the ordinary and natural meaning of the words chosen by the parties be put to one side on the footing that the Court considers that they cannot have intended to mean what they said, although what they said is neither ambiguous nor absurd. That is not the Court's legitimate function.

It is in this environment that *Andar* made its way to the High Court.

ANDAR

The factual background to *Andar* is not dissimilar to that of *Valkonen* although the latter case is not referred to in the High Court's judgment. Mr Wail was a director and employee of Andar. Brambles entered into a contract with Andar for the provision of laundry delivery services. Mr Wail was injured in the course of a delivery run partially, it was found by the trial judge, as a result of Brambles' negligence. The contract between Brambles and Andar contained indemnity clauses of general application. They did not specify negligence. After Mr Wail commenced negligence proceedings against Brambles, Brambles joined Andar and sought indemnity from Andar pursuant to the provisions of the contract.

At first instance, the County Court of Victoria applied the Canada SS Rules and held that Andar was not obliged to indemnify Brambles.[64] The Court of Appeal took a different view. Following the decision of Cox J in *Valkonen*, Winneke P and Charles and Batt JJA expressed the view that the *Canada SS* was inconsistent with the principles enunciated by the High Court in *Darlington v Delco* and that Andar was required to indemnify Brambles. Their Honours did so on the basis that 'on their plain and ordinary meaning', the provisions of the contract were sufficiently broad and did not exclude Brambles' own negligence.[65]

Neither the decision of the High Court in *Darlington v Delco*, nor the Canada SS Rules were discussed during the special leave application before McHugh and Hayne JJ.[66] Argument during the special leave application was instead focused upon issues of causation in the context of a small proprietary company in which the injured employee was also a director.

Likewise, the Rules were not discussed during the two day hearing of Andar's appeal.[67] No cases were identified by counsel in support of their arguments as to the applicability of the indemnity to negligence. The only reference to caselaw in this context occurred during an exchange between Gummow J and counsel for Brambles during which his Honour raised the relevance of the reluctance of the Court in the case of *Chan v Cresdon*[68] to construe words of a guarantee broadly.[69]

The argument as to the scope and operation of the indemnity during the hearing of the appeal was similarly limited and focused only upon the actual wording of the relevant clauses of the indemnity. Reference to the principles applicable to the construction of indemnities occurred only in a number of abstract exchanges which may or may not have involved intimations of the Canada SS Rules, for example:[70]

Kirby J: Well, Mr Finch, it is just a matter of whether the law as a matter of principle or policy says, if you want to get a party to surrender its rights at law, it has to be on the line, it has to be agreed, it has to be specific. I thought, fondly, that that was what the law said about restricting …

Mr Finch: We say there ought to be no special rule applied here, apart from the rule which governs the question of whether the parties agree …

Kirby J: Maybe it should apply. Maybe there should be a special rule.

Further, Gleeson CJ at one point noted the decision of the House of Lords in *Securicor* in the context of the introduction of the *Unfair Contract Terms Act 1977* (UK) but did not take this line of questioning further:[71]

It is not irrelevant, is it, because I thought a lot of the law about strict instruction [sic] of exclusion clauses took a turn. Photo Production v Securicor I think was the case in which the House of Lords said that because of this remedial legislation you now do not have to stand on your head when you are interpreting express clauses of contract.

A majority of the High Court overturned the decision of the Court of Appeal, holding that Andar was not obliged to indemnify Brambles. In doing so, it did not comment on the Victorian Court of Appeal's approval of *Schenker* and did not otherwise make reference to the Canada SS Rules. Central to the reasoning of the High Court was the proposition that as with contracts of guarantee, indemnity clauses in commercial contracts should be construed strictly and against the proferens, in this case Brambles. This approach did not require the identification of ambiguity in the relevant contractual clause as a preliminary step.

The majority decision quoted, with approval, the statement of the majority in *Ankar*, namely:[72]

At law, as in equity, the traditional view is that the liability of the surety is strictissimi juris and that ambiguous contractual provisions should be construed in favour of the surety.

The majority invoked *Chan v Cresdon Pty Limited*[73] as authority for the proposition that this statement was a 'settled principle governing the interpretation of contracts of guarantee' and then, whilst acknowledging that guarantee provisions, such as those considered in *Ankar* and indemnity clauses differ in form

and effect, concluded that 'both are designed to satisfy a liability owed by someone other than the guarantor or indemnifier to a third person'.[74] As a result, it was said, '[t]he principles adopted in *Ankar*, and applied in *Chan*, are therefore relevant to the construction of indemnity clauses'.[75] Interestingly, *South Wales Switchgear* was cited as providing support for this latter proposition. The majority then proceeded to construe the indemnity clauses of the agreement between Brambles and Andar. Its conclusion that the indemnity granted by Andar to Brambles did not extend to loss or damage resulting from claims by employees of Andar against Brambles was largely based on the fact that:[76]

On their face, neither [of the relevant clauses] expressly provides that liability arising on the part of Brambles as a result of injuries suffered to employees of Andar falls within the terms of the indemnity.

Their Honours considered that such an omission was not surprising given the supposed intention of the arrangement to minimise, to the outside world, the appearance that an entity other than Brambles was carrying out the business. This statement has been cited by commentators as indicating that the majority was, in fact, adopting an approach to the construction of the clauses which took into account the commercial context and purpose of the contract.[77] Their Honours then went on to confirm that such an interpretation was consistent with the balance of the contract and, in any event, to the extent of ambiguity, for the reasons set out in *Ankar*, the contract was to be construed in Andar's favour.[78]

In dissent, Callinan J confirmed his agreement with the Court of Appeal's approach to the construction of the indemnity clauses.[79] His Honour quoted, with approval, the decision of the High Court in *Darlington v Delco* and also in *McCann v Switzerland Insurance*, each of which, in his Honour's view, supported the proposition that no special rules of construction should applied to indemnities in commercial contracts.[80] However, Callinan J did not approach the interpretation of the clauses in a contextual manner. Rather, his Honour's finding that the indemnity clauses evidenced 'the clearest possible intention on the part of the parties to ensure that [Brambles] is not to be liable for any loss arising out of the performance of the work by the appellant'[81] appears to be reliant upon a literal reading of the broad wording of the indemnity.

Less than a year after handing down its decision in *Andar*, the High Court gave consideration to the construction of indemnities once again, this time in the context of certain letters of indemnity issued on behalf of a bank in respect of a consignment of goods. The judgment in *Pacific Carriers Limited v BNP Paribas*[82] included the following comment on the correct approach to the construction of commercial contracts:[83]

The construction of the letters of indemnity is to be determined by what a reasonable person in the position of Pacific would have understood them to mean. That requires consideration, not only of the text of the documents, but also the surrounding circumstances known to Pacific and BNP, and the purpose and object of the transaction.

The majority quoted Lord Wilberforce's statement in *Reardon Smith Line Limited v Hansen–Tangen*:[84]

In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

The decision in *BNP Paribas* has been identified by some as potentially representing 'a triumph for commercial construction'.[85]

Before considering the High Court's decision in *Andar* in more detail, it is appropriate briefly to review the manner in which *Andar* has been interpreted by the Courts since it was handed down.

AFTER ANDAR

Three judgments delivered last year by the New South Wales Court of Appeal suggest that the decision of the High Court in *Andar* has not settled the principles applicable to the construction of indemnity, exclusion and guarantee clauses in commercial contracts.[86]

In *Rava v Logan Wines Pty Limited & Anor*,[87] delivered on 16 March 2007, the Court of Appeal comprising Hodgson, Tobias and Campbell JJA considered the proper construction of a guarantee clause in a joint venture agreement. Counsel for the plaintiff submitted that on its proper construction, the clause which provided that the debts of the joint venture would be guaranteed by the directors of each of the joint venture companies on an equal basis, did not require the appellant, one of the directors, to repay a 50 per cent portion of debts that one of the joint venture companies had already satisfied. The Court rejected this interpretation of the clause. Hodgson JA rejected the interpretation on the basis that the clause could not operate as a guarantee in favour of any creditor of the joint venture because they were not parties to the agreement. As a result, 'it

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could not then operate literally as a guarantee of the debts of the partnership'. The only sensible way it could operate was as 'a guarantee by each principal of the obligation of his company to contribute equally to payment of the partnership debts'.[88] Tobias JA provided a similar analysis, concluding that the interpretation of the guarantee contended for by counsel for the appellant would be 'a commercial nonsense'.[89] Campbell JA, agreeing with Tobias JA, went further to comment upon a submission that had been made by counsel for the appellant to the effect that *Andar* mandated the strict construction of the guarantee clause:[90]

There is, however, another way in which the principle of construction that was adopted in Andar needs to be applied to the facts in this case. It needs to be recalled that the contra proferentem rule is just one rule of construction. It needs to be used bearing in mind the fundamental purpose of construction of a document, namely, to ascertain the intention of the parties arising from the document as a whole and reading the document with such background information as was known by all the parties to it.

Further, it is to be used along with other aids that the law recognises for the construction of a document. Other such aids ... include the one that says a contract that has been entered in a business context and is elliptical or ambiguous should not be read in a way that is commercially unlikely to be what the parties intended ...

His Honour then confirmed that, in his view, the construction of the clauses in question as contended for by the appellant, lacked a 'sensible commercial purpose', whilst the construction proffered by the trial judge and respondent was 'commercially realistic'. This being the case, no question arose which required the Court to choose between competing constructions and 'hence no question arises of the application of the principle for the construction of indemnities and guarantees that was adopted by the High Court in *Andar*'.[91]

It is difficult to reconcile Campbell JA's approach to the construction of indemnities and guarantees in *Rava*, with that adopted by the majority in *Andar*, for the reason that, in *Andar*, the approach proffered required, as a preliminary step, that the clause in question be construed strictly. Only then, if ambiguity remained, would the clause be construed contra proferentem. On the other hand, Campbell JA's approach in *Rava* appears more closely aligned with the commercial approach advocated by Mason J in *K & S Lake City Freighters*.

The second New South Wales Court of Appeal case is that of *BI (Contracting) Pty Limited v AW Baulderstone Holdings Pty Limited*.[92] *BI (Contracting)* concerned the construction of a reverse indemnity drafted in similar terms to those in *Valkonen* and *Andar*. Beazley JA, with whom Tobias JA and Bell J agreed, found that BI (Contracting) was liable to indemnify AW Baulderstone in respect of the latter's own negligence. In the course of the judgment, her Honour reviewed existent academic criticism of *Andar* and the High Court's refusal to grant special leave to appeal in the matter of *Tempo Services Limited v State of New South Wales*[93] in circumstances in which such a case may have provided a vehicle for resolving any ambiguities arising from *Andar*.

Her Honour found that the High Court's omission of references

to the Canada SS Rules in *Andar* was significant and there was no mandate for courts to apply the third of the Canada SS Rules to the construction of commercial contracts notwithstanding references to *South Wales Switchgear* in the *Andar* decision.[94] In summary, her Honour stated that:[95]

... the High Court has not expressly endorsed the application of the third principle [of Canada SS] in cases where it has otherwise applied a rule of strict construction ... Rather, as I understand it, the Court's approach to construction of guarantees and indemnities is as stated in Anker and Andar.

The third case is *Gardiner v Agricultural and Rural Finance Pty Limited*,[96] which was delivered on 6 September 2007. In his judgment, Spigelman CJ considered the High Court's decision in *Andar* and academic criticism of that decision. He also had regard to the comments of Campbell JA in *Rava* and the statements of Beazley JA in *BI (Contracting)*. His Honour found that the principles of construction relevant to commercial contracts have, over the last few decades, been brought into line with the High Court's approach to statutory interpretation, which 'requires attention to the broader context of the words in issue in the first instance, not only after some kind of 'ambiguity' has been identified'. His Honour concluded that 'there is more than one principle involved in the task of contractual interpretation, which must be undertaken in accordance with the general approach ... applicable to commercial contracts'.[97] This view was subsequently echoed by McColl JA in *Waterways Authority of New South Wales v Coal & Allied (Operations) Pty Limited*,[98] although the 2008 decision of the New South Wales Court of Appeal in *Kooee Communications Pty Limited v Primus Telecommunications Pty Limited*,[99] whilst confirming the validity of *Gardiner*, warns of the adverse consequences of re–writing commercial contracts under the guise of contextual interpretation.

DISCUSSION

Spigelman CJ's concluding remarks on the subject of *Andar* in *Gardiner* do not provide any real guidance as to the 'general approach' being advocated beyond the need to consider the 'broader context' prior to discerning any ambiguity which may enliven the operation of the contra proferentem rule. This starting point, as with that of Campbell JA in *Rava*, appears to be at odds with the strict construction approach identified as being of general application to contracts of guarantee and indemnity in *Andar*.

Absent from the majority and minority judgments in *Andar* and from *BI (Contracting)* is consideration of approaches to construction such as those espoused by the High Court in *K & S Lake City Freighters Pty Limited v Gordon & Gotch Limited* where Mason J (as he then was) stated:[100] 'The modern approach to interpretation insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise ...' and, if it is the case that the principles of statutory and contractual construction are aligned, in *CIC Insurance Limited v Bankstown Football Club Limited*,[101] where the majority said:

Instances of general words in a statute being so constrained by their context are numerous. In particular, as McHugh JA pointed out in Isherwood v Butler Pollnow Pty Ltd if the apparently plain words of a provision are read in the light of the mischief which the statute was designed to overcome and of the objects of the legislation, they may wear a very different appearance. Further, inconvenience or improbability of result may assist the court in preferring to the literal meaning an alternative construction which, by the steps identified above, is reasonably open and more closely conforms to the legislative intent.

In light of the High Court's approach to *BNP Paribas* it is difficult to understand how a court's consideration of the commercial setting and an objective review of the circumstances in which the contract was entered into could constitute the usurpation of the function of the parties and an illegitimate exercise, as was intimated in *Leighton Contractors v Smith*. It has long been accepted in the English courts that the Canada SS Rules provide a useful footing for bringing contextual issues to bear in cases where the contract does not clearly specify the circumstances in which the indemnity is to be enlivened. Further, it is perhaps significant that the decision of the Victorian Court of Appeal in *Andar* was not permitted to stand.

However, it is unclear to what extent the majority of the High Court in *Andar* considered the commercial circumstances of the contract in question and why, if the Canada SS Rules were available, it was necessary for the majority to traverse the narrower and more vertiginous path from *Mayer v Isaac* to *Ankar*. There is no satisfactory explanation for this, although the transcript of the hearing of the appeal as extracted above leaves open the possibility that the majority either overlooked or else chose not to engage with the line of authority addressing *Canada SS*. Certainly the majority's reference to the

supposed desire of Brambles to reduce, as far as possible, any differentiation between itself and Andar in the eyes of third parties, in support of their conclusion that the indemnity did not apply, evidences some regard for the commercial context of the transaction, although the extent to which this issue influenced their decision is unclear.

That the decision in *Andar* has required further explication and, in the case of *Rava*, differentiation, by the New South Wales Court of Appeal suggests that *Andar* has not resolved the principles applicable to the interpretation of indemnity clauses or indeed, of exclusions or guarantees in commercial contracts generally. Further, the disparity between the approach taken in *Andar* and the principles of construction outlined by the High Court in such cases as *Darlington v Delco*, *McCann*, *CIC Insurance*, *Project Blue Sky* and *BNP Paribas* indicates that further clarification by the Court will be required.

In these circumstances and considering that the High Court has not yet, despite being invited to do so,[102] made its position with respect to the SS Canada Rules express, it may be unsafe to treat Beazley JA's comments in *BI (Contracting)* as authority for the proposition that the High Court's silence in *Andar* must resound in the conclusion that the Canada SS Rules no longer apply in Australia. Similarly, it cannot be said that the majority judgment in *Andar* has determined, for once and for all, that indemnities, exclusions and guarantees in commercial contracts should be treated as belonging to a special category to which the modern, contextual approach to construction ought not apply.

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4. [1952] AC 192 at 208

5. [1990] VR 834

6. Unreported, Supreme Court of South Australia Full Court, 29 November 1995 (BC9502316)

7. [2007] NSWCA 62

8. [2007] NSWCA 173

9. [2007] NSWCA 235

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12. (1998) 194 CLR 355

13. Ibid at 384 per McHugh, Gummow, Kirby and Hayne JJ

14. (1986) 161 CLR 500

15. Ibid at 510 per Mason, Wilson, Brennan, Deane and Dawson JJ. Their Honours go on to confirm that 'the same principle applies to the construction of limitation clauses'.

16. *K & S Lake City Freighters Pty Ltd v Gordon & Gotch Ltd* (1985) 157 CLR 309 at 315

17. (2000) 203 CLR 579 at [22]

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19. J W Carter and D Yates, 'Perspectives on Commercial Construction and the Canada SS Case' (2004) 20 *JCL* 233 at 245

20. (1840) 6 M & W 605

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23. Carter and Yates, above, n19; D Gosewitch 'Difficulties with Indemnities Between Business Entities' (2006) 34 *ABLR* 89; N D'Angelo 'The Indemnity: It's All in the Drafting' (2007) 35 *ABLR* 93

24. [1952] AC 192 at 208

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37. Ibid at 830

38. Ibid at 846 per Lord Wilberforce

39. Ibid at 851 per Lord Diplock

40. [2003] 2 Lloyd's Rep 61

41. Ibid see especially [116] per Lord Scott

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62. Ibid at [13ff]

63. [2000] NSWCA 55 at [11] per Mason P and Fitzgerald JA

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71. Ibid at [4530] to [4540]

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73. (1989) 168 CLR 242

74. (2004) 317 CLR 424 at [22]

75. Ibid at [23]

76. Ibid at [25]

77. Carter and Yates, above, n19 at 236

78. (2004) 317 CLR 424 at [26]–[29]

79. Ibid at [113]

80. Ibid at [122] to [124]

81. Ibid at [113]

82. [2004] HCA 35

83. Ibid at [22]

84. [1976] 1 WLR 989 at 995–6

85. E Peden and J W Carter 'Taking Stock: the High Court and Contract Construction (2005) 21 *JCL* 172 at 180

86. These are not the only three judgments of the New South Wales Court of Appeal that have considered the decision in *Andar*. For example, *Andar* was referred to and applied in *F & D Normoyle Pty Limited v Transfield Pty Limited t/as Transfield Bouygues Joint Venture & Anor* (2005) NSWLR 502 at 511 to 512 per Ipp JA, with whom McColl JA agreed and in *National Roads and Motorists' Association v Whitlam* [2007] NSWCA 81 at [66] to [69] per Campbell JA, with whom Beazley JA and Handley AJA agreed. However, the three judgments have been chosen as they include more significant analysis of the decision in *Andar* than other relevant decisions of the Court of Appeal.

87. [2007] NSWCA 62

88. Ibid at [7] to [8] per Hodgson JA

89. Ibid at [46] per Tobias JA

90. Ibid at [53] and [54] per Campbell JA

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