Show Cause Notices - A Principal's Obligations in Light of *Renard's* Case

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Although the *Renard* case has been reported in the Newsletter, this article is commended due to its excellent and thorough treatment of the issues, which are of practical importance to principals, contractors and subcontractors. - J.T.

INTRODUCTION

The Principal's freedom to use the powers given in show cause notices to terminate the contract against a defaulting Contractor has been fettered.

The decision of the New South Wales Court of Appeal in *Renard Constructions (ME) v Minister for Public Works (Renard's* case)[1] alters the way in which show cause notices have traditionally been interpreted within the construction industry.

It creates much uncertainty as to the appropriateness of show cause notices. In a 2:3 majority, the Court of Appeal held that there was an implied term in the contract that the powers conferred on the Principal by clause 44.1 of NPWC Edition 3 (1981) had to be exercised reasonably and honestly.

The difficulty for any Principal wishing to use the powers is determining whether or not it is reasonable to use the power in the circumstances that have arisen.

The case creates a precedent requiring a Principal at common law to have regard to the interests of, and in acting reasonably, to act in good faith in relation to, the Contractor when invoking a show cause notice, rather than solely pursuing its own interests. *Renard's* case has subsequently been applied in *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney*[2] *(Hughes Bros* case) and in *Presmist Pty Ltd v Turner Corporation Pty Ltd*[3] *(Presmist* case).

RENARD'S CASE

The contracts awarded to the Contractor in 1985 contained NPWC Edition 3 (1981) as part of its general conditions.

Clause 44.1 of NPWC Edition 3 provides:

> "If the Contractor defaults in the performance or observance of any covenant, condition or stipulation in the contract or refuses or neglects to comply with any direction as defined in clause 23 but being one which either the Principal or the Superintendent is empowered to give, make, issue or serve under the contract and which is issued or given to or served or made upon the Contractor by the Principal in writing or by the Superintendent in accordance with clause 23, the Principal may suspend payment under the contract and may call upon the Contractor, by notice in writing, to show cause within a period specified in the notice why the powers hereinafter contained in this clause should not be exercised.
>
> The notice in writing shall state that it is a notice under the provisions of this clause and shall specify the default, refusal or neglect on the part of the Contractor upon which it is based.
>
> If the Contractor fails within the period specified in the notice in writing to show cause to the satisfaction of the Principal why the powers hereinafter contained should not be exercised the Principal, without prejudice to any other rights that he may have under the contract against the Contractor, may-
>
> (a) take over the whole or any part of the work remaining to be completed and for that purpose and in so far as it may be necessary to exclude from the site the Contractor and any other person concerned in the performance of the work under the contract; or
>
> (b) cancel the contract, and in that case, exercise any of the powers of exclusion conferred by subparagraph (a) of this paragraph.
>
> If the Contractor notifies the Superintendent in writing that he is unable or unwilling to complete the Works, or to remedy the default, refusal or neglect stated in the notice in writing referred to in the first paragraph of this sub-clause, the Principal may act in accordance with the provisions of sub-paragraph (a) or sub-paragraph (b) of the last preceding paragraph, as he thinks fit."

The time for practical completion was originally provided to be 17 January 1986, but this was later extended to 3 March 1986. On 28 February 1986, the Contractor applied for further extensions of time. On 4 March 1986, the Principal gave notice to the Contractor to show cause before 5.00 pm on 18 March 1986 as to why the Principal

should not take over the work or cancel the contract. On 17 March 1986 the Contractor in showing cause stated, inter alia, that the Principal had not yet supplied materials which under the contract it was required to supply and that, subject to certain qualifications, it expected that the work would be complete by the end of April 1986.

On 26 March 1986, after discussions between representatives of the Contractor and the Principal, the Contractor was instructed to proceed to complete the work at a rate and in a manner satisfactory to the Superintendent.

By letter dated 2 April 1986 the Principal granted a further extension of time taking the extended date for practical completion to 7 March 1986. At that stage the Principal had not supplied all materials it was required to supply under the contract.

The Assistant Project Manager was concerned about delays and poor workmanship and recommended on 15 May 1986 to the Superintendent that the Contractor be asked to show cause under subclause 44.1, in respect of both contracts. On 20 May 1986, the Superintendent served notices calling on the Contractor to show cause before 5.00 pm on 26 May 1986 at the office of the Principal why the Principal should not proceed to take over the whole of the work remaining to be completed, pursuant to subclause 44.1(a) or to cancel the contracts pursuant to subclause 44.1(b).

On 26 May 1986 the Contractor delivered a letter in regard to one of the contracts saying that it was willing and able to complete within a reasonable time; it had sufficient manpower who could work up to seven days a week; it considered that the action contemplated by the Principal would be a repudiation of the contract; it would claim payment on a quantum meruit basis for work carried out if the Principal took the threatened action and it preferred to be left alone to complete the works.

On 27 May 1986, the Assistant Project Manager passed on certain information to the Superintendent, but he did not give him a complete picture of the extent of the work which had been done following service of the notice to show cause. His advice to the Superintendent was given on the footing that the extended Date for Practical Completion was 7 March 1986. *(Because of delays on the part of the Principal, the Date for Practical Completion should have been extended under subclause 35.4, even though the Contractor had not asked directly for an extension of time.).* The Assistant Project Manager recommended cancellation of both contracts.

The Superintendent made a recommendation to his superior who had a delegation from the Minister to terminate the contracts. However, the superior was not aware that the Principal had not supplied the parts until mid April 1986 and that this would necessarily have extended the Date for Practical Completion, or that since service of the show cause notice the Contractor had increased the work force, was working longer hours and had brought in a highly experienced foreman.

Notices were served on the Contractor under the first paragraph of clause 44.1 on 29 and 30 May 1986, respectively, stating that the Principal had taken over the whole of the work remaining to be completed and excluding the Contractor from the site. The Contractor left the sites that day.

In regard to each contract the Contractor treated the action taken by the Principal as a wrongful repudiation of the contract, and began arbitration proceedings under clause 45.

Arbitration

Arbitration, was determined in the Contractor's favour. The arbitrator concluded that the Principal had been unreasonable in exercising the power to take over the work and exclude the Contractor from the site.

First Appeal

On appeal from the Arbitrator's decision, Cole J reversed the decision, stating that the clause did not impliedly impose an obligation upon the Principal to, when exercising the power to take over the site and exclude the Contractor from the site, act reasonably.

Cole J further held that s.44(1) did require the Principal to give to any representations made by the Contractor in response to a show cause notice bona fide, proper and due consideration, but no more.

Second Appeal

The Court of Appeal was faced with deciding whether there was an implied condition in clause 44.1 that the Principal would act reasonably in:

(a) deciding to give notice; and
(b) exercising the power the Principal had under the clause if the Contractor failed to show cause to the Principal's satisfaction in answer to the notice.

Priestly JA and Handley JA concluded (but for different reasons) that the Principal must give reasonable consideration to both questions, but that in the circumstances, had not.

> "For myself, I cannot see why a term should not be implied at both stages; that is, it seems to me relatively obvious that an objective and reasonable outsider to this contract upon reading subclause 44.1 would assume without serious question that the Principal would have to give reasonable consideration to the question whether the Contractor had failed to show cause and then, if the Principal had reasonably concluded that the Contractor had failed, that reasonable consideration must be given to whether any power and if any which power should be exercised."[4]

Priestly JA concluded that the requirement to act reasonably and honestly was implied because the rules laid down for implication of terms had been satisfied.[5,6 & 7]

The implied term must be reasonable and equitable; necessary to give business efficacy to the contract, so that no term will be implied if the contract is so effective without it; so obvious that "it goes without saying"; capable of clear expression; and must not contradict any clear expression in the contract: see *Hospital Products Ltd v United States Surgical Corporation.*[8]

The Court decided that such a term was necessary as it formed the view that the parties had not clearly stated in the contract how a power or discretion conferred by the contract was to be exercised.

Priestly JA considered that the power of the Principal to terminate for a breach that may conceivably be minor rendered the contract "quite unworkable" in terms of business efficacy, concluding that clause 44.1 was to be read as being subsidiary to the "main contractual promises by each party to the contract to the other".[9]

Dissent by Meagher JA

Meagher JA accepted the view of Cole J in the earlier decision that notions of reasonableness cannot be interpreted as a limitation to the exercise of clause 44 powers by the application of the test for the importation of implied terms established by the High Court.[10 & 11]

He said that the Principal could not have been satisfied that the Contractor was in default because the Superintendent's Representative had provided him with inaccurate information. It was for that reason that the Principal should not have exercised the power of taking over the work and excluding the Contractor from the site as given under clause 44.1.

Meagher JA further stated that the Principal need only take into account its own interest when invoking a show cause notice.

IMPLYING "REASONABLENESS" TERMS IN CONTRACTS

The implication of such terms to ensure that the decision making functions under a contract are fulfilled in a fair and honest manner is not new in contract law.

What is new is the obligation on the Principal to act fairly and take into account the interests of the Contractor when it decides that it wants to invoke the powers and rights to show cause which the parties have agreed it is to have under the contract.

Illustrative cases

Australia has no doctrine of good faith, thereby making it necessary to imply the term by reason of the nature of the contract, such as an implied duty to co-operate where the contract cannot be performed without co-operation, as in *Mackay v Dick.*[12]

In *Perini Corp v Commonwealth*[13] *(known* as the *Redfern Mail Exchange* case), it was held that there was an implied term binding the Principal and the Contractor not to do anything that might prevent the Superintendent from a proper discharge of his functions given under the contract. The Principal is bound by a positive implied term to ensure that the Superintendent does his duty. Both the Principal and the Contractor are bound by an implied term to co-operate with each other in achieving the contractual aim.

In *Amann Aviation Pty Ltd v The Commonwealth*[14] and *The Commonwealth v Amann Aviation Pty Ltd*[15] in both the Full Court of the Federal Court and the High Court there was accepted the view that good faith and fair dealing must be observed by a person whom the contract has appointed as the Arbiter of the right to terminate the contract.

Common law position and standard contracts

Contracts increasingly are written to include terms to act honestly and fairly. For instance, like that in clause 23(a) of AS 2124, which provides:

> "The Principal shall ensure that at all times there is a Superintendent and that in the exercise of the functions of the Superintendent under the Contract, the Superintendent -
> (a) acts honestly and fairly;".

It is interesting to note that there is no corresponding obligation on the Contractor not to do anything to prevent the Superintendent from performing its function, notwithstanding that in *Perini's* case the Court found that there was an implied term on the Contractor not to do so.

It can be argued that clause 23(a) extends the obligations of the Principal beyond what is required as pronounced in *Perini's* case.

No obligation of good faith on the Contractor

Renard's case, *Hughes Bros* case and the *Presmist* case have not determined that there is a corresponding obligation on the Contractor to act reasonably, act in good faith and act fairly towards the Principal. All of the cases that have dealt with the issue have been bought before the Court because the Contractor has alleged that he has been detrimentally affected because of the unreasonable application of the show cause powers. The fact that the Principal is in such a powerful position of being able to terminate for even a minor breach under clause 44.1 and such breach may not materially affect the Principal is the underlying rationale of the decision in *Renard's* case.

However, what is the situation if the Principal is of the view that the Contractor is not performing, and there are a series of niggling delays which affect the Principal? Following *Renard's* case, the Principal is left in a difficult position of whether to invoke the show cause notice, particularly in the absence of any obligation on the part of the Contractor.

The judiciary has not gone so far as to proclaim that there is an implied term in the contract of good faith in contractual performance imposed by law such as, for example, in the United States Uniform Commercial Code s.1-203 and the Restatement of Contracts, Second s.205.[16]

RENARD'S DECISION IN THE CONTEXT OF OTHER DEVELOPMENTS REGARDING GOOD FAITH

Judicial Trends

Renard's decision represents the trend of some parts of the judiciary to be increasingly interventionist in rearranging the rules for the way in which parties conduct business with one another.[17]

Where a court perceives an imbalance of power between parties, and that the stronger party has been unfair in its conduct, the courts are increasingly willing to re-employ equitable principles to correct the position.

Previously, a person was free to vigorously pursue his or her own self interest in his or her dealings with others, except if there was a fiduciary relationship that had been established.[18]

Not all members of the judiciary agree that good faith should apply to show cause notices. Meagher JA dissented in both *Renard's* case as well as *Hughes Bros,* where an application has been made for an appeal to the High Court, Kirby P seemed to be reluctant to apply *Renard's* case, but was compelled to because of its precedent status.[19]

In a revealing paper written by Priestley JA and presented at a conference of the Australian Bar Association held in London in July 1987, Priestley JA noted that:

> "It does not seem to me to be a great leap of imagination to see the possibility of applying the tort duty formulation to situations of the kind dealt with by Lord Wilberforce in *Liverpool City Council v Irwin.* Some ground for arriving at a formulation not unlike the American good faith doctrine already exists in Australia: in *Secured Income Real Estate (Australia) Ltd v St Martin's Investments Pty Ltd* in 1979 the High Court adopted as correct a dictum of

Sir Samual Griffith when he was Chief Justice of Queensland when he said that each party to a contract agrees by implication to do all such things as are necessary on his part to enable the other party to have the benefit of the contract. Although Mason J (speaking for the court) indicated that there might be some circumstances where Griffith's dictum might not be applicable, significantly, it seems to me these are likely to be in the area of commercial contract, it may well be that in today's climate as I have described it judges may be interested in exploring such areas as the bad faith doctrine, despite their apparent novelty."

Legislative developments

Legislation such as the *Insurance Contracts Act 1984* which at s.13 requires both parties to such contracts "to act with the utmost good faith" and the provisions of the *Contracts Review Act 1980* (NSW), s.52A of the *Trade Practices Act 1974* (Cth) and the *Bankruptcy Act 1966* ss.120, 121, 122, 123 and 124 indicates the changes Australian law has undergone in embracing the concept of good faith.

Australia following United States trends

The United States and Canada have the requirement on a party to act in good faith as part of their legal system.

Most American jurisdictions now recognise a common law duty to perform contractual duties in good faith.

The United States Uniform Commercial Code S1-203 and the Restatement of Contracts, Second s.205 explicitly provide that parties are required to observe good faith in the performance and enforcement of a contract.

Good Faith is defined to mean "Honesty in fact in the conduct or transaction concerned" (s.1-201 (19) Uniform Commercial Code).

The term in s.205 is implied subject to the qualification that parties may expressly agree as to what "good faith" permits or requires them to do.[20]

The Restatement does not have statutory force in any jurisdiction, but is continually referred to by judges in the United States as being of great persuasive authority.[21]

Priestly JA, in *Renard's* case was very much of the view that requirements of good faith should be adopted similarly in Australia:

> "Good Faith: The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith which are regarded in many of the civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract. Although this implication has not yet been accepted to the same extent in Australia as part of judge made Australian contract law, there are many indications that the time may be fast approaching when the idea, long recognised as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way that it has in Europe and the United States."[22]

CONCEPTS OF REASONABLENESS - HOW WILL A PRINCIPAL KNOW WHEN IT IS BEING REASONABLE?

The difficulty - what is reasonable?

Renard's case introduces a requirement for the Principal to behave in a matter that is reasonable but unfortunately provides little guidance in respect of factors a Principal should take into account when determining what is reasonable before exercising the powers.

Reasonableness is judged by the standards of the reasonable man and is an objective test.

The Principal may believe he is acting reasonably and honestly at the time when the powers are exercised, but an Arbitrator or Court reviewing that decision may think otherwise when determining a standard of reasonableness. What is regarded as reasonable will vary with the perception of different judges and arbitrators.

It was recognised by Meagher JA that reasonableness is almost impossible to define. He quoted *Taylor in Armstrong v State of Victoria*:[23]

> "But reasonableness, alone is an abstract concept and does not by itself provide a test for determining what charges may or may not be made; it is a useful guide if, and only if, we are aware of the various matters which must be considered where the necessity arises of determining whether particular charges are or are not reasonable."

If there has been unconscionable conduct, it would always be unreasonable. Unconscionable conduct involves conduct that is of not fair dealing which would "stand condemned by ordinary standards of honesty and decency".[24]

Unreasonable conduct may not be unconscionable.

The uncertainty

The very concept of "reasonableness" is subjective.

The Principal will be continually burdened by the thought that it may be unreasonable to use the show cause notice and the associated powers for default if the Contractor fails to show cause. The prospect of a possible claim of damages by the Contractor will always be looming, and may force the Principal to compromise the rights it may otherwise have under the contract because of the threat of such action by the Contractor.

The uncertainty as to the consequences which may ensue may compel a Principal to ignore a default by the Contractor.

Although the judgements given by Priestly JA and Handley JA in *Renard's* case went into detailed analysis of the requirement to act reasonably when exercising the power to show cause under clause 44 and that a *"significant default"* will enable the Principal to use the power conferred, there is otherwise little assistance given.

What constitutes a "significant default"?

What may appear a minor breach to the Contractor may indeed be a significant default to the Principal.

The judgements gave little assistance in determining what is a "significant default".

It was recognised that there may be differing views as to whether a default was significant or not, but that the test will always come back to whether the Principal was acting reasonably, and it will always be up to the Principal to

decide whether to exercise the power or not. "... it will only be if the non satisfaction of the Principal does not have a reasonable basis that the exercise of one or more of the powers will be in breach of one or both the implied obligations."[25]

Main consideration

In *Hughes Bros* it was recognised that the main consideration for clause 44.7 is the commercial need for a Principal to remain clear of any financial difficulty, or a related disputation, that the Contractor may encounter in the course of the contract. Consequently, it was held that it would "not be difficult in ordinary circumstances for the Principal to fulfil the reasonableness obligation". [26]

The Principal in *Hughes Bros* was found to have acted reasonably when using clause 44.7, and the court rejected the argument by the Contractor that it was in financial difficulty only because of a dispute with the Principal involving ongoing claims under the contract. The Court found nothing in the materials before it that suggested that the Contractor's financial problems were the Principal's fault or that the Contractor would defeat the Principal on the disputed claims.

"Since the Contractor was not claiming (and produced no evidence to show) that the Principal was not bona fide in disputing the Contractor's claims, I see no basis for finding the Principal was not acting reasonably in using the power to give the notice."[27]

In exercising the power under clause 44.7 for insolvency, Priestley JA thought that reasonableness would require that the Principal would have to take into account any knowledge it has of the circumstances concerning the winding up proceedings and give at least some consideration to them, and to take into account any reasons given by the Contractor, or information given to the proceedings if, for instance, the Contractor claims that it will be able to defeat an application made by a creditor for the proceedings.[28]

What is clear from *Renard's* and *Hughes Bros* cases is that the Principal must have adequate information, and must take that into account in making a decision whether to invoke the show cause powers.

Are there still benefits of Show Cause Notices?

"Notice to Show Cause" provisions such as in clause 44.1 of NPWC Edition 3 and clause 44.2 AS 2124-1992 have traditionally been used as a weapon on the part of the Principal to bring recalcitrant Contractors into line if the breach is one that can be remedied by the Contractor.

Technically, a Principal could terminate the contract for a minor breach and this potential for abuse on the part of the Principal is perhaps the underlying agenda as to why the Court decided the way it did in *Renard's* case.

Priestley JA made particular mention for potential abuse in his decision:

> "It seems to me that the words of the clause empower the Principal to give a notice to show cause upon any default in carrying out any requirement in the contract. Thus for a completely trivial default the Principal can give a notice to show cause. (One obvious example would be where, through some mistake, the Contractor's attempt to show cause was delivered late)."[29]

Reasonableness - defeating the purpose of a Show Cause Notice?

The main purpose of a show cause notice is to swiftly obtain an effective result in order that the Principal can get on with the job. How long does the Principal have to wait for a conclusive responsive? What if no sensible information can readily be obtained?

By the time that the Principal is thinking about calling up the show cause power, the damage in the relationship between the parties is invariably irreversible and information may not necessarily be forthcoming.

Without prescriptive legislation or a comprehensive definition in a contract as to what an obligation of "fair dealing" or "good faith" requires, it will be difficult in some instances to advise with any degree of certainty as to what standard of behaviour will be judged to be appropriate if a Principal elects to use a show cause notice.

US/Canadian decisions offer little assistance

The problem of grappling with what good faith means has not been readily solved in America which has been using the doctrine for several years:

> "The great variety of suggested interpretations shows that American jurisprudence has not yet developed a coherent theory of good faith. It is possible that good faith will remain closely associated with notions such as fairness, honesty and reasonableness which are already well established in the law."[30]

In Canada, it has been said that "good faith" cannot be defined with any reasonable precision and the only definition or guidance that can be provided is by way of illustrations of bad faith behaviour.

"Good faith" conduct is the guide to the manner in which the parties should pursue their mutual contractual objectives. Such conduct is breached [sic] when a party acts in "bad faith" - a conduct that is contrary to community standards of honesty, reasonableness and fairness".[31]

Options available in respect of Show Cause Notices

In light of the developments outlined above, it has become necessary for parties to construction contracts to approach "show cause" clauses differently. Four alternative approaches are outlined below.

1. Define essential terms in a contract

Specify which types of breach will entitle the Principal to take action either to:

(a) determine the contract; or
(b) take over the works where the Contractor fails to remedy the breach within a given time.

In such a case, if the relevant circumstances arose, and the Principal elects to terminate and exercise rights pursuant to a show cause provision, it need not act reasonably, since it is a right expressly conferred upon it by the contract itself.

2. No obligation to be reasonable

Include a clause stating that the Principal, in exercising any of its rights under the contract, is not required to exercise those rights reasonably or for the benefit of the Contractor.

The disadvantage of adopting such a course is that the inclusion of a like term is not conducive to the harmonious relations essential between parties to construction contracts and is likely to receive criticism from some sectors within the construction industry.

The advantage of such a provision is that it would make it quite clear that there was to be no implication at law of the requirement to act reasonably, or that the parties had a reasonable expectation that they would exercise powers and discretions given by the contract reasonably. It could not be said that there was an absence of good faith because the Principal used its commercial position to negotiate with the other a provision favourable to it. The courts will not change contractual provisions freely agreed in the absence of fraud, or mistake, or sharp practice.

3. Delete any "show cause" provisions

By deleting any show cause provision the Principal is not left with the vexed issue of whether or not he is acting reasonably in using the powers. Without the inclusion of a show cause notice, if the Contractor is in breach, then the Principal can rely on its common law right to terminate and does not need to show that it is acting reasonably in doing so.

The breach would need to show that the Contractor is able no longer to provide the Principal with substantially the benefit of the contract before the right to terminate would arise. If the contract is still to be performed by the party in breach, the innocent party can treat itself as discharged and terminate if the breach is of a fundamental term of the contract.

4. Include a definition of "good faith" in the contract

The inclusion of such a definition will reduce the uncertainty of a Principal as to what will be deemed reasonable or unreasonable conduct by it when exercising powers pursuant to a show cause clause.

The following has been suggested as a basic definition:

"Good faith" includes:

(i) being fair, reasonable and honest;

(ii) doing all things reasonably expected by the other party and the contract.

If desired, a negative clause may also be added to the definition, to the effect that a party must not act so as to impede or restrict the other party's performance. Parties may choose to go further, setting out a "code of conduct" to be adhered to.[32]

The difficulty with the inclusion of a definition of good faith is that, whilst it does go some way towards clarifying the uncertainty of what is meant by acting in good faith, the definition, by necessity, is broad. The requirement to act reasonably raises the perennial problem of "what is reasonable"?

The advantage of this provision though is that the requirement is put expressly on both parties and ameliorates the unfairness of the obligation being solely on the Principal as is currently the situation. ❑

FOOTNOTES

1. (1992) 26 NSWLR 234
2. (1993) 31 NSWLR 91
3. (1992-3) 30 NSWLR 478
4. op. cit. *Renard's* case at p.257
5. *BP Refinery (Westernport) Pty Ltd v Hastings (1977)* 52 ALJR 20
6. *Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337
7. *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596
8. (1984) 156 CLR 41 at p.66 per Gibbs CJ
9. Justice TRH Close of the Supreme Court of NSW - 'The *Concept of Reasonableness in Construction Contracts*'. Paper presented at the 28th Australian Legal Convention, Hobart, 1993
10. op. cit. *Codelfa*
11. op. cit. *Secured Income*
12. (1881) 6 AC 251 at p.263
13. [1969] 2 NSWR 530
14. (1990) 22 FCR 527; 92 ALR 601
15. (1991) 66 ALJR 123; 104 ALR 1
16. See *Service Station Association Ltd v Berg Bennett and Associates Pty Ltd* 117 ALR 393 at p.404 and *Vroom BV v Foster's Brewing Group Ltd* unreported decision, 11 March 1993, Supreme Court of Victoria
17. Professor JLR Davis *'Good Faith in Building Contracts and Construction'*. Paper presented at the Construction Law Committee's Construction Law Seminars in 1993.
18. Paul Finn *'Commerce, the Common Law and Morality'* Melbourne University Law Review, v.17, June 1989 at p.91
19. *Hughes Bros Pty Ltd v Trustees of the Roman Catholic Church for the Archdiocese of Sydney and Another* 31 NSWLR 91 at p.93: Kirby P 'I am therefore bound by what was decided by the Court in *Renard. I* must therefore apply *Renard* in the present appeal. To do so is part of my judicial duty. It would be even so if I were to disagree strongly with what was determined in *Renard*'.
20. See Burton *'Breach of Contract and the Common Law Duty to Perform in Good Faith'* (1980) 94 Harvard Law Review 369 at pp.371-2
21. op. cit. *Renard's* case at p.267
22. Ibid. at pp.263-4
23. [No. 2] 11 (1957) 99 CLR 28 at pp.88-9
24. *Waltons Stores (Interstate) Limited v Maher & Anor* (1988) 164 CLR 387 at p.434 per Deane J
25. op. cit. *Renard* at p.259
26. op. cit. *Hughes Bros* at p. l01
27. op. cit. *Hughes Bros* at p.103 per Priestly JA
28. ibid p.l02
29. op. cit. *Renard* at p.258
30. HK Lucke *'Good Faith and Contractual Performance'* Chapter 5 of Finn, Paul *'Essays on Contract'* Law Book Company, Sydney 1987 at p.l61
31. *Gateway Realty Ltd v Avton Holdings Ltd (No.3)* (1991) 106 NSR(2d) 180 at p.197
32. Stephen Hibbert and Emma Maloney *'Building and Construction Law'*, September 1993, pp.l83-89 ❑