The Cost of Construction Expedience: Undocumented Variations and Arbitral Jurisdiction in Miller v Monaghan

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In the physical execution of capital projects, there is a persistent friction between the rigid administrative mechanics of a written contract and the urgent, on-the-ground necessity to maintain operational momentum. When site conditions evolve or project scopes expand, the formal machinery of written notices, cost estimates, and countersignatures is frequently abandoned in favor of verbal approvals. It is a pragmatic, operational shortcut designed to save time, but one that almost inevitably invites a legal reckoning when the final invoices are issued. When a dispute arises over these undocumented variations, a critical jurisdictional question frequently emerges: If the parties completely ignored the strict variation procedures mandated by their contract, does the dispute over that "off-the-books" work still fall under the contract's arbitration agreement? Or does the procedural failure sever the dispute from the contract entirely, stripping the arbitrator of jurisdiction? This precise tension was recently adjudicated by the Supreme Court of Western Australia in *Miller v Monaghan* [2026] WASC 441. The judgment provides an instructive framework for capital allocators, general counsel, and construction professionals regarding the breadth of standard arbitration clauses and the limits of contractual non-compliance in establishing arbitral jurisdiction. **The Factual Matrix: Expedience Over**

Procedure The dispute in *Miller* centered on a standard form residential building contract executed in April 2024 for a sum of $675,910. The contract contained a highly prescriptive mechanism for variations under cl 12, requiring a written request from the owner, the preparation of a formal variation document by the builder detailing the cost, and the explicit, signed agreement of the owner before the work commenced. As is common in the industry, the paperwork fell behind the physical reality of the build. The plaintiff builder issued an invoice for $106,773.52 for additional work carried out on a "cost-plus" basis. The builder openly conceded that the formal variation procedure in cl 12 was not followed for every item of additional work. Instead, the builder justified the departure through an alleged verbal agreement driven by timeline pressures. As Justice Lundberg noted in the judgment, the plaintiff deposed:

> *"[45] In that context, to keep the Works progressing and to allow Mr and Mrs Monaghan to have their variations, I said to Mr Monaghan, at a meeting at 10 Sabina Drive in late-September 2025, 'All these changes are getting too complicated to keep up with the paperwork with, so all these additional works will need to be carried out at cost plus a reasonable margin and reconciled as we go, if we 're to get you in before Christmas'. Mr Monaghan said to me: 'That's fine'."*

When the defendant owner disputed the invoice, citing the absence of signed variations alongside invoicing errors, the builder sought to invoke the contract's arbitration clause (cl 18). Following a refusal by the contractual appointing authority (the Housing Industry Association) to appoint an arbitrator, the builder applied to the Supreme Court under s 11(4) of the *Commercial Arbitration Act 2012* (WA) to force the appointment. **The Jurisdictional Question: Are Non-Compliant Variations Arbitral?** For the Court to exercise its power to appoint an arbitrator, it first had to be satisfied that the

dispute actually fell within the parameters of the arbitration agreement. This raised a formidable jurisdictional argument: if the builder completely bypassed the mandatory contractual procedure for raising variations, is the resulting dispute still subject to the contract's arbitration clause? The vulnerability of this position was addressed by Justice Lundberg:

> *"[26] The questions of whether the Variations were carried out, the value of the Variations and Mr Miller's entitlement are all matters falling for determination within the scope of the foreshadowed arbitration proceedings. It would not be appropriate to determine such matters in the context of the current hearing.*
>
> *[27] There is an argument potentially available as to whether the Variations-dispute falls within the ambit of the arbitration agreement because the Parties do not appear to have complied with the procedure for the raising of variations under cl. 12 of the Contract. Whilst it is accepted that neither party complied, that does not preclude the dispute from being arbitral."*

The Determination: The "Widest Import" of the Bargain

The Court rejected the premise that procedural non-compliance negates arbitral jurisdiction, relying heavily on the broad drafting of the arbitration clause itself. Clause 18 of the Building Contract dictated that "any dispute, disagreement or difference… relating to this Contract" must be referred to arbitration.

Applying established principles of commercial construction, the Court noted that phrases such as "relating to" are heavily favored by the judiciary to capture precisely this kind of administrative deviation. Quoting the precedent set by Martin

CJ in *Fitzpatrick v Emerald Grain Pty Ltd*, the Court reaffirmed that the phrase is "properly construed as a term of the widest import which should not, in the absence of compelling reasons, be read down."

Justice Lundberg concurred with the plaintiff's submission, determining verbatim:

> *"I respectfully agree, bearing in mind the breadth of the arbitration agreement in this case, as objectively assessed.*
>
> *That is, the court can be presently satisfied that, subject to the findings which might be made on the evidence, the subject matter of the variations claimed by the plaintiff is a dispute relating to the Building Contract and capable of being referred to arbitration."*

Crucially, the Court recognized that while the paperwork was flawed, the legal remedies to rectify that flaw, such as relying on the owner's verbal consent, are inherently tied to the contract's execution and remain the exclusive domain of the arbitrator:

> *"It is at least arguable that, although there was non-compliance with the variation procedure in cl 12 of the Building Contract, the plaintiff may be able to rely on the conduct of the parties to make good his contentions, relaying on some species of estoppel. Whether that will be the case requires a trier of fact to assess the competing evidence and credibility of the witnesses, which is beyond the scope of this application. It is enough to say that the plaintiff's claims for payment of the works undertaken as variations, which form the basis of the dispute between the parties, are matters relating to the Building Contract."*

Finding that the dispute squarely fit within the arbitration

agreement, the Court exercised its statutory power to formally appoint the arbitrator. Furthermore, the Court ordered the defendant to pay the plaintiff's legal costs for the application on a party/party basis, noting that the plaintiff's conduct "involved nothing more than an adherence to the parties' bargain" and that the application "was necessary and appropriate in order to overcome the stalemate in the arbitral process." **Pragmatic Imperatives for the Construction Sector** The *Miller v Monaghan* decision offers stark, practical guidance for stakeholders in the construction industry. Courts will read phrases like "relating to this Contract" with a broad and flexible approach. A mutual or unilateral failure to comply with the administrative mechanics of a variation clause will unlikely sever the dispute from the arbitral tribunal. Skipping the paperwork may prejudice a party's chances of actually winning the arbitration on the merits, forcing them to rely on complex, evidence-heavy arguments like estoppel. However, as the Supreme Court of Western Australia has clearly signaled, that arduous evidentiary battle will unequivocally be fought in arbitration, exactly as the contract originally intended.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

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www.waselandwasel.com
business@waselandwasel.com

Enforcing Third-Party Subpoenas in Arbitration:

Supreme Court of Western Australia Rejects Oppression and Discovery Objections

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The intersection of private commercial arbitration and judicial intervention frequently generates procedural friction, particularly concerning the compulsion of third-party evidence. In the recent decision of *Brackenridge -v- A.T. Brine & Sons Pty Ltd* [2026] WASC 338, the Supreme Court of Western Australia provided significant judicial insight into the legal principles and evidentiary thresholds required to set aside a subpoena issued in support of arbitral proceedings.

This ruling offers a critical reference point for the enforcement of subpoenas against non-parties, clarifying the principles governing legitimate forensic purpose, the intersection with arbitral discovery regimes, and the evidentiary burden required to establish "oppression."

The Context of the Dispute

The precedent case arose from a consolidated arbitration between plaintiff homeowners and a defendant builder concerning a lump-sum residential building contract in Cottesloe. During the arbitration, the appointed Arbitrator directed by consent that there would be no general discovery. However, the parties were permitted to apply for the production of specific documents relevant to the issues in dispute.

With the permission of the Arbitrator, the plaintiffs obtained an *ex parte* subpoena from the Supreme Court pursuant to section 27A of the *Commercial Arbitration Act 2012* (WA). The

subpoena compelled a third party, the project's architect, who was also the authorized agent of the homeowners and a relative of the plaintiffs, to produce several categories of documents, including architectural drawings, correspondence, and variation approvals.

The architect applied to the court to set aside the subpoena, arguing that it lacked a legitimate forensic purpose, circumvented the agreed discovery process, and was oppressively broad.

The Court's Key Findings

Relevance and Legitimate Forensic Purpose

In addressing the objection that the requested documents lacked relevance, the Court applied the established principle that a subpoena possesses a legitimate forensic purpose if it is "on the cards" that the documents sought will materially assist a party's case.

Crucially, Justice Lundberg afforded a degree of judicial deference to the Arbitrator's initial assessment that the documents were material to the issues in dispute. Because the architect acted as the owners' authorized agent under the building contract, his drawings, site instructions, and handling of extensions of time were foundational to the core issues of the arbitration, which included defective work, delays, and variations. The judgment reinforces that a third party cannot rely on an unduly narrow conception of relevance when the arbitral pleadings clearly implicate their professional involvement.

The Discovery Objection

The applicant further argued that the subpoena was an abuse of process designed to bypass standard discovery, given that the arbitrating parties themselves likely possessed many of the requested documents.

The Court rejected this premise. While acknowledging that deploying a subpoena merely to bypass general discovery can constitute an abuse of process, the Court clarified that the mere potential for overlap does not, of itself, invalidate the subpoena. “Something more than this is required,” the Court noted.

The Court highlighted three factors validating the subpoena:

1. The arbitrating parties had expressly consented to forego general discovery, allowing instead for specific document production.

2. The Arbitrator had granted explicit permission for the subpoena, and the defendant builder did not oppose it, demonstrating it was not an attempt to circumvent or undermine the arbitral process.

3. The production of documents directly from the third party’s possession could be independently probative of the existence, content, and context of those records.

The Threshold for Oppression

Perhaps the most instructive aspect of the judgment is the Court’s treatment of the “oppression” objection. The architect contended that compliance would be “significant and onerous,” estimating that thousands of documents generated over a four-year period would need to be reviewed from unsegregated electronic folders and personal devices.

The Court dismissed this contention as “little more than conjecture,” establishing a clear evidentiary standard: assertions of oppression must be supported by cogent evidence rather than mere estimates. Justice Lundberg noted that a subpoena recipient is expected to undertake good faith efforts to assess the compliance task, such as deploying appropriate electronic search terms, to provide the court with a more

granular assessment of the work and cost involved. Blanket assertions regarding the volume of emails or the duration of a project are insufficient to demonstrate an unreasonable burden.

Furthermore, the architect expressed concern that the requested documents might be used by the plaintiffs to mount a subsequent professional liability claim against him. The Court held that the evident relevance of the materials to the current arbitration outweighed this risk. Any potential misuse is robustly mitigated by the implied undertaking, which strictly restricts the use of compulsorily produced documents to the proceedings for which they were sought.

Implications and Key Takeaways

The Supreme Court's decision provides clear, direct guidance for legal practitioners, contractors, and project owners navigating arbitral disputes and third-party evidence. The message is uncompromising: general claims of burden are insufficient to avoid compliance.

For stakeholders operating in this space, the key takeaways are:

- **Arbitral Deference:** Courts are highly inclined to respect an arbitral tribunal's determination regarding the relevance of third-party documents. Securing the arbitrator's explicit permission heavily insulates the subsequent court subpoena from relevance-based challenges.
- **Overlap with Discovery is Permissible:** Utilizing a subpoena to obtain targeted documents that might otherwise be discoverable is not automatically an abuse of process, particularly where the tribunal has actively managed the discovery regime and consented to the subpoena process.

- **Evidentiary Precision for Oppression:** Non-parties seeking to challenge a subpoena on the grounds of oppression cannot rely on theoretical estimates of burden. Detailed, empirical evidence demonstrating good faith efforts to limit the scope (e.g., through targeted technology searches) is an absolute prerequisite.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
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www.waselandwasel.com
business@waselandwasel.com

A Reading of the High Court of Australia Transcript on the Nature of Cryptocurrency in Poulton v Conrad: Judicial Considerations of Whether a Bitcoin Holding Can Be Possessed and Protected by the Torts of Conversion and Detinue

October 19, 2026

A Reading of the High Court of Australia Transcript on the Nature of Cryptocurrency in *Poulton v Conrad*: Judicial

Considerations of Whether a Bitcoin Holding Can Be Possessed and Protected by the Torts of Conversion and Detinue

In August 2026, the High Court of Australia heard oral arguments in *Poulton v Conrad* [2026] HCATrans 44, addressing a foundational question in digital asset law: can a Bitcoin holding be possessed at common law, and therefore be protected by the traditional torts of conversion and detinue? The transcript provides an extensive view of how an apex court assesses the integration of decentralized digital assets into established property paradigms. The inquiries raised by the Justices highlight the mechanical and conceptual difficulties of applying historic torts to modern technology. These deliberations hold significant implications for the cryptocurrency industry across common law jurisdictions, including the United Kingdom (UK), the Dubai International Financial Centre (DIFC), the Abu Dhabi Global Market (ADGM), Hong Kong, and the British Virgin Islands (BVI).

Identifying the "Thing"

A threshold issue for the Court was defining the exact subject matter of the dispute. To establish the torts of conversion or detinue, a claimant must prove interference with a possessory right over a specific, identifiable "thing."

Justice Gordon repeatedly sought clarity on this classification, asking counsel to isolate the exact asset in question: "Are we talking about the private key? Are we talking about the private key with the public key? Are we talking about the private key, plus the private key, plus something else?" She emphasized that "when we are talking about a legal relation, it is identification of the thing, whatever it is, between the two parties."

The respondent submitted that the relevant object is the Unspent Transaction Output (UTXO), the record of value on the public ledger. Justice Gleeson summarized the structural

necessity of this identification: “But you need ‘thing’ in order to get possession, and you need possession in order to get the tort.”

However, the appellant characterized Bitcoin as an “ideational asset,” asserting that “bitcoin is just a string of data. There is no coin, nothing tangible. There is nothing backing bitcoin; there is no promise, no resource,” and argued that “information is not property, no matter how valuable or useful.”

Justice Edelman expressed skepticism toward utilizing broad labels to solve specific legal questions. “I mean, I find this going round in circles with definitions of ‘property’ which apply in different ways, with different elements, in different contexts, to be incredibly unhelpful,” he remarked. Instead, he tested a functional definition, asking whether there is anything wrong with “describing bitcoin as a liberty to alter the ledger?”

The Absence of a Counterparty and the Rule of Law

A crucial distinction between Bitcoin and traditional financial intangibles, such as bank accounts, is the absence of a centralized debtor. Justice Beech-Jones explored this distinction by comparing Bitcoin to a physical commodity rather than a contractual right.

Responding to analogies drawn between Bitcoin and fiat currency deposited in a bank, Justice Beech-Jones observed: “when we talk about a chose in action in the form of a debt in a bank, the thing is the debt owed by the bank to the individual. So, there is effectively a counterparty.” He contrasted this with physical property: “When you own a diamond, there is no counterparty – it is the world. There is no counterparty obligation.” Applying this to the crypto asset, he asked, “Are you not saying, well, the relevant analogy is bitcoin is not like a chose in action in that

sense, because it is not a cause of action or a debt or a contractual right or anything of that kind against, say, the bank. It exists against the world – on one view, either against the world or against no one."

This architecture, an asset with no counterparty obligations maintained by a consensus protocol, prompted Justice Steward to question the legal enforceability of the network. He asked whether Bitcoin is simply "an unenforceable congeries of rights" and whether the appellant's argument meant that "bitcoin sits outside an ascertainable system of the rule of law – it is almost anarchial – and it cannot give rise to something that we can recognise at law?"

Systemic Legal Consequences and "The Gap"

The Justices critically assessed whether it was necessary to extend conversion and detinue, which are historically chattel torts, to intangible assets. Justice Edelman warned of the downstream effects on other legal domains, asking: "if one were to change the torts of conversion and detinue and extend them beyond tangible things or assets, then what would that do to other areas of the law?"

Both Justice Edelman and Justice Gordon interrogated whether there was a genuine legal vacuum requiring this extension. Justice Edelman pressed the respondent: "What is the gap? What is the factual scenario where an interference with somebody's so-called bitcoin – to use the term compendiously – would not give rise to an adequate legal remedy?" Justice Gordon similarly asked, "are there other remedies available that would give you the same relief?", noting that claims based on agency, breach of confidence, or contract might already provide adequate recourse without altering personal property torts.

Normative Choices and Third-Party Risks

Chief Justice Gageler framed the dispute as a policy decision

for the common law. Noting that property is universally described as a legal relationship with a thing, he stated: “The question here is at the level of: should a legal relationship be recognised?” He subsequently outlined the challenge: “The question we have to address is whether the existing principles need to be adapted to meet it.”

A major consequence of that normative choice involves third-party rights. The tort of conversion operates on strict liability. Gageler CJ noted the historical treatment of physical money: “If you steal money from me – if you take money out of my pocket, I can sue you for conversion, can I not?… If you then use the money to buy something from an innocent third party, I cannot sue the innocent third party who then holds the coin.” He observed that “it is the negotiability of the property that allows for the innocent third party to have a defence.”

He then pressed the respondent on whether Bitcoin possesses this attribute, asking, “Is bitcoin a currency? Is it negotiable?” If a court allows conversion claims for Bitcoin but does not extend a good-faith purchaser defense, an innocent third party who receives stolen Bitcoin could be strictly liable to the original owner.

Global Implications for Common Law Jurisdictions

The judicial debate in *Poulton v Conrad* is highly significant for the global cryptocurrency industry, particularly in offshore and regional financial hubs that rely on the common law. Jurisdictions such as the UK, DIFC, ADGM, Hong Kong, and the BVI frequently look to apex courts in Australia and England to clarify the treatment of novel commercial assets.

If the High Court of Australia rules that a Bitcoin holding is capable of possession and subject to conversion, it provides plaintiffs with a strict-liability proprietary remedy. Conversion does not require a breach of contract or fiduciary

duty; it is an assertion of superior title against anyone who interferes with the asset. For digital asset exchanges, liquidators, and victims of cryptocurrency theft in hubs like Dubai, Hong Kong or the BVI, this would streamline asset recovery, establishing a direct claim over stolen digital assets and circumventing complex equitable tracing rules.

Conversely, if the Court determines that extending possessory torts to intangibles disrupts established law and that plaintiffs should rely on equitable and contractual remedies, industry participants will need to structure their custodial and trading agreements with greater reliance on express trusts and strictly drafted indemnities. Furthermore, if strict liability torts are applied without recognizing cryptocurrency as negotiable, digital asset exchanges in the DIFC or ADGM could face severe compliance and liability risks when handling deposited assets that may be tainted by prior theft.

Ultimately, the High Court’s examination of the UTXO, physical control, and the boundaries of personal property will shape the commercial realities and legal architecture of the digital asset economy across the common law world.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
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business@waselandwasel.com

Arbitrability, Corporate Insolvency, and Fractured

Disputes: The NSW Court of Appeal's Approach in Clough v Elecnor and the Lex Domicilii vs. Lex Arbitri Divide

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Introduction: The Collision of Party Autonomy and Public Policy

The intersection of international commercial arbitration and corporate insolvency consistently generates profound jurisdictional friction. While arbitration is a private, consensual mechanism governed by party autonomy, corporate insolvency is a collective, statutory procedure rooted in public policy and designed to bind third parties.

When a commercial dispute triggers corporate restructuring mechanisms, courts face a critical question: is the dispute still "capable of settlement by arbitration," or must it be resolved by national courts? The New South Wales Court of Appeal (NSWCA) recently addressed this tension in *Clough Projects Australia Pty Ltd v Elecnor Australia Pty Ltd* [2026] NSWCA 111.

By dissecting the arbitrability of corporate matters and addressing the procedural fracturing of disputes, highlighted prominently in Ground 5 of the appeal, the NSWCA delivered a judgment that mirrors global approaches to the conflict between the law of the arbitral seat (*lex arbitri*) and the law of the corporate domicile (*lex domicilii*).

The Factual Matrix: *Clough v Elecnor*

The dispute arose from an unincorporated joint venture between

Elecnor and Clough to deliver a major energy infrastructure project in Australia. The Joint Venture Deed contained a broad arbitration clause designating Singapore as the arbitral seat under ICC Rules.

In late 2022, Clough entered voluntary administration and subsequently executed a Deed of Company Arrangement (DOCA) under Part 5.3A of the Australian *Corporations Act 2001* (Cth). Under the DOCA, specified assets were transferred to a Creditors' Trust. Following this insolvency event, Elecnor sought to exercise a compulsory acquisition clause to buy out Clough's participating interest in the joint venture for a nominal $1.00. The DOCA trustees resisted, arguing that the DOCA had already transferred Clough's interest to the trust, thereby altering or extinguishing Elecnor's contractual buyout rights.

Elecnor commenced litigation in the NSW Supreme Court seeking specific performance of the buyout (the "Clause 21.3 Matter"). In response, Clough and the trustees filed a cross-claim seeking $55 million in commercial contribution for called bank guarantees (the "Call Contribution Matter"). Elecnor subsequently applied to stay the cross-claim and refer it to arbitration in Singapore, prompting Clough to argue that the entire dispute should be heard together in court, or alternatively, that Elecnor's primary claim should be temporarily stayed pending the arbitration.

The Arbitrability of Corporate Matters: The Statutory Shield

Central to the appellate review was determining which matters were "capable of settlement by arbitration" under the Australian *International Arbitration Act 1974* (Cth). The NSWCA affirmed the primary judge's ruling that the dispute must be fractured into two distinct matters.

The Call Contribution Matter was identified as a discrete, purely contractual controversy and was stayed and referred to

arbitration in Singapore. However, the Court held that the Clause 21.3 buyout dispute was **non-arbitrable**.

The Court's reasoning hinged on the statutory nature of the DOCA. Resolving Elecnor's buyout rights required construing the DOCA and the operation of the *Corporations Act* in a manner that would inherently affect the rights of third-party creditors. The Court noted that a DOCA is not merely a private agreement; it is a statutory instrument that effects a change in the company's legal status and binds all creditors by operation of law. Consequently, there is a "legitimate public interest in seeing that disputes of the type in question are resolved by public institutions… rather than institutions and structures established by the parties."

Ground 5 and the Reality of Fractured Proceedings

Because the corporate buyout matter was non-arbitrable, it remained within the jurisdiction of the NSW courts, while the financial contribution claim was sent to arbitration. This bifurcation formed the basis of Ground 5 of the appeal, wherein Clough challenged the primary judge's refusal to temporarily stay the non-arbitrable court proceedings pending the determination of the Singapore arbitration.

The NSWCA dismissed Ground 5, affirming that the decision not to stay the Clause 21.3 Matter was a valid exercise of discretionary case management. The Court held that the resolution of the corporate acquisition dispute did not depend on the outcome of the arbitrated contribution claim. The dismissal of Ground 5 underscores a harsh procedural reality: when an arbitration agreement collides with a non-arbitrable statutory regime, the fracturing of the dispute across dual forums is often an inevitable consequence of enforcing the arbitration agreement to the extent permissible by law.

Global Reflections: *Lex Domicilii* vs. *Lex Arbitri*

The *Clough* judgment reflects a universal paradigm in cross-

border dispute resolution: the supremacy of the *lex domicilii* over the *lex arbitri* in matters of corporate status and insolvency.

In international arbitration, parties select a seat (e.g., Singapore) whose laws, the *lex arbitri*, govern the procedural framework of the arbitration and typically determine objective arbitrability. However, the legal personality, restructuring, and insolvency of a corporation are governed exclusively by its *lex domicilii* or *lex concursus* (e.g., Australia).

Globally, courts align with the NSWCA's approach. Purely *in personam* commercial claims, such as quantifying a debt, can be arbitrated. But *in rem* claims, or disputes that strike at the core mechanics of an insolvency proceeding and affect the collective rights of the creditor pool, are universally guarded by the domestic courts of the corporate domicile. The public policy underlying the *lex domicilii* acts as a firm boundary that private arbitral tribunals cannot cross.

Strategic Takeaways for International Commercial Disputes

For corporate entities managing cross-border agreements, the *Clough v Elecnor* decision offers several practical, jurisdiction-neutral insights:

- **Evaluate the Scope of Arbitrability:** When disputes involve distressed counterparties, parties should recognize that arbitration clauses may not cover issues that invoke statutory restructuring regimes or impact the collective rights of third-party creditors.
- **Prepare for Parallel Proceedings:** As demonstrated by the NSWCA's dismissal of Ground 5, courts are willing to fracture disputes, retaining jurisdiction over corporate status issues while sending discrete commercial claims to arbitration.
- **Assess the Interplay of Governing Laws:** During the drafting and enforcement phases, it is essential to

analyze how the procedural laws of the chosen arbitral seat (*lex arbitri*) will interact with the mandatory corporate and insolvency laws of the counterparties' home jurisdictions (*lex domicilii*), anticipating that local courts will intervene to protect statutory frameworks.

Conclusion

The NSW Court of Appeal's judgment in *Clough v Elecnor* is a definitive modern precedent on the limits of arbitrability. It illustrates that while international commercial arbitration remains the preferred mechanism for resolving cross-border contractual disputes, the statutory gravity of corporate restructuring and insolvency remains firmly within the domain of domestic courts. Navigating the resultant procedural fractures requires a sophisticated understanding of both the procedural flexibility of the *lex arbitri* and the mandatory public policy of the *lex domicilii*.

Wasel & Wasel advises on complex commercial disputes, international arbitration, and cross-border corporate litigation. The firm possesses extensive experience navigating multi-jurisdictional matters, addressing the intricate conflicts of law between arbitral seats and corporate domiciles, and managing parallel proceedings involving statutory insolvency regimes and commercial arbitration across global jurisdictions.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

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business@waselandwasel.com

Misappropriated Mining Hardware and Newly Minted Tokens: Analysis of Yimiao v 3V (Supreme Court of Victoria) – Opportunity Loss, Unjust Enrichment, and Constructive Trusts

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Introduction

The Supreme Court of Victoria's judgment in *Yimiao Australia Pty Ltd v 3V Development Australia Pty Ltd* [2026] VSC 133 provides a detailed examination of how established common law and equitable doctrines apply to the unauthorized retention of cryptocurrency mining hardware and the subsequent generation of digital assets. Delivered by Justice Attiwill, the decision addresses the quantification of damages in volatile digital asset markets, the application of unjust enrichment to misappropriated infrastructure, and the equitable classification of newly minted cryptocurrency.

This article objectively outlines the facts and legal findings of the judgment, and it compares the Victorian Supreme Court's approach with the legal frameworks in the United Kingdom (UK), Hong Kong (HK), the Dubai International Financial Centre (DIFC), and the Abu Dhabi Global Market (ADGM), focusing on global hot topics such as digital asset valuation and equitable tracing.

The Factual Matrix

The plaintiff, Yimiao Australia Pty Ltd, purchased 1,598 Bitmain L7 Antminer machines, configured to mine Litecoin and Dogecoin. These machines were hosted at a site in Victoria owned by the defendant, 3V Development Australia Pty Ltd (3V).

The Court found that on 25 July 2022, 3V excluded Yimiao's agents from the premises. The Court stated that "3V voluntarily took possession of the Yimiao Machines without any legal right to do so" [987]. Subsequently, 3V disconnected the hardware from Yimiao's designated mining pool and connected a portion of the machines to F2Pool and ViaBTC mining pool accounts linked to 3V personnel, including its sole director, Dajian Li. The Court found that 3V utilized the hardware to mine 8,850,529 Dogecoin and 4,806 Litecoin [1010].

Yimiao initiated proceedings claiming bailment, detinue, conversion, trespass to goods, restitution, and knowing receipt of trust property against 3V and Dajian Li.

Quantification of Damages and Loss of Commercial Opportunity

A primary issue before the Court was the quantification of damages for Yimiao's "loss of a commercial opportunity" to mine cryptocurrency over the hardware's four-year lifespan. Yimiao sought over AUD $26 million, relying on expert evidence projecting future network hashrates (mining difficulty), token issuance, and a realization strategy where tokens would be held until reaching specific fiat values.

Justice Attiwill confirmed the availability of damages for a lost commercial opportunity but rejected Yimiao's calculation. Applying principles from *Sellars v Adelaide Petroleum NL* and quoting the High Court in *Cessnock City Council v 123 259 932 Pty Ltd*, the Court noted that a plaintiff is given a "'fair wind' but not a 'free ride'" [541] when a defendant's wrongdoing causes uncertainty.

The Court found the expert's methodology unreliable, observing that it failed to properly account for the mathematical hard

caps on token issuance and abandoned historical average pricing when updating forecasts. Justice Attiwill held:

“In my view, the value of the opportunity that Yimiao lost cannot be ascertained by reference to the degree of possibilities and probabilities. There is insufficient evidence of what the value of that opportunity might have been. Yimiao did not adduce important evidence of value, despite being able to do so. In addition, important evidence of Mr McNew is not cogent and is unreliable. As a result, there are substantial and important gaps in the evidence concerning value. In these circumstances, it is not for the Court to use uninformed guesswork to determine the issue of damages.” [653]

Consequently, the Court awarded nominal damages of $100 for the torts of conversion and detinue regarding the lost profits [917].

The insistence on objective, non-speculative evidence when claiming damages in volatile digital asset markets is consistent across major common law jurisdictions. In the UK and Hong Kong, courts demand rigorous economic models to establish quantum in digital asset disputes. For example, in the UK (*B2C2 Ltd v Quoine Pte Ltd* [2020] SGCA(I) 02, applying common law), courts have rejected retrospective, hypothetical trading strategies for volatile assets. Similarly, the DIFC Digital Assets Law (DIFC Law No. 3 of 2024) expressly defines digital assets as property but relies on standard common law principles of foreseeability and certainty for damages. The ADGM, applying English common law via the Application of English Law Regulations 2015, mirrors this approach, aligning with the Victorian Court’s refusal to engage in “uninformed guesswork.”

Restitution and Unjust Enrichment: Objective Valuation of Hardware

While the claim for future crypto profits failed due to evidentiary deficiencies, Yimiao successfully recovered AUD $14,850,066.72 under the doctrine of restitution for unjust enrichment.

The Court determined that 3V was unjustly enriched by obtaining possession of the machines. Quoting the High Court in *Redland City Council v Kozik*, Justice Attiwill noted:

“A claim for restitution of unjust enrichment requires a defendant to have received some benefit for which restitution must be made. Unlike compensation or loss, and unlike the prophylactic principle of accounting for and disgorging a defendant’s net profits, restitution of unjust enrichment focuses upon the benefit of the transaction between the plaintiff and the defendant.” [936]

The Court categorized the relevant benefit not as the actual cryptocurrency generated, but as the “opportunity to use the machines.” The Court observed:

“Where a person obtains property of another person without the authority or consent of that person, and obtains a benefit in doing so (ie the opportunity to use it), this may give rise to a claim for restitution of an unjust enrichment.” [942]

To value this benefit, the Court utilized the objective replacement cost of the hardware at the time of the misappropriation. Relying on expert evidence that a new L7 Antminer was valued at $19,310.88 AUD on 25 July 2022, the Court awarded restitution based on the 769 unreturned machines:

“The missing Yimiao Machines were received by 3V, and have never been returned to Yimiao. On and from 25 July 2022, 3V received the benefit of the opportunity to use the Yimiao Machines… In these circumstances, the replacement value as at 25 July 2022 is an appropriate measure of the objective value of the missing Yimiao Machines… It is the amount of

$14,850,066.72. This is the value of the benefit retained by 3V at the expense of Yimiao." [964-965]

The treatment of digital asset infrastructure as property subject to objective restitution aligns with approaches in the UK, HK, DIFC, and ADGM. Under English law, unjust enrichment requires that a defendant be enriched at the claimant's expense without a juristic reason. Courts frequently grant restitutionary remedies for the objective value of misappropriated property, often assessed via a hypothetical "reasonable hiring fee" or replacement cost (*Attorney General v Blake* [2001] 1 AC 268). The DIFC and ADGM Courts apply similar tests derived from English equity. By anchoring the unjust enrichment claim to the physical hardware's replacement cost rather than the volatile digital tokens it produced, the Victorian Court utilized a valuation mechanism widely accepted across these international jurisdictions.

Constructive Trusts and Knowing Receipt: Hardware vs. Newly Minted Tokens

A central legal issue was whether the newly minted Dogecoin and Litecoin constituted trust property, which would trigger third-party liability for Dajian Li under the "knowing receipt" doctrine (*Barnes v Addy*), as the mined tokens were deposited into his F2Pool accounts.

The Court bifurcated its analysis between the physical hardware and the newly minted tokens. For the physical hardware, the Court applied the principle from *Black v S Freedman & Co*:

"Where money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character." [980]

Justice Attiwill concluded:

"I find that 3V held the Yimiao Machines on constructive trust

(institutional) for Yimiao upon the principles in *Black v S Freedman & Co* on and from 25 July 2022. 3V misappropriated the Yimiao Machines." [982]

However, the Court reached a different conclusion regarding the newly minted Dogecoin and Litecoin. While 3V breached its fiduciary duty as a constructive trustee by using the machines for its own profit, the resulting cryptocurrency was not trust property at the exact moment of its creation.

Quoting *Grimaldi v Chameleon Mining NL [No 2]* and *Hospital Products Ltd v United States Surgical Corporation*, the Court explained that under Australian law, the trust imposed over profits generated in breach of fiduciary duty is a *remedial* constructive trust, which only comes into existence upon a court order:

"The imposition of such a constructive trust is remedial, not institutional. In *King v Fister*, the Queensland Court of Appeal stated that a 'remedial constructive trust is, as its name suggests, one imposed by way of remedy in order to do equity. It is a trust imposed by the court and arises at the time of the making of the order'." [1007]

Consequently, because the cryptocurrency was not classified as institutional trust property at the time it was received by Dajian Li's wallet, the cause of action for knowing receipt failed:

"As a result, any receipt of the cryptocurrency by Mr Dajian Li did not involve the receipt by him of trust property. The cryptocurrency was not trust property when it was misappropriated by 3V or when it may have been subsequently received by Mr Dajian Li… To the extent the cryptocurrency may be the subject of a constructive trust, that constructive trust would be remedial rather than institutional, and thus would not apply to the cryptocurrency until the time of this Court making an order to that effect. The claim against Mr

Dajian Li must be dismissed." [1008]

The distinction between institutional and remedial constructive trusts highlights a notable divergence between Australian equity and English law. English courts have rejected the concept of the remedial constructive trust. In *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45, the UK Supreme Court held that unauthorized profits or bribes obtained by a fiduciary are held on an *institutional* constructive trust from the moment of receipt.

If the *Yimiao* facts were adjudicated in the UK, or in jurisdictions that strictly follow English equity such as Hong Kong, the DIFC, or the ADGM, a court would likely determine that the newly minted cryptocurrency was held on an institutional constructive trust immediately upon generation. Under that framework, the tokens would constitute "trust property" upon deposit, potentially satisfying the necessary elements for a "knowing receipt" claim against the director. The Australian retention of the remedial constructive trust for fiduciary profits creates a temporal gap that limits third-party recipient liability prior to a court order, a framework that contrasts with the approaches in the UK, HK, DIFC, and ADGM.

Conclusion

As digital asset operations mature, *Yimiao Australia v 3V Development* outlines the application of common law frameworks to hardware misappropriation and cryptocurrency generation. The Victorian Supreme Court's rigorous approach to the quantification of damages, combined with the jurisdictional variances identified in equitable tracing and trust doctrines across the UK, DIFC, ADGM, and Hong Kong, confirms that digital asset recovery requires a jurisdictionally tailored strategy.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
Tier-1 services since 1799.
www.waselandwasel.com
business@waselandwasel.com

No Signatory, No Standing: Queensland Court Overturns Arbitrator on Trustee Joinder

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The resolution of commercial disputes through arbitration is often praised for its efficiency and privacy, yet its foundational authority remains strictly tethered to the consent of the parties. Unlike the broad jurisdiction of a court, an arbitrator's power extends only as far as the written agreement allows. This limitation becomes a critical battleground when complex corporate structures, such as family trusts involving split ownership and operational entities, collide with the rigid terms of a contract. In the recent decision of *Tailing Gully Farming Pty Ltd v Pratt* [2025] QSC 353, the Supreme Court of Queensland provided a definitive ruling on the limits of an arbitrator's jurisdiction over third-party trustees. The judgment serves as a stern reminder that financial entanglement is not a substitute for legal privity, establishing that a court must intervene when an arbitrator wrongfully expands their reach to include a "stranger to the contract."

The dispute arose from a lease of cane farming land in Queensland. The registered owner of the land, William Robert Pratt, entered into a written lease in 2019 with Tailing Gully

Farming Pty Ltd (TGF). The agreement was explicit: Mr. Pratt was defined as “the Lessor” and TGF as “the Lessee.” Clause 18 of the document contained a standard arbitration agreement, requiring that any dispute regarding the construction of the lease or the rights and liabilities of the parties be referred to arbitration.

As the commercial relationship soured, Mr. Pratt alleged that TGF had breached various covenants of the lease, resulting in significant financial losses. He referred the matter to arbitration. However, a significant legal complication emerged during the proceedings. While Mr. Pratt was the signatory and land owner, the actual farming business was conducted by a related entity, Janella Farming Pty Ltd (Janella), acting as the trustee for the William Pratt Family Trust. Consequently, it was uncontroversial that the “overwhelming majority of losses claimed to have been suffered by Mr Pratt in the arbitration are in fact losses suffered by Janella.”

Recognizing that the true financial victim was not the named lessor, the arbitrator decided to join Janella to the proceedings. The arbitrator reasoned that although Janella was not a signatory, the “inclusion of Janella as a party in the Arbitration is necessary because of the subject matter in controversy, rather than the formal nature of the claim.” The arbitrator concluded that Janella had standing because it had a claim “through or under” Mr. Pratt.

TGF challenged this decision in the Supreme Court, arguing that the arbitrator had exceeded his jurisdiction. The Court’s analysis, delivered by Justice Kelly, focused on the strict legal definition of a “party” under the *Commercial Arbitration Act 2013* (Qld). While the Act extends the definition of a party to include “any person claiming through or under a party to the arbitration agreement,” the Court held that this phrasing is not a catch-all for related entities.

Drawing on the leading authority of *Tanning Research*

Laboratories Inc v O'Brien, Justice Kelly explained that the prepositions "through" and "under" convey the specific notion of a "derivative cause of action." To fall within this definition, a third party must rely on a right or defense that is "vested in or exercisable by the party." This typically applies to assignees, liquidators, or trustees in bankruptcy who legally stand in the shoes of the original signatory. In this case, Janella was not claiming a right derived from Mr. Pratt; it was asserting its own distinct claim for damages while Mr. Pratt remained the lessor. The Court found that Mr. Pratt had "failed to articulate a coherent or maintainable basis" for contending that Janella was effectively claiming through him.

The respondents attempted to preserve the arbitrator's jurisdiction by arguing theories of agency and estoppel. They contended that Mr. Pratt had entered into the 2019 Lease as an agent for Janella, thereby making Janella the true lessor, or alternatively, that TGF was estopped from denying Janella's status because they had paid rent to the trustee.

The Court dismissed these arguments as "sufficiently weak as to be not sustainable." It was undisputed that Mr. Pratt, not Janella, was the registered owner. Justice Kelly reasoned that "as Janella was not the owner of the Land, Mr. Pratt can have had no actual or ostensible authority to represent that Janella was 'the Lessor'." The lease explicitly defined the lessor as Mr. Pratt, and there were "no words contained in the 2019 Lease to the effect that Mr. Pratt entered the 2019 Lease as agent for and on behalf of Janella."

Similarly, the estoppel argument failed because the express terms of the written contract were "plainly inconsistent with, and contradict," the alleged assumption that the trustee was the lessor. The mere fact that TGF paid rent to Janella at Mr. Pratt's direction was not enough to override the written agreement. Mr. Pratt's own evidence admitted that he operated the business through Janella because he "considered the

farming business to be mine … notwithstanding how it is legally held," rather than due to any mutual agreement with the lessee.

Critically, the judgment clarifies the standard of review a court must apply when an arbitrator's jurisdiction is challenged. The Court confirmed that the review is a hearing *de novo*, meaning the court looks at the jurisdiction question afresh to ensure the arbitrator was correct. Justice Kelly held that the arbitrator's reliance on the "subject matter in controversy" was a fundamental error. By ignoring the strictures of privity, the arbitrator had strayed beyond his authority. The Court declared that "the doctrine of privity of contract applies and Janella as a stranger to the 2019 Lease cannot seek to recover damages by reason of its breach."

Consequently, the Court set aside the arbitrator's decision. Justice Kelly concluded that "curial intervention is necessary to prevent the arbitration from foundering by reason of the wrongful inclusion of the second respondent." The decision stands as a clear directive that the efficiency of arbitration cannot come at the expense of fundamental contractual principles. The position of the Court pursues that a trustee entity, no matter how closely related to the signatory or how deeply involved in the financial operations, cannot force its way into an arbitration without a clear legal basis found within the agreement itself.

This case serves as a cautionary tale for families and trustees managing complex asset holding structures where arbitration is the preferred method of dispute resolution. Often, families separate land ownership from operational risk for "legal and tax reasons," as Mr. Pratt admitted was his motivation. However, when a trustee entity like Janella is the operational engine incurring expenses, the legal documentation must explicitly reflect this role. Effective asset management requires that the entity bearing the financial risk is also the entity named in the arbitration agreement. If a trustee

intends to enforce rights under a contract, it must ensure it is not merely a passive beneficiary of rent payments but an active, defined party within the arbitration agreement.

Furthermore, the judgment highlights the precise legal scaffolding required for a trustee to access arbitration provisions without being a primary signatory. To successfully argue that a trustee is claiming “through or under” a signatory, there must be a clear legal mechanism, such as an assignment or a formalized agency agreement, that bridges the gap between the individual owner and the corporate trustee. The court emphasized that the prepositions “through” and “under” require a “derivative cause of action” that is “vested in or exercisable by the party.” Simply being a related entity or the “invoicing entity” does not create this legal bridge. Trustees must consider structuring their commercial relations so that the cause of action for financial loss resides with the signatory, or ensure the arbitration clause is broad enough to expressly include related entities. Without such foresight, a trustee remains a “stranger to the 2019 Lease,” unable to utilize the efficiency of arbitration to recover its losses.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile:
https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
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www.waselandwasel.com
business@waselandwasel.com

Ex NF v Munneke: A Supreme Court of South Australia

Analysis of Private Keys, Insolvency, and the Tracing of Corporate Digital Assets

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The judgment of the Supreme Court of South Australia in *EX NF PTY LTD (IN LIQ) & ANOR v MUNNEKE & ORS* [2025] SASC 165 (2 October 2025) represents a significant and forensically detailed application of orthodox corporate law principles to the distinct evidentiary challenges posed by digital assets. While the case involved the ownership and disposition of Bitcoin (BTC) and Ether (ETH), its true value, particularly for international digital asset disputes and arbitration, is not in the creation of novel "crypto law." Rather, the judgment provides an authoritative framework for insolvency practitioners, creditors, and counsel on how established principles of beneficial ownership, directors' duties, and shareholder ratification are to be applied when corporate assets are held in pseudonymous wallets controlled by a fiduciary. The court's methodical approach demonstrates a refusal to be confounded by the technical nature of the assets, focusing instead on a rigorous, evidence-based analysis of off-chain records, competing narratives, and the objective conduct of the parties to establish title and remedy breaches of duty. This analysis will deconstruct the court's reasoning, focusing on the key takeaways for digital asset disputes, specifically the court's treatment of provenance over possession, its method for deconstructing "personal investment" claims, the primacy of off-chain financial records, the seamless application of tracing principles, and the critical invalidation of shareholder ratification once a company enters the "zone of insolvency."

A primary challenge in digital asset disputes is the common defense that technical control of a private key is tantamount to legal and beneficial ownership. The *Munneke* judgment provides a clear rebuttal to this presumption, establishing that a court's inquiry will prioritize the *provenance* of the asset over the mere *possession* of the keys. The director, Mr. Munneke, "contended that he…is presumed by law to be the owner of the cryptocurrency" [para 50], a claim supported by his exclusive control of the CoinJar account and the associated private keys [para 135]. The court, however, looked past this technical control to determine the asset's true character at its inception. The foundational finding was that "the bitcoin was purchased in February and August 2014…using Ex NF's funds from the NAB account" [para 798]. The court noted that the CoinJar exchange account "was linked only to the NAB account" [para 798], despite Mr. Munneke's awareness that he could have linked a personal bank account [para 798]. This direct, objective link between the company's fiat funds and the acquisition of the digital asset was the court's starting point and a fact that the director's defenses could not overcome. The director's claim that corporate funds "were used from the NAB account because it was convenient" [para 50] was implicitly rejected in favor of the court's finding that the purchases were, "on their face, company transactions" [para 830]. This demonstrates a clear judicial method: the "on-ramp", the source of the fiat currency used to acquire the asset, will be a paramount consideration in determining beneficial ownership, regardless of whose name is on the exchange account or who controls the subsequent wallet.

From this finding of provenance, the court's analysis then turned to dismantling the director's *post facto* rationalization for the holding. This is a crucial takeaway for the digital asset industry, where the line between corporate treasury and personal holdings is often blurred, particularly in founder-led enterprises. The court was faced with conflicting defenses: Mr. Munneke claimed the crypto was

a “family investment” [para 50], possibly for the ZALD Trust [para 156], while Ms. Zaccara, the sole shareholder, “assert[ed] that the cryptocurrency was purchased for the benefit of only Ms Zaccara personally” [para 50]. The court systematically deconstructed these narratives by privileging contemporaneous evidence of *corporate purpose* over subsequent, self-serving claims of *personal investment*. The most compelling piece of evidence was an “unguarded” 2018 email from Mr. Munneke to a broker, written years after the acquisition but before the dispute. In it, Mr. Munneke explained his early involvement with Ethereum: “Bought in at the pre-sale to use it, never expected it to be an investment, just thought it was a cheaper way to get gas for development” [para 806]. The court was “ultimately persuaded that Mr Munneke’s email…constitutes an admission” [para 841] that the asset was acquired for a specific business utility, not as a personal investment. This finding was bolstered by other objective evidence of corporate purpose, including the company co-hosting a “Blockchain Hackathon” [para 846] and expert testimony regarding the benefits for a developer to hold ETH at the time [para 112]. The court’s finding was decisive: “I am satisfied that the ethereum was purchased by Ex NF in the course of its business for use in its business at some point in the future” [para 845]. This provides a clear test for future disputes, weighting contemporaneous evidence of business utility far more heavily than subsequent, inconsistent claims of personal ownership.

Further cementing the asset’s corporate character, the court gave significant weight to the objective, off-chain financial records. This analysis was twofold. First, the court noted where the company’s *own conduct* demonstrated ownership. It was submitted, and the court accepted, that Ex NF had “claim[ed] a tax credit in respect of the cryptocurrency in 2014” [para 400] and, critically, “assum[ed] a GST collection obligation in 2018” [para 431] upon the sale of the ETH to fund the Ward Street property. The respondents’ defense that these were

simply “mistakes” by the accountants [para 432] was unpersuasive. This objective conduct, recorded in statutory filings, was treated as powerful evidence of the asset’s true character. Second, the court’s analysis of the company’s *failure* to keep proper records for its other transactions demonstrated the director’s breach of duty. The court found that contrary to section 286(1) of the *Corporations Act*, Ex NF “did not maintain written financial records that correctly recorded and explained its transactions…and which would enable true and fair financial statements to be prepared and audited” [para 775]. This failure meant the director was incapable of making an informed decision. As Mr. Munneke himself admitted in his s 597 examination, “he did not know in January 2016 whether Ex NF was solvent or insolvent” [para 738]. This dual focus, using the records that *did* exist to establish ownership of the crypto, and the *absence* of records to establish a breach of duty in disposing of it, highlights the central, determinative role that financial accounting plays in digital asset disputes.

Once the court established that the digital assets were the company’s property, it had no difficulty applying traditional equitable tracing principles to the asset’s subsequent metamorphosis. This is a vital confirmation for liquidators and creditors. The court seamlessly followed the company’s ETH, which it found was “the property of Ex NF” [para 850], through its liquidation by the director. It noted the fiat proceeds were deposited into the company’s NAB account, and that these specific funds were then “drawn from the NAB account to be paid as settlement monies for the purchase of Ward Street” [para 25]. The court also noted that the surplus funds from the sale, some $121,988.89, “were retained by Ex NF in the NAB account” [para 816], conduct which the court found was consistent only with corporate ownership. This clean application of tracing, from ETH to fiat in a corporate account, to the acquisition of a real property asset in a third party’s name, affirms that these established equitable

remedies are perfectly equipped to unwind complex misappropriations, allowing the liquidator to claim the resulting real-world property as a traceable proceed of the company's original digital asset.

The final and most critical legal disposition of the court was its invalidation of the director's primary defense: shareholder ratification. In the digital asset space, which is dominated by closely-held companies, the alignment of the director and sole shareholder often presents a significant hurdle for creditors. The respondents' case relied heavily on this alignment, arguing "that Ms Zaccara, as sole shareholder of Ex NF, agreed, ratified, and acquiesced to the release of Ex NF's funds" [para 54]. The court, however, deployed the established "zone of insolvency" doctrine to neutralize this defense completely. It first established that the *Kinsela* duty, which requires directors to consider creditors' interests, had been enlivened. For the 2015 O'Connell Street transaction, the court found "a 'real and not remote risk of insolvency'" [para 773]. For the 2018 Ward Street transaction, the company was "facing insolvency" [para 863]. The court then articulated the legal consequence by citing *Kinsela v Russell Kinsela Pty Ltd (In Liq)*: "where a company is insolvent the interests of the creditors intrude…It is in a practical sense their assets and not the shareholders' assets that…are under the management of the directors" [para 645].

This finding was fatal to the defense. The court held that the power of the shareholder to ratify the director's self-dealing was extinguished. "shareholders cannot," the court found, "ratify conduct of directors that is adverse to the interests of creditors in circumstances of doubtful solvency, near insolvency, or the like" [para 801(c)]. This principle was applied to both property transactions. Furthermore, the court invalidated the ratification defense on several other independent grounds. It found the consent was not "informed," as "Ms Zaccara had no better knowledge of Ex NF's financial

situation…than Mr Munneke did" [para 801(d)]. Specific to the Ward Street transaction, the court identified a fatal contradiction: "no issue of ratification arises…given Ms Zaccara was, she says, unaware that Ex NF ever held cryptocurrency. Therefore, it follows that she was never consenting to Ex NF's cryptocurrency being deployed" [para 876]. The court also affirmed that ratification is irrelevant for breaches of *statutory* duties, such as sections 180, 181, and 182, which it found the director had breached [para 801(a)]. This systematic rejection of the unanimous consent defense is perhaps the judgment's most significant contribution, providing a clear path for liquidators to overcome collusive behavior between directors and shareholders in founder-driven companies.

Having defeated the ratification defense, the court found the director's breaches of duty were plain. He failed to exercise care and diligence (s 180(1)), as a "reasonable director…would not have made a gift of the bulk of Ex NF's cash…without any idea of Ex NF's real financial position" [para 800(a)]. He acted for an improper purpose (s 181(1)), admitting the goal was to place an asset "not tied to the success or failure of Ex NF" [para 800(c)]. And he improperly used his position (s 182(1)) [para 800(d)]. The court also summarily rejected the statutory "business judgment rule" defense, as the director had a clear "material personal interest" and had failed to "inform themselves" [para 800(b)]. The transactions were therefore found to be voidable "unreasonable director-related transactions" under section 588FDA [paras 802, 877], allowing the liquidator to recover the assets for the benefit of the creditors.

In conclusion, the *Munneke* judgment is a powerful illustration of the judiciary's capacity to apply orthodox legal and equitable principles to complex digital asset disputes. It serves as an authoritative guide, confirming that beneficial ownership will be determined by a forensic examination of fiat

provenance, corporate purpose, and off-chain financial records, not merely by the control of a private key. Most importantly, it reaffirms the power of the *Kinsela* "zone of insolvency" principle as a critical tool for creditors, demonstrating that shareholder ratification is no defense to the misappropriation of corporate assets when the interests of creditors have been placed at risk. The decision confirms that the established tools of corporate law and equity are robust, fit for purpose, and fully capable of providing remedies for malfeasance in the digital age.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

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www.waselandwasel.com
business@waselandwasel.com

Spain's EU Law Defence Rejected in Australian Award Ruling

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In a landmark decision clarifying the relationship between European Union law and public international law obligations, the Federal Court of Australia has delivered a comprehensive judgment in *Blasket Renewable Investments LLC v Kingdom of Spain* [2025] FCA 1028. Stewart J has ordered the enforcement of four arbitral awards, totalling approximately €500 million, against the Kingdom of Spain, providing a robust affirmation of the integrity of the international investment arbitration

system. The judgment navigates a complex intersection of foreign State immunity, treaty interpretation, and the so-called “intra-EU objection” that has been litigated fiercely in courts worldwide.

The proceedings arose from Spain’s alterations to its renewable energy regulatory framework in the early 2010s. Foreign investors, alleging that these changes breached the fair and equitable treatment standard under Article 10 of the Energy Charter Treaty (ECT), initiated arbitrations under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention). Having secured favourable awards from ICSID tribunals, the investors, or their assignees, sought to enforce those awards in Australia under the *International Arbitration Act 1974* (Cth). Spain resisted, mounting a multifaceted defence that struck at the very foundation of its consent to arbitrate.

Spain’s primary contention was that it was immune from the Court’s jurisdiction pursuant to section 9 of the *Foreign States Immunities Act 1985* (Cth). While the High Court’s recent decision in *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* [2023] HCA 11 held that accession to the ICSID Convention constitutes a waiver of immunity for enforcement proceedings, Spain sought to distinguish the present case. It argued that the High Court’s ruling did not govern a situation where the binding status of the awards themselves was in dispute. This challenge to the awards’ validity was predicated on the jurisprudence of the Court of Justice of the European Union (CJEU), notably in cases such as *Achmea* and *Komstroy*. Those decisions established that arbitration clauses in investment treaties are incompatible with the foundational treaties of the EU when applied to disputes between an EU Member State and an investor from another Member State. Spain argued that this principle of EU law rendered its offer to arbitrate under the ECT inapplicable to the EU-based investors, meaning no valid arbitration agreement was ever

formed. Consequently, the awards were not "binding" under Article 53 of the ICSID Convention, and Spain had not waived its immunity in respect of them.

Stewart J firmly rejected this line of reasoning by returning to the fundamental architecture of the ICSID Convention. His Honour affirmed the widely-held view that the Convention establishes a "self-contained or closed-loop system" for the review and enforcement of awards. The Court found that once an ICSID tribunal has determined its own jurisdiction and rendered an award, and internal remedies such as annulment have been exhausted, the role of a domestic court in an enforcement proceeding is circumscribed. As the Full Court had previously noted, the sole issue for a competent court under Article 54(2) of the Convention is the presentation of a certified copy of the award. An Australian court cannot look behind the award to re-examine the tribunal's jurisdiction or merits. This principle, the Court reasoned, is central to the Convention's object of providing legal security for international investments by mitigating sovereign risk.

Critically, the judgment addressed the apparent conflict between Spain's obligations under EU law and its duties under the ICSID Convention. Stewart J determined that the primacy of EU law, as articulated by the CJEU, is a rule that operates within the autonomous EU legal order. It does not extinguish Spain's pre-existing obligations under public international law owed to non-EU states such as Australia. As a party to the ICSID Convention, but not the EU treaties, Australia's obligation under Article 54 to recognise and enforce the awards remained unaffected by Spain's "juridical dilemma".

The Court also dismissed Spain's alternative contention that the EU treaties had effected an *inter se* modification of the ICSID Convention among EU Member States. Applying the principles of treaty modification reflected in the Vienna Convention on the Law of Treaties, Stewart J found that the obligations under the ICSID Convention, particularly those

concerning the recognition and enforcement of awards, were *erga omnes partes*—owed to all contracting states collectively, not merely bilaterally. Such obligations, which protect the common interest in the stability of the entire investment framework, cannot be modified by a sub-group of parties without affecting the rights of others.

Further, the Court resolved a novel issue concerning the assignment of the awards. In two of the proceedings, the original award creditors had assigned their rights to Blasket Renewable Investments LLC. Spain argued that the Court lacked power to enforce an award in favour of a non-party to the original arbitration. His Honour rejected this, concluding that the rights under an ICSID award, once given the force of law in Australia, constitute a chose in action capable of assignment. Nothing in the ICSID Convention itself prohibits such an assignment.

The decision in *Blasket* represents a significant contribution to the global jurisprudence on the enforcement of investor-state awards. It confirms that an Australian court will not permit a foreign state to use conflicts within another legal order, however profound, as a shield to resist its clear obligations under public international law as implemented into Australian domestic law. The judgment provides unequivocal support for the principle that the ICSID regime is a self-contained system, reinforcing Australia's status as a reliable and pro-enforcement jurisdiction.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile:
https://waselandwasel.com/about/mahmoud-abuwasel/

Lawyers and consultants.
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www.waselandwasel.com
business@waselandwasel.com

Superintendent’s Certificate to Arbitration: Interpreting Liquidated Damages from a Queensland Court of Appeal

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In the recent decision of **Pacific Diamond 88 Pty Ltd v Tomkins Commercial & Industrial Builders Pty Ltd [2025] QCA 50**, the Queensland Court of Appeal offered some illuminating perspectives on how arbitration clauses can interact with (and ultimately safeguard) the parties’ substantive rights when a contract’s payment and security mechanisms are under strain. Although the dispute at hand revolved largely around liquidated damages and set-off provisions, the Court’s reasoning provides a clear reminder of the “final safety net” that arbitration can represent for parties who wish to challenge a Superintendent’s certifications or the Principal’s contractual interpretations.

From the outset, Justice Bond observed that “in this form of contract disputes would ultimately be resolved by arbitration, although parties were permitted to have recourse to the courts in certain circumstances.” The judgment underscores that an **arbitral process** can be the ultimate recourse when a party seeks to contest Superintendent-issued certificates or claim extensions of time. Justice Bond explained that because the parties had **deleted** vital passages in the standard form contract (AS4902-2000) that would otherwise allow the Principal to set off liquidated damages progressively, the correct interpretation was that “the Principal would only be able to utilise any certified liquidated damages as part of

the final certificate process."

Where that final certificate process might yield a sum payable by the Contractor—or, conversely, reduce the amount payable to the Contractor—the aggrieved party retains the right to dispute the Superintendent's certification through arbitration. Justice Bond phrased it succinctly:

> *"If the Contractor disputed that by giving notice pursuant to cl 37.4(d) on the basis that it should have been granted an extension of time, it might vindicate that position in arbitration obtaining a direction from the arbitrator that there should have been an extension of time."*

This statement highlights a crucial lesson: even if the Superintendent has issued a certificate imposing a monetary liability on the Contractor (or absolving the Principal from having to pay), that certificate does not necessarily settle the question once and for all. The presence of an **arbitration clause** in the contract—and the parties' careful drafting around final certificates and dispute notices—means the Contractor (or the Principal) can still put those issues before an arbitrator, seeking an authoritative ruling about the correctness of the Superintendent's or the Principal's stance.

Justice Bond also pointed out the logical sequence under which arbitration would be triggered. Once the Superintendent's final certificate is issued, the "final certificate shall be conclusive evidence" except in certain circumstances, including "unresolved issues the subject of any notice of dispute pursuant to clause 42, served before the 7th day after the issue of the final certificate." That notice of dispute procedure, in turn, funnels the parties into arbitration if they cannot otherwise resolve their differences.

Practitioners should note, too, the Court's observation that this approach—deferring any real monetary consequences of

Superintendent certifications to the final certificate stage—does not leave a party permanently deprived of its entitlement. Instead, it reflects a commercial bargain that ensures the Principal can still seek the benefit of liquidated damages, but only when the project is sufficiently far along (or completed) such that final entitlements are being ascertained in a single accounting. Meanwhile, the Contractor retains a robust right to **arbitrate** any alleged missteps in certifying or quantifying that liability.

All told, **Pacific Diamond 88** serves as a timely reminder that parties who strike out the more immediate set-off or recourse mechanisms in standard forms are not banishing themselves to a realm of indefinite uncertainty. Instead, as Justice Bond indicates, they are choosing to "unite in rejecting" a mid-project set-off process, and deferring the question of liability or entitlement until the end-game—knowing the law, and the arbitration clause in particular, will still allow them to test the Superintendent's conclusions when it truly matters.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
Profile: https://waselandwasel.com/about/mahmoud-abuwasel/

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business@waselandwasel.com

When Private Keys Mean Real Control: A Landmark Ruling on

Crypto

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A recent decision in the Supreme Court of Tasmania, reported as **[2025] TASSC 2**, provides clear guidance on how principles of **possession** apply to cryptocurrency. The matter involved an **appellant** and a **respondent** who agreed that the appellant would invest ten thousand dollars of the respondent's money in **Bitcoin**. A dispute later arose when the appellant retained some of the purchased cryptocurrency as a fee, rather than transferring all of it to the respondent. In considering whether the respondent could successfully bring claims in **detinue** and **conversion**, the court turned to a principle that remains vital in physical and digital property cases alike: **it is trite law that a person is in possession of property if that person has actual control of the property and an intention to possess it**.

In this dispute, the court examined whether the appellant maintained actual control over the relevant Bitcoin and intended to possess it as his own. Although Bitcoin is intangible, the court emphasized that its owner is the one who controls the **private keys** for the digital wallet in which the currency is held. Because possession for legal purposes depends on excludability and control, having sole access to the private keys is essentially equivalent to having physical custody of a tangible item. Moreover, the appellant did not disclose or prove any arrangement suggesting that the appellant lacked such control or that another entity actually had possession of the keys.

An important dimension to the court's reasoning was the fact that the appellant consistently acted as if he personally oversaw the Bitcoin and had sole authority regarding

transfers. The respondent had trusted the appellant to invest the funds, and the court concluded that the appellant was the only individual capable of granting or denying access to the cryptocurrency. That exclusive ability to decide who received the Bitcoin, combined with evidence of the appellant's intent to keep some of it as a fee, satisfied the requirement for possession as traditionally defined by **case law**. The intangible nature of Bitcoin did not undermine its status as **property** and did not invalidate claims that relied on principles of physical property law. The court made it clear that so long as something can be controlled, held, and excluded from others, it can be the subject of **detinue** and **conversion**.

The key lessons from this matter are straightforward. First, cryptocurrency is property and can be possessed in the eyes of the law. Second, a court will look closely at who actually controls the **private keys**. If a person has those keys and no one else can move the cryptocurrency without that person's cooperation, that person is in possession. Third, to establish **detinue**, the respondent had to show that the appellant held the Bitcoin in a manner inconsistent with the respondent's rightful claim and refused to return it after demands were made. Fourth, to demonstrate **conversion**, the respondent had to prove that the appellant's actions were so inconsistent with the respondent's ownership that it amounted to a denial of that ownership. In both these torts, actual possession by the appellant was crucial, and the court had little trouble concluding that he held the digital property under his sole control.

The judgment also touched on the appellant's claim for a fee. The appellant insisted that a portion of the respondent's Bitcoin constituted his fee, but the court determined that the appellant never secured express agreement that he could retain the cryptocurrency in that manner. Although it was recognized that the appellant was entitled to some compensation for his

services, the judge refused to accept that the appellant could simply keep part of the digital currency as that fee. The judge took note of an original suggestion that any fee might be based on a "percentage over base," meaning a fee on top of the ten thousand dollars. Since the respondent had wanted ten thousand dollars' worth of Bitcoin, the court found it reasonable that an appropriate fee should be reflected in normal currency rather than in withheld cryptocurrency. The appellant's unilateral decision to keep some of the Bitcoin was inconsistent with the respondent's ownership rights, leading directly to liability.

Because the appellant maintained control over the private keys, the court found that he possessed the Bitcoin and was responsible for returning it upon demand. By refusing to do so, the appellant exposed himself to damages. The court observed that the demand and refusal elements had been established on several occasions. When the respondent requested the immediate transfer of the entire amount of Bitcoin, the appellant delivered only a portion. When further demands were made, the appellant again refused to hand over the remainder. These facts all supported the finding that the appellant both detained the currency unjustly (detinue) and dealt with it in a way inconsistent with the respondent's rights (conversion).

The ruling demonstrates how digital assets, though intangible, are not beyond the reach of ordinary legal principles. The central premise continues to be that **actual control** plus the **intention to possess** qualifies as possession, no matter whether the subject property is a physical object or an electronic asset safeguarded by cryptography. The holder of the private keys enjoys the same kind of power that someone holding a physical item would have: it can be kept, transferred, or refused to others. Accordingly, courts can use familiar rules of property and tort to resolve disputes over cryptocurrency.

This matter reaffirms that individuals handling cryptocurrency for others should do so with clear agreements in place, especially regarding **fees** and **possession**. Failing to clarify whether any commission will be in cryptocurrency or in ordinary currency often sets the stage for these disputes. Above all, the court’s approach confirms that **the law does not require tangibility for an asset to be owned and possessed**, so long as those hallmarks of control and intention are in place.

Author: Mahmoud Abuwasel
Title: Partner – Disputes
Email: mabuwasel@waselandwasel.com
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