JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CIVIL
CITATION	**:**	GR ENGINEERING SERVICES LTD -v- INVESTMET LTD [2019] WASC 439
CORAM	**:**	TOTTLE J
HEARD	**:**	18 NOVEMBER 2019
DELIVERED	**:**	5 DECEMBER 2019
FILE NO/S	**:**	CIV 2140 of 2017
BETWEEN	**:**	GR ENGINEERING SERVICES LTD Plaintiff AND INVESTMET LTD Second Defendant SQUIRE PATTON BOGGS (AU) Third Defendant

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Catchwords:

Contract - Contractual construction - Whether obligations under escrow agreement required strict compliance - Where contract provided for relief by way of interpleader - Where court must consider contract as a whole - Where court must consider commercial context - Where principles of construction favour harmonious reading of clauses

Contract - Breach of contract - Exclusion clauses - Where liability excluded except in cases of 'gross negligence' and 'wilful misconduct' - Whether breach of contract supports finding of negligence - Whether breach can be described as

'gross negligence' - Where no breach of contract found

Legislation:

Civil Liability Act 2002 (WA), s 3, s 5A, s 5B

Result:

Plaintiff's claim dismissed

Category: B

Representation:

Counsel:

Plaintiff	:	Mr M L Bennett
Second Defendant	:	No appearance
Third Defendant	:	Mr M N Solomon SC & Ms K A T Pedersen

Solicitors:

Plaintiff	:	Bennett + Co
Second Defendant	:	No appearance
Third Defendant	:	Jackson McDonald

Case(s) referred to in decision(s):

Australian Broadcasting Commission v Australasian Performing Right Association Ltd [1973] HCA 36, 23
Spartalis v BMD Constructions Pty Ltd [2014] SASFC 124, 26
Simic v New South Wales Land and Housing Corporation [2016] HCA 47, 19
George 218 Pty Ltd v Bank of Queensland Ltd [No 2] [2016] WASCA 182, 22
Black Box Control Pty Ltd v Terravision Pty Ltd [2016] WASCA 219, 21
Carter v The Dennis Family Corporation [2010] VSC 406, 26
DIF III – Global Co-Investment Fund LP v Babcock & Brown International Pty Limited [2019] NSWSC 527, 26
Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd (2014) 251 CLR 640, 21
GR Engineering Services Ltd v Eastern Goldfields Ltd [2018] WASC 19, 17
James Thane Pty Ltd v Conrad International Hotels Corp [1999] QCA 516, 26

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104, 21

Red Sea Tankers Ltd v Papachristidis (The 'Hellespont Ardent') [1997] 2 Lloyd's Rep 547, 25

TOTTLE J:

1 In this action the plaintiff (GR Engineering) claims damages from the third defendant (Squire Patton Boggs), a firm of solicitors, for breach of an escrow agreement (the Escrow Agreement). Squire Patton Boggs was the escrow agent and, in that capacity, held a share transfer executed by the second defendant (Investmet) in favour of GR Engineering in respect of shares that constituted security for a debt due by Eastern Goldfields Ltd (originally the first defendant) to GR Engineering.

2 There are two issues: first, did Squire Patton Boggs breach the Escrow Agreement by failing to deliver the share transfer to GR Engineering; and, secondly, if it was in breach, does it have contractual immunity from liability on the basis that the breach did not constitute 'gross negligence'.

3 This judgment is concerned with issues of liability only.

The facts

4 There was no dispute about the primary facts that were established by the contemporaneous documents. My findings are set out in the paragraphs that follow.

5 This action arises from a partial compromise of claims made by GR Engineering against Eastern Goldfields in respect of works done on the refurbishment of Eastern Goldfields' Davyhurst gold plant. The action against Eastern Goldfields was dismissed by consent on 5 August 2019.

6 GR Engineering's claims against Eastern Goldfields were made under a contract dated 22 September 2016 (the Contract). The Contract Sum (as defined) was $12,487,638. General conditions incorporated in the Contract included a provision that entitled GR Engineering to serve a 'notice to show cause' explaining why it should not exercise its various specified rights in the event of 'a substantial breach' by Eastern Goldfields. A substantial breach included failing to make a payment within seven days of the payment becoming due and the specified rights that arose included the right to suspend the whole or any part of the works required to be completed under the Contract.

7 On 24 March 2017 GR Engineering alleged Eastern Goldfields had failed to pay $7,724,009.60 due under the Contract in January and

February 2017 and gave notice to Eastern Goldfields 'to show cause' why it should not suspend the works until payment was made. Correspondence ensued between the parties to which it is unnecessary to refer in detail. It is sufficient to say that, in response to representations that Eastern Goldfields was raising money in the form of equity capital, GR Engineering indicated that it was prepared to continue performing the Contract provided certain payments were made by agreed dates. Significantly, Eastern Goldfields did not dispute that the sums claimed by GR Engineering (together with other sums that had fallen due in the meantime) were due. On 28 April 2017 Eastern Goldfields paid $4,596,925 to GR Engineering. On 4 May 2017 GR Engineering gave notice to Eastern Goldfields that it was suspending works under the Contract until it received full payment of the amount due under the Contract.

8 Mr Michael Fotios was a director and the Executive Chairman of Eastern Goldfields. He was also a director of Investmet and it was an entity controlled by him. Mr Fotios was the person primarily involved in Eastern Goldfields' fundraising activities.

9 On 11 May 2017 GR Engineering's solicitors served a statutory demand on Eastern Goldfields for payment of $6,601,496.68.

10 On 1 June 2017 Eastern Goldfields applied to this court for orders setting aside the statutory demand on the ground that it had offsetting claims. Squire Patton Boggs acted on behalf of Eastern Goldfields in that application. The application was listed for hearing on 15 June 2017.

11 On 15 June 2017 an agreement was reached between GR Engineering, Eastern Goldfields and Investmet, the terms of which were recorded in a deed entitled 'Guarantee', executed on that day by the three parties (the Guarantee Deed). The material terms of the agreement were as follows:

(a) Eastern Goldfields would pay GR Engineering $5 million (including GST) by 21 June 2017. The Guarantee Deed contained a recital that Eastern Goldfields had agreed to pay the $5 million by 21 June 2017 but it did not include a provision specifically imposing an obligation on Eastern Goldfields to make that payment. As explained later in these reasons the omission of an express term imposing an obligation on Eastern

Goldfields to pay the $5 million was used by Eastern Goldfields to argue that it was not obliged to make the payment.

(b) Subject to the satisfaction of conditions precedent (referred to below) Investmet would irrevocably guarantee the payment of the $5 million to GR Engineering (cl 3).

(c) The payment of $5 million would be secured by 18,461,538 fully paid ordinary shares in the capital of Eastern Goldfields held by Investmet (cl 2(c) and cl 3.3(c)). (Originally the security was to be shares in another mining company but in the course of the negotiations preceding the Guarantee Deed the value of those shares dropped suddenly by 30% and it was agreed that Eastern Goldfields shares would be provided as security in their place).

(d) Investmet would execute an off market share transfer in favour of GR Engineering in respect of the shares being provided as security which would be held by Squire Patton Boggs as escrow agent (cl 2(c)).

(e) Consent orders would be executed by GR Engineering and Eastern Goldfields setting aside the statutory demand with no order as to costs (cl 2(b)).

(f) The conditions precedent were as follows:

(i) execution of the Escrow Agreement by all parties;

(ii) execution of the consent orders setting aside the statutory demand and the deposit of the consent orders with Squire Patton Boggs; and

(iii) the provision by Eastern Goldfields to GR Engineering of evidence that the share transfer had been signed by Investmet and deposited with the defendant (cl 2).

(g) Clause 3.3 of the Guarantee Deed governed the rights of the parties if payment of the $5 million were not made by 21 June 2017. It provided:

> **3.3 Non-payment**
>
> (a) If [Eastern Goldfields] does not pay the Guaranteed Money by the Date for Payment, [GR Engineering]

may issue a default notice in writing requiring the [Eastern Goldfields] to pay the Guaranteed Money on or before the expiry of the Cure Period.

(b) Following the expiration of the Cure Period and provided [Eastern Goldfields] does not pay the Guaranteed Money to [GR Engineering] prior to the expiry of the Cure Period, [GR Engineering] may issue a notice in writing requiring the Escrow Agent to release the Share Transfer Form in accordance with the Escrow Agreement.

(c) Following receipt of the Share Transfer Form, [GR Engineering] may lodge the Share Transfer Form with [Eastern Goldfields] (and its share registry) to procure that the Shares are transferred to [GR Engineering] provided that [GR Engineering] may only do so if Investmet is able to trade the Shares in accordance with the securities trading policy (Securities Trading Policy) of [Eastern Goldfields]. If Investmet is prohibited from trading the Shares pursuant to the Securities Trading Policy, [GR Engineering] may only lodge the Share Transfer Form with [Eastern Goldfields] and its share registry when Investmet is able to trade under the Share Trading Policy.

(d) In the event [Eastern Goldfields] only partially pays the Guaranteed Money by the Date for Payment or on or before the expiry of the Cure Period:

(i) [GR Engineering] may only lodge the Share Transfer Form for an equivalent proportion of the Shares (based on the share price of [Eastern Goldfields] as at the close of trading on the Effective Date) to be transferred to [GR Engineering]; and

(ii) the Escrow Agent is authorised to complete the Share Transfer Form, and do any other actions necessary, to give effect to the transfer of a proportion of the Shares in accordance with sub-clause (i) above.

(e) Once realised by [GR Engineering], to the extent that the value of the Shares exceeds the Guaranteed Money, any excess Shares will be returned to the Guarantor. This sub-clause (e) survives termination of this deed.

(f) In realising the proceeds of the sale of the Shares, [GR Engineering] must:

(i) act reasonably and promptly in selling the Shares;

(ii) seek to obtain the best price for the sale of the Shares; and

(iii) not take any action (other than selling the Shares), or fail to act, which may prejudice the ability to obtain the best price for the sale of the Shares.

I interpolate that the reference to the 'Securities Trading Policy' in cl 3.3(c) was explained by counsel for GR Engineering as being required to take account of the possibility that Mr Fotios as a director of both Investmet and Eastern Goldfields might have been privy to 'inside information'.

(h) Immediately upon satisfaction of the conditions precedent:

(i) Eastern Goldfields would provide GR Engineering with a date and time prior to 21 June 2017 for GR Engineering and Eastern Goldfields to meet in good faith to discuss various issues arising under the Contract, including the 'Offsetting Claims' that formed the basis of Eastern Goldfields' application to set aside the statutory demand; and

(ii) GR Engineering would lift the suspension of the works under the Contract and would 'immediately and unconditionally recommence works towards [the] commissioning' of the plant and take certain other steps in relation to the works specified in the Guarantee Deed (cl 4).

12 Also on 15 June 2017:

(a) GR Engineering, Eastern Goldfields, Investmet and Squire Patton Boggs executed the Escrow Agreement;

(b) Investmet executed the share transfer and it was delivered to Squire Patton Boggs; and

(c) the consent orders setting aside GR Engineering's statutory demand were signed and provided to Squire Patton Boggs.

13 The Escrow Agreement was in the form of a letter from Squire Patton Boggs addressed to Eastern Goldfields, Investmet and GR Engineering. The letter was subsequently executed by Eastern Goldfields, Investmet and GR Engineering as a deed.

14 In the introductory paragraphs of the Escrow Agreement Squire Patton Boggs stated:

> Squire Patton Boggs (AU) wishes to confirm its appointment as escrow agent for Eastern Goldfields Limited (EGS), Investmet Limited (Investmet), and GR Engineering Services (GRES) (together, the Parties) in relation to the agreement dated on or about the date of this letter between the Parties concerning a guarantee provided by Investmet (Guarantor) in respect of an obligation for EGS to pay $5,000,000 to GRES (Agreement).
>
> Subject to receiving a signed copy of this letter from the Parties, we confirm the following terms and conditions of escrow:

15 Clause 1 of the terms and conditions recorded the appointment of Squire Patton Boggs as Escrow Agent. It provided:

> **1 APPOINTMENT OF ESCROW AGENT**
>
> 1.1 The Parties appoint Squire Patton Boggs (AU) to act as escrow agent (Escrow Agent) on the terms and conditions of this letter (Letter Agreement).
>
> 1.2 Capitalised terms in this Letter Agreement have the meaning set out in the Agreement unless otherwise defined in this Letter Agreement.
>
> 1.3 The Escrow Agent accepts its appointment as escrow agent and agrees to:
>
> (a) hold the Escrow Documents (defined below) in escrow; and
>
> (b) deal with and release the Escrow Documents (defined below) from escrow on the terms and conditions of this Letter Agreement.

16 The Escrow Documents were not defined in the Escrow Agreement but by cl 3 the 'Parties' were required to deliver to Squire Patton Boggs a copy of the consent order and the share transfer thus making it plain that those documents were the Escrow Documents.

17 Clause 3 contained an acknowledgment by the Parties of the terms on which Squire Patton Boggs was obliged to release and deal with the Escrow Documents. It stated:

> 3.1 The Parties acknowledge that the Escrow Agent:
>
> (a) will only release and deal with the Escrow Documents *strictly* in accordance with *the terms of clause 4*; and
>
> (b) is not liable at law or in equity (including for negligence, breach of contract, breach of statute or on any other basis) to any Party in respect of the release of and dealings with the Escrow Documents where the Escrow Agent has acted *within the terms of clause 4*.
>
> 3.2 The Parties irrevocably instruct the Escrow Agent to and [sic] deal with the Escrow Documents as prescribed by or required *under clause 4*.
>
> (emphasis supplied).

18 Clause 4 set out Squire Patton Boggs's obligations as the Escrow Agent. It provided:

> **4 RELEASE AND DEALING WITH THE ESCROW DOCUMENTS**
>
> 4.1 Upon the Agreement becoming unconditional, the Escrow Agent must:
>
> (a) release the Consent Order from escrow; and
>
> (b) cause the Consent Order to be filed at the Supreme Court of Western Australia.
>
> 4.2 Upon the receipt of a notice from [GR Engineering] that [Eastern Goldfields] has failed to pay the Guaranteed Amount by the expiration of the Cure Period, the Escrow Agent will release the Share Transfer Form to [GR Engineering] provided that:
>
> (a) acting reasonably, there are no grounds for the Escrow Agent to believe the notice or the matters set out in the notice are not genuine; and
>
> (b) any amendments to the Share Transfer Form required by clause 3.3(d) of the Agreement have been made by the Escrow Agent.

19 Clause 5 of the Escrow Agreement provided that Squire Patton Boggs's costs would be borne by Eastern Goldfields and GR Engineering equally.

20 Clause 6 of the Escrow Agreement set out Squire Patton Boggs's duties and responsibilities. It provided:

> 6.1 The duties and responsibilities of the Escrow Agent are limited to those set out in this Letter Agreement.
>
> 6.2 The Escrow Agent:
>
> (a) acts as a depository only and is not responsible or liable for the sufficiency or validity of any document deposited with it;
>
> (b) is not under any duty to inquire into the terms and provisions of any agreement or instruction other than as set out in this Letter Agreement;
>
> (c) is not and must not be treated as being a trustee or fiduciary acting for the benefit of any of the Parties; and
>
> (d) will have no further duties or responsibilities under this Letter Agreement following the release of the Escrow Agreements [sic] in accordance with clause 4.
>
> 6.3 For the avoidance of doubt, the Escrow Agent is not required to use or advance its own funds or otherwise incur financial liability on its part in performance of its duties or the exercise of its rights under this Letter Agreement.
>
> 6.4 The Escrow Agent is:
>
> (a) subject to, and only obliged to recognise notifications or directions given in accordance with this Letter Agreement or any order made by a court of competent jurisdiction; and
>
> (b) entitled to rely on any notification which the Escrow Agent in good faith believes to be genuine.

21 Clause 7 of the Escrow Agreement governed the liability of Squire Patton Boggs. It provided:

> **7 RELEASE FROM LIABILITY**
>
> 7.1 The Escrow Agent is not liable for any error of judgement or for any acts done or steps taken or omitted by it in connection with

this Letter Agreement, except for the Escrow Agent's own gross negligence or wilful misconduct.

7.2 All Parties waive any claim which they may have or may assert against the Escrow Agent arising out of the execution, delivery or performance by the Escrow Agent of the Letter Agreement, unless that claim is based upon the gross negligence or wilful misconduct of the Escrow Agent.

7.3 All Parties jointly and severally indemnify and hold harmless the Escrow Agent from any liabilities or claims (including reasonable legal fees) which the Escrow Agent may incur or sustain as a result of its performance under this Letter Agreement except if the liability or claim is due to the gross negligence or wilful misconduct of the Escrow Agent.

22 Clause 8 of the Escrow Agreement governed what was to occur in the event of a dispute between the Parties with respect to the escrow arrangements. It provided:

8 INTERPLEADER AND LEGAL PROCEEDINGS

8.1 If a dispute arises between the Parties with respect to the escrow arrangements contained in this Letter Agreement, the Escrow Agent:

(a) may interplead all of the assets held in escrow by it under this Letter Agreement in a court of competent jurisdiction; and

(b) will then be fully relieved from any liability or obligation with respect to those interpleaded assets.

8.2 All Parties will pursue any legal redress or recourse in connection with any dispute relating to the escrow arrangements contained in this Letter Agreement, without making the Escrow Agent a Party unless the dispute is based upon the gross negligence or wilful misconduct of the Escrow Agent.

23 Eastern Goldfields did not pay the $5 million on 21 June 2017. On 22 June 2017 GR Engineering sent a letter to Eastern Goldfields and Investmet giving notice of default in accordance with cl 3.3(a) of the Guarantee Deed.

24 On 27 June 2017 Mr Simon Rear, a partner of Squire Patton Boggs sent an email to Mr Tim O'Leary, of the law firm Gilbert + Tobin, who had been instructed by Eastern Goldfields. Mr Rear attached to his email the Contract, the Guarantee Deed, the Escrow Agreement, GR Engineering's letter of 22 June 2017 giving notice of

default, the share transfer and the consent orders. Mr Rear stated that the consent orders had been filed at the court. In fact that had not occurred. Mr Rear also stated:

> As discussed, given that Squire Patton Boggs is the escrow agent we are unable to act in relation to any advice regarding any potential dispute between Eastern Goldfields Limited and GR Engineering Services Limited in relation to this matter. Accordingly, we will not be attending the meeting EGS has scheduled today with you. I also refer you to paragraph 8 of the Escrow Agreement regarding our rights to interplead the share transfer form. If we are notified of a dispute in relation to the escrow agreement, we would currently expect that, in the capacity as the escrow agent, we would allow the parties 7 days to reach a resolution of the dispute or request further time to resolve the dispute, before we apply for interpleader in the court.

25 On 28 June 2017 Gilbert + Tobin sent a letter to GR Engineering disputing that Eastern Goldfields was under any obligation to pay $5 million. The first five paragraphs of the letter are reproduced below:

> 1 We act for Eastern Goldfields Ltd (EGS) and refer to the document titled '*Guarantee*' dated 15 June 2017 ('**Guarantee**'), and to your letter dated 22 June 2017.
>
> **No primary obligation and so no amount is 'guaranteed'**
>
> 2 The document titled 'Guarantee' provides at page 3 under 'Background' that '*[EGS] has agreed to pay the Guaranteed Money to GRES by the Date for Payment*'. But there is no identification of the source of that alleged obligation.
>
> 3 It is apparent that EGS does not undertake any such obligation in the 'Guarantee'. And of course, given the statement in the 'Background', it would in any event be inconsistent for EGS to do so in that document.
>
> 4 A guarantor's liability is co-extensive with that of the principal debtor. In circumstances where EGS has not undertaken any obligation to pay the 'Guaranteed Money' by the Date for Payment, the guarantee is of no effect and the guarantor, Investmet Limited (**Investmet**), is discharged: the guarantor's liability cannot extend beyond that of the principal debtor.
>
> 5 It follows that Investmet has no liability under the 'Guarantee' and GR Engineering Services Ltd (**GRES**) has no entitlement under the escrow arrangements or otherwise to the Shares (as defined in the 'Guarantee'). Specifically, GRES has no entitlement to require the release of the Share Transfer Form (as defined). We are copying this letter to the Escrow Agent, Squire

> Patton Boggs (AU), to ensure that it is aware that the Escrow Letter Agreement dated 15 June 2017 is not enforceable.

26 In the remainder of the letter of 28 June 2017 Gilbert + Tobin:

(a) set out the basis upon which Eastern Goldfields asserted that GR Engineering had engaged in misleading conduct contrary to the *Australian Consumer Law* and asserted it was entitled to an order for the rescission of the Guarantee;

(b) asserted that GR Engineering had not complied with its obligations under the Guarantee Deed to start recommissioning the works; and

(c) asserted that there were defects and omissions in GR Engineering's work which were, among other things, the subject of Eastern Goldfields' 'offsetting claims'.

27 On 29 June 2017 under cover of an email from its solicitors GR Engineering sent a letter to Squire Patton Boggs giving notice that it required the release of the share transfer in accordance with cl 3.3(b) of the Escrow Agreement. The relevant paragraphs of GR Engineering's letter were as follows:

> This notice to release is given pursuant to clause 3.3(b) of the Guarantee as [Eastern Goldfields] has not paid the Guaranteed Money to [GR Engineering] prior to the expiry of the Cure Period.
>
> [GR Engineering] hereby gives notice requiring [Squire Patton Boggs], as Escrow Agent, to release the Share Transfer Form in accordance with the Escrow Agreement.

28 Later on 29 June 2017 Squire Patton Boggs sent a letter in reply to GR Engineering's letter of 29 June 2017 referred to in the preceding paragraph. Squire Patton Boggs referred to the Guarantee Deed, the Escrow Agreement, Gilbert + Tobin's letter to GR Engineering of 28 June 2017 and to GR Engineering's notice seeking release of the share transfer. Squire Patton Boggs's letter continued as follows:

> The G&T Correspondence sets out details of a dispute in relation to the enforceability of the Guarantee (among other matters). In the circumstances, it is clear that a dispute appears to have arisen between the parties in relation to the Guarantee and the escrow arrangements.
>
> We note that clause 8 of the Escrow Deed provides that '*if a dispute arises between the Parties with respect to the escrow arrangements…*

> *the Escrow Agent may interplead all of the assets held in escrow by it under this Letter Agreement in a court of competent jurisdiction…*'
>
> Accordingly, in the context of this potential dispute, we cannot release the Share Transfer Form to GRES as requested in the Notice and we request that GRES outlines its position in respect of the matters set out in the G&T Correspondence on an urgent basis.
>
> (Emphasis in original)

29 On 30 June 2017 GR Engineering's solicitors sent a letter to Squire Patton Boggs again giving notice that GR Engineering required the release of the share transfer. Relying on cl 4.2 of the Escrow Agreement GR Engineering's solicitors argued that it was incontrovertible that Eastern Goldfields had not paid the $5 million by the expiration of the Cure Period and that the notice and the matters contained in it were genuine and thus there was no basis upon which Squire Patton Boggs could refuse to release the share transfer. GR Engineering's solicitors contended that:

(a) Squire Patton Boggs's purported reliance on cl 8 involved an 'ill-conceived interpretation' of the provision and one that gave rise to an inference that Squire Patton Boggs was using its position as escrow agent to benefit Eastern Goldfields and Investmet.

(b) Clause 8 could only be relied upon where there was a dispute with respect to the 'escrow arrangements' and not where there was a 'potential dispute' about the enforceability of other documents.

(c) Squire Patton Boggs had no entitlement to compel GR Engineering to respond to the matters raised in Gilbert + Tobin's letter of 28 June 2017.

30 GR Engineering's solicitors threatened to commence proceedings for an injunction to compel the release of the share transfer if Squire Patton Boggs did not release it voluntarily.

31 Squire Patton Boggs responded to GR Engineering's solicitors' letter of 30 June 2017 on the same day and rejected any allegation that it was using its position for the benefit of Eastern Goldfields or Investmet. In response to GR Engineering's solicitors' contentions regarding the interpretation of the Escrow Agreement Squire Patton Boggs stated:

> Your letter sets out your interpretation of the Escrow Agreement. We do not take a position on this interpretation other than to note that the letter dated 28 June 2017 from Gilbert + Tobin (G + T Letter) asserts that the Guarantee and Escrow Agreement are unenforceable and this conflicts with your view. We note that you have not addressed the matters raised in the G + T letter and that you do not consider that your client is obliged to. Our request was made in order to understand the position between the parties on what was, at the time of our earlier letter, a potential dispute. In the absence of a specific response to the issues raised in the G + T letter and your demand that we release the share transfers we understand your client to dispute the matters put forward in the G + T Letter. It is not our position as Escrow Agent to resolve the difference between the parties and this enlivens 8.1 of the Escrow Agreement.

32 On 4 July 2017 GR Engineering's solicitors sent a letter to Gilbert + Tobin attaching a draft writ of summons they were instructed to file to enforce payment of sums due under the Contract. The draft writ also named the second and third defendants as prospective parties. GR Engineering's solicitors' letter was copied to Squire Patton Boggs.

33 On 5 July 2017 Squire Patton Boggs responded to GR Engineering's solicitors' letter of 4 July 2017 and stated:

> In our letter dated 29 June to your client and in our letter dated 30 June to [GR Engineering's previous solicitors]'s we stated that we were willing to commence interpleader proceedings to resolve the issues between your client and Eastern Goldfields Limited. This remains our position. The proceedings will either be commenced by originating summons or if your client does commence proceedings, by summons in that matter.
>
> We note that the draft writ attached to your letter names Squire Patton Boggs as a defendant and seeks damages against us. We deny any liability for damages to your client. However, as we have previously advised the parties, we will otherwise abide by the orders of the court regarding the release of Escrow Documents that we hold.

34 On 5 July Squire Patton Boggs filed the consent orders setting aside the statutory demand. An order setting aside the demand was made on 17 July 2017.

35 On 10 July 2017 GR Engineering commenced the present action.

36 On 31 August 2017 Eastern Goldfields filed a summons pursuant to r 16(1) of the *Supreme Court (Arbitration) Rules 2016* seeking orders staying the action against Eastern Goldfields and referring the matter to

arbitration pursuant to an arbitration agreement contained in the Contract.

37 By chamber summons issued on 28 September 2017 Squire Patton Boggs applied for interpleader relief. The application expressed that nothing in the orders sought 'in any way limits or affects the plaintiff's claim in this action against the third defendant for damages for delay'.

38 The applications for a stay and for interpleader relief were heard on 3 November 2017.

39 Judgment was reserved and was delivered on 24 January 2018.[1] A stay of the action against Eastern Goldfields was granted. Interpleader relief was granted. In the course of reasons for judgment I stated:[2]

> I am also satisfied that Squire Patton Boggs faces competing claims from GR Engineering and Investmet. I am satisfied that there is a dispute between the parties 'with respect to the escrow arrangements' such that cl 8 of the Escrow Agreement is engaged.
>
> The most difficult issue for Squire Patton Boggs is what purpose is served by the grant of interpleader relief given that if the relief is granted it will not be released from the proceedings because it will still face GR Engineering's claim for damages. Furthermore, it could avoid becoming embroiled in the dispute about the enforceability of the Escrow Agreement by agreeing to abide by the outcome of the dispute between GR Engineering and Investmet. Ultimately Squire Patton Boggs' position on the issue of the utility or lack of utility served by interpleader relief is that it has a contractual right to that relief and it should not be denied whatever benefit is to be derived from the grant of it.
>
> Whilst I have reservations about the utility of the relief sought by Squire Patton Boggs I consider that it has a contractual entitlement to the relief sought by it and I will make an order substantially in the terms of [3] and [4] of its chambers summons of 28 September 2017.

40 The order giving effect to the interpleader relief was expressed as follows:[3]

> 1. The Third Defendant be granted relief by way of interpleader.
>
> 2. The Third Defendant hand over the document currently held by the Third Defendant in escrow, namely the executed Share

[1] ***GR Engineering Services Ltd v Eastern Goldfields Ltd*** [2018] WASC 19.
[2] ***GR Engineering Services Ltd v Eastern Goldfields Ltd*** [70] - [72].
[3] I observe that Order 3 contains a typographical error in its reference to 'Order 9', which ought to read Order 3.

> Transfer Form (as defined in para 138.4 of the amended statement of claim dated 14 August 2017) (Property), to the Principal Registrar or other officer of the Court.
>
> 3. No further action be brought by the Plaintiff or the First and Second Defendants against the Third Defendant in respect of the Property provided that nothing in this Order 9 in any way limits or affects the Plaintiff's claim in this action against the Third Defendant for damages for delay.
>
> 4. The costs of the Third Defendant's application for interpleader relief dated 28 September 2017 be reserved to the Trial Judge.

41 On 5 August 2019 judgment was entered against Investmet for damages to be assessed. Certain ancillary orders not presently relevant were made.

An overview of the parties' cases

GR Engineering's case

42 As outlined above GR Engineering's case involved two elements, first that the failure to release the share transfer was a breach of the Escrow Agreement and secondly that the breach constituted 'gross negligence' depriving Squire Patton Boggs of immunity from liability afforded by cl 7 and cl 8.2 of the Escrow Agreement.

43 The foundation of GR Engineering's case is the proposition that cl 4.2 of the Escrow Agreement imposed a strict requirement upon Squire Patton Boggs to release the share transfer provided, 'acting reasonably' there were no grounds for Squire Patton Boggs to believe that the notice or the matters set out in the notice were not genuine and that any amendments required to the share transfer pursuant to cl 3.3(d) of the Guarantee Deed had been made.

44 GR Engineering described the obligation to release the share transfer as Squire Patton Boggs's 'core obligation'. It maintained Squire Patton Boggs was obliged to release the share transfer to GR Engineering because it could not be contended that the matters set out in GR Engineering's notice were not genuine and no amendments were required to the share transfer.

45 GR Engineering described the interpleader provision as incidental to the broader purpose of the Escrow Agreement. It contended that it was not open to Squire Patton Boggs to use cl 8 to relieve itself of its core obligation to release the share transfer and that cl 8 could not be

relied on to relieve Squire Patton Boggs of liability where it had been grossly negligent by completely mistaking its obligations under the Escrow Agreement.

46 In support of its contention that the obligation imposed on Squire Patton Boggs by cl 4.2 was a strict one, GR Engineering relied upon the text of the Escrow Agreement, the commercial context in which the Escrow Agreement was made and its commercial purposes. GR Engineering described those commercial purposes as: avoiding the expense of litigation; providing GR Engineering with security; and providing an efficient transfer of value to GR Engineering in the event of a default by Eastern Goldfields in the payment of the $5 million.

47 GR Engineering contended that the obligations assumed by Squire Patton Boggs were analogous to the obligations assumed by a commercial bank that has given a performance bond.[4] It placed particular emphasis on the principle of autonomy that holds that the obligations of the issuing or accepting bank are not to be read as qualified by reference to the terms of the underlying contract between the parties. The ultimate point of GR Engineering's analogy was that once Squire Patton Boggs had satisfied itself that the notice and its contents were genuine the contentions raised by Gilbert + Tobin on behalf of Eastern Goldfields about the underlying transaction embodied in the Guarantee Deed were of no concern to Squire Patton Boggs and could not justify its failure to hand over the share transfer.

48 Extending the performance bond analogy GR Engineering submitted that in the circumstances in which Eastern Goldfields argued that there was no liability to pay the $5 million guaranteed by Investmet it was incumbent upon Eastern Goldfields to seek an injunction restraining the release of the share transfer in much the same way as a party who has provided a performance bond will often seek an injunction restraining its contractual counterparty from presenting the bond for payment.

49 GR Engineering argued that the provisions of cl 8 had a narrow field of operation. As a preliminary point GR Engineering argued that cl 8 should not be analysed in terms of conferring a 'right' to interplead because such a right existed by virtue of O 17 of the *Rules of the Supreme Court 1971* (WA). Its submission was to the effect that the only circumstance in which cl 8 was relevant was in the event that

[4] See ***Simic v New South Wales Land and Housing Corporation*** [2016] HCA 47; (2016) 260 CLR 85 (French CJ) [2] - [10].

Eastern Goldfields or Investmet applied for an injunction to restrain Squire Patton Boggs from releasing the share transfer. In that event if Squire Patton Boggs interpleaded the share transfer it would be relieved of liability.

50 GR Engineering submitted that s 5B(2) of the *Civil Liability Act 2002* (WA) (CLA) applied to the determination of the standard of care that had to be observed by Squire Patton Boggs because s 5A(2) provided that Part 1A of the CLA applied to claims for damages for harm caused by the fault of any person even if the damages are sought to be recovered in an action for breach of contract. 'Harm' includes any economic loss.[5] GR Engineering submitted that when account was taken of the factors listed in sub-paragraphs (a) - (d) of s 5B(2) of the CLA the standard of care required of Squire Patton Boggs was high and, in effect, a minor departure from the standard would amount to negligence and a major departure would more readily constitute gross negligence.

51 GR Engineering submitted that if, contrary to its primary case, Squire Patton Boggs's obligation to release the share transfer was not strict then cl 8.1 set a standard that had to be met before Squire Patton Boggs was entitled not to comply with a request to release the share transfer. The following conditions had to be satisfied before the standard was met: first, there had to be a dispute; second, the dispute had to be between *all* the Parties; and thirdly, the subject matter of the dispute had to be 'with respect to the escrow arrangements'. GR Engineering contended the cl 8 conditions were not fulfilled.

Squire Patton Boggs's case

52 Squire Patton Boggs's primary case rests on two propositions. First, on the proper construction of the Escrow Agreement cl 4 did not create a strict unqualified obligation to release the share transfer upon receipt of a valid notice to release because cl 8 entitled Squire Patton Boggs to interplead in the event of a dispute between the 'Parties' with respect to the escrow arrangements. Secondly, it was plain from the correspondence exchanged in the period between the issue of a notice of default on 22 June 2017 and Squire Patton Boggs's letter to GR Engineering's solicitors on 30 June 2017 that there was a dispute between all the 'Parties' about the escrow arrangements.

[5] *Civil Liability Act 2002* (WA) s 3.

53 Squire Patton Boggs argues that even if its construction of cl 4.2 and cl 8.1 was incorrect and its obligation to release the share transfer was strict, or, if it was incorrect in concluding that the 'standard' imposed by cl 8 was satisfied, it was not negligent or if it was negligent, it was not grossly negligent.

54 Squire Patton Boggs advances a secondary case based on the proposition that an issue estoppel arises from the conclusion recorded in my reasons published on 24 January 2018 that 'I [was] satisfied that there is a dispute between the parties 'with respect to the escrow arrangements' such that cl 8 of the Escrow Agreement is engaged'.[6] Squire Patton Boggs contends that part of the issue GR Engineering seeks to pursue had already been determined against it.

Analysis

The proper construction of the Escrow Agreement

55 The first issue involves reconciling the tension identified in the parties' submissions between the obligation imposed on Squire Patton Boggs to release the share transfer (provided the requirements of cl 4.2(a) and cl 4.2(b) are met) and the opportunity for Squire Patton Boggs to interplead provided by cl 8.1.

56 There was no dispute between the parties as to the principles applicable to the construction of commercial contracts. The meaning of the terms of a commercial contract are to be determined by reference to the understanding of a reasonable business person considering the text, context and purpose of the contract.[7] 'Context' means the entire text of the contract as well as any contract or document referred to in the text of the contract.[8]

57 In support of its submission that Squire Patton Boggs's obligation to release the share transfer was strict, GR Engineering drew attention to the following textual and contextual considerations:

(a) the absence in cl 4.1 of the Escrow Agreement of any explicit qualification on the obligation to release the share transfer in the

[6] ***GR Engineering Services Ltd v Eastern Goldfields Ltd*** [70].
[7] ***Electricity Generation Corporation v Woodside Energy Ltd*** [2014] HCA 7; (2014) 251 CLR 640. [35] (French CJ, Hayne, Crennan & Kiefel JJ); ***Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*** [2015] HCA 37; (2015) 256 CLR 104 [51] (French CJ, Nettle & Gordon JJ); ***Black Box Control Pty Ltd v Terravision Pty Ltd*** [2016] WASCA 219 (Newnes and Murphy JJA & Beech J) [42].
[8] ***Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd*** [46] (French CJ, Nettle & Gordon JJ).

event of a 'dispute between the Parties with respect to the escrow arrangements';

(b) the emphasis in cl 3 of the Escrow Agreement on Squire Patton Boggs's obligation to release and deal with the Escrow Documents *strictly* in accordance with the terms of cl 4;

(c) the limited nature of Squire Patton Boggs's duties as set out in cl 6; and

(d) the reference in cl 6.4(a) of the Escrow Agreement to the obligation of Squire Patton Boggs to recognise notifications or directions given under the agreement unqualified by any reference to the possibility of an interpleader application under cl 8.

58 GR Engineering reinforced the textual and contextual considerations identified above with its submissions about the context and commercial purpose of the transactions constituted by the Guarantee Deed and Escrow Agreement. In my view the transactions had at least four relevant purposes. The first was to compromise the statutory demand proceedings and thereby achieve a partial resolution of the disputes that had arisen under the Contract. In this respect it was significant that GR Engineering had been kept out of money that Eastern Goldfields accepted was due by it. The second was to provide security for the payment of $5 million. The third was to provide a broad framework for further discussions about the disputes between GR Engineering and Eastern Goldfields. The fourth was to lift GR Engineering's suspension of work under the Contract. Against that background it may be accepted (and was accepted by Squire Patton Boggs) that it was intended that the Escrow Agreement should provide an efficient mechanism for GR Engineering to realise the security constituted by the executed share transfer. It may also be accepted that the parties wanted to avoid further litigation.

59 The court must endeavour to construe a contract as whole, giving weight to all its clauses where possible; the court will strain against interpreting a contract so that a particular clause is rendered nugatory or ineffective.[9] In ***Australian Broadcasting Commission v Australasian***

[9] ***George 218 Pty Ltd v Bank of Queensland Ltd*** [No 2] [2016] WASCA 182; (2016) 313 FLR 287 [88] (Martin CJ, Newnes & Murphy JJA).

Performing Right Association Ltd,[10] Gibbs J, as his Honour then was, observed:[11]

> It is trite law that the primary duty of a court in construing a written contract is to endeavour to discover the intention of the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render them all harmonious one with another.

60 The inclusion of cl 8 in the Escrow Agreement must be weighed against the textual, contextual and commercial considerations identified by GR Engineering.

61 I am not persuaded that cl 8 should be construed as having the very limited field of operation for which GR Engineering contends. I do not accept that its provisions could only be invoked by Squire Patton Boggs in the event that Eastern Goldfields or Investmet applied for an injunction to restrain the release of the share transfer. As was submitted by Squire Patton Boggs this narrow construction is not supported by the text of cl 8 or indeed by the Escrow Agreement more generally. It is a very strained construction.

62 In my judgment cl 8.1 can be construed in a way that both recognises that it has a wider field of operation than accepted by GR Engineering and permits harmonious operation with cl 4.2 by simply giving the words in the clause their ordinary and natural meanings. The clause should be construed as relieving Squire Patton Boggs of the otherwise strict requirement to release the share transfer if 'there is a dispute between the Parties with respect to the escrow arrangements'. This is not a strained construction. It is a construction that reflects and gives weight to the text of cl 8. It is a construction that does not depend on characterising interpleader relief as a 'contractual right' but recognises (as submitted by GR Engineering) that the interpleader procedure is available by reason of O 17 of the *Rules of the Supreme Court*. It is a construction, however, that recognises that for Squire Patton Boggs to be able to avail itself of interpleader relief it must first be relieved of the obligation to release the share transfer to GR Engineering. It is difficult to understand how cl 8.1 could operate in

[10] ***Australian Broadcasting Commission v Australasian Performing Right Association Ltd*** [1973] HCA 36; (1973) 129 CLR 99.
[11] ***Australian Broadcasting Commission v Australasian Performing Right Association Ltd*** (109).

any other way and, with respect to GR Engineering's submissions, the construction set out above emerges plainly from the text of the clause.

63 I do not accept that construing the obligation to release the share transfer as qualified in the manner described above is contrary to 'business common sense' or does not accord sufficient weight to the commercial context and commercial purposes of the transactions. Of course, the construction preferred by me is not as favourable to GR Engineering as the construction for which it contends because construing cl 4.2 and cl 8.1 as permitting Squire Patton Boggs to avail itself of interpleader relief carries with it the potential for delay in the realisation of the security pending the determination of interpleader proceedings. In turn the delay carries with it the risk that the value of the shares might fall, (a risk illustrated in this case by the fall in the value of the shares originally proposed as security). That risk was, however, a risk inherent in GR Engineering taking shares as security, especially in circumstances in which GR Engineering accepted that it might not be able to transfer the shares into its name immediately because of the possible operation of Eastern Goldfields' 'Securities Trading Policy' (see cl 3.3(c) of the Guarantee Deed). The risk of delay and a fall in the value of the security did not negate, however, the commercial purpose of the transactions. Assessed objectively it was a risk accepted by GR Engineering as part of the bargain struck with Eastern Goldfields and Investmet.

64 Finally, the inclusion of cl 8 in the Escrow Agreement is a critical difference between the transaction embodied in that agreement and a performance bond. The analogy with performance bonds is thus flawed and this undermines GR Engineering's reliance on the principles applicable to performance bonds as supporting the construction for which it contends.

The meaning of gross negligence

65 It has been said of the term gross negligence that it has no legal significance in the law of torts and it is at worst meaningless and at best vague unless clearly defined.[12] It is not a term of art and its meaning falls to be determined by the application of the principles of contractual construction to which I have referred earlier. It is commonly found in exceptions to exclusion clauses exemplified in this case by cl 7 of the Escrow Agreement.

[12] *Fleming's The Law of Torts* (10th ed, 2011) [7.180].

66 In ***Red Sea Tankers Ltd v Papachristidis (The 'Hellespont Ardent')***[13] Mance J (as his Lordship then was) considered the following clause in a commercial contract:[14]

> Neither the Commercial Advisor nor any of its officers, directors, employees or agents shall be liable, responsible or accountable, whether directly or indirectly, in contract or tort or otherwise to the Corporation for any losses, claims, damages, liabilities or expenses … asserted against, suffered or incurred by the Corporation or any shareholder thereof arising out of, relating to or in connection with any action taken within the scope of duties of the Commercial Advisor under this Agreement … except, in each case, Damages resulting from acts or omissions of the Commercial Advisor which (a) were the result of gross negligence…

67 Mance J explained:[15]

> … the concepts of 'gross negligence' here appears to me to embrace serious negligence amounting to reckless disregard, without any necessary implication of consciousness of the high degree of risk or the likely consequences of the conduct on the part of the person acting or omitting to act.
>
> If the matter is viewed according to purely English principles of construction, I would reach the same conclusion. 'Gross' negligence is clearly intended to represent something more fundamental than failure to exercise proper skill and/or care constituting negligence. But, as a matter of ordinary language and general impression, the concept of gross negligence seems to me to be capable of embracing not only conduct undertaken with actual appreciation of the risks involved, but also serious disregard of or an indifference to an obvious risk.

68 Mance J went on to hold that the concept of gross negligence did not involve any subjective mental element of appreciation of risk but included 'conduct which a reasonable person would perceive to entail a high degree of risk of injury to others coupled with heedlessness or indifference to or disregard of the consequences' and the heedlessness or disregard need not be conscious.[16]

69 Australian courts considering the meaning of 'gross negligence' in the context of exclusion and indemnity clauses have followed the approach of Mance J in ***The 'Hellespont Ardent'***:

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[13] ***Red Sea Tankers Ltd v Papachristidis (The 'Hellespont Ardent')*** [1997] 2 Lloyd's Rep 547.
[14] ***The 'Hellespont Ardent'*** (579).
[15] ***The 'Hellespont Ardent'*** (586).
[16] ***The 'Hellespont Ardent'*** (587).

(a) In ***James Thane Pty Ltd v Conrad International Hotels Corp***,[17] Williams J (with whom McMurdo P and Thomas JA agreed) held that gross negligence clearly involved more than mere negligence.

(b) In ***Carter v The Dennis Family Corporation***,[18] Habersberger J explained that the term 'gross negligence' used in an employment contract connoted 'a grave, serious or significant departure from the standard of care which a reasonable person would have observed in all the circumstances'.[19]

(c) In ***Spartalis v BMD Constructions Pty Ltd***,[20] the Full Court of the Supreme Court of South Australia (Peek, Blue, & Parker JJ) held that gross neglect by an employee connotes a 'very serious disregard of an obvious risk or a grave departure from the standard of care expected of a reasonable employee in the same circumstances'.[21] Their Honours said the qualification of the words 'neglect of duty' by the adjective 'gross' was indicative of something 'well beyond what might ordinarily constitute negligence'.[22]

(d) Recently in ***DIF III – Global Co-Investment Fund LP v Babcock & Brown International Pty Limited***,[23] Ball J cited ***The 'Hellespont Ardent'*** in construing a similar exculpatory clause containing a 'gross negligence or wilful misconduct' carve out, and observed: [24]

> 'Gross negligence' is not a term with a precise meaning; and its meaning is to be ascertained from the context in which it is used. In some cases, it has been held to encompass more than mere negligence. However, any distinction between gross negligence and mere negligence is one of degree and not of kind. In other cases, the word 'gross' has been found to add no additional meaning in the circumstances.
>
> In the present case, in my opinion the phrase 'gross negligence' encompasses more than mere negligence, but it would at least

[17] ***James Thane Pty Ltd v Conrad International Hotels Corp*** [1999] QCA 516.
[18] ***Carter v The Dennis Family Corporation*** [2010] VSC 406.
[19] ***Carter v The Dennis Family Corporation*** [35].
[20] ***Spartalis v BMD Constructions Pty Ltd*** [2014] SASFC 124; (2014) 120 SASR 575.
[21] ***Spartalis v BMD Constructions Pty Ltd*** [90].
[22] ***Spartalis v BMD Constructions Pty Ltd*** [90].
[23] ***DIF III – Global Co-Investment Fund LP v Babcock & Brown International Pty Limited*** [2019] NSWSC 527.
[24] ***DIF III – Global Co-Investment Fund LP v Babcock & Brown International Pty Limited*** [306] - [307].

> include a deliberate decision not to undertake enquiries or investigations required by the contract. (citations omitted)

70 Conformably with the authorities to which I have referred, in the context in which the term 'gross negligence' is used in the Escrow Agreement I consider that it means something more than mere negligence and involves a serious or significant departure from the standard of care required of Squire Patton Boggs in discharging the obligations imposed on it by the Escrow Agreement. For the purposes of this case, at least, in my view the difference between mere negligence and gross negligence is best expressed as simply being one of degree.

Were the conditions specified in cl 8 satisfied?

Was there a dispute?

71 GR Engineering argues that for cl 8 to be enlivened what was required was a dispute and not a *potential* dispute and that all that had arisen was a potential dispute.

72 In Squire Patton Boggs's letter to GR Engineering of 29 June 2017 it stated that '…it is clear that a dispute appears to have arisen between the parties . . .' and a later passage in the same letter referred to a 'potential dispute'. In Squire Patton Boggs's letter of 30 June 2017 in response to GR Engineering's solicitors' letter of that date (in which it was contended in forceful terms that Squire Patton Boggs was in breach of its obligation to release the share transfer) Squire Patton Boggs explained that it had used the words 'potential dispute' because, at the time it sent the letter of 29 June 2017, GR Engineering had not responded to the matters raised in the Gilbert + Tobin's letter of 28 June 2017.

73 In my view there is no merit in GR Engineering's contention that all that had arisen was a potential dispute. The use by Squire Patton Boggs of the expression 'potential dispute' in its letter of 29 June 2017 should not distract from the reality of the situation. Gilbert + Tobin's letter to GR Engineering contending that GR Engineering had no entitlement under the escrow arrangements was sent by email at 4.15 pm on 28 June 2017. GR Engineering's solicitors sent the notice to release the share transfer to Squire Patton Boggs at 2.16 pm on 29 June 2017. GR Engineering's notice to release the share transfer made it plain beyond peradventure that it did not accept that it had no entitlement to call for the release of the share transfer. It was sent after

receipt of Gilbert + Tobin's letter of 28 June 2017 and, by necessary implication, constituted a rejection of the contention that GR Engineering had no entitlement to call for the release of the share transfer. If there was any room for doubt about the existence of a dispute (and I do not accept that there was) then that doubt was removed by GR Engineering's solicitors' letter of 30 June 2017 sent by email on that day at 2.43 pm.

Was the dispute 'with respect to the escrow arrangements'?

74 GR Engineering submits that if there was a dispute it concerned the issue of whether Eastern Goldfields was under any obligation to pay $5 million, the allegations of misleading conduct and the offsetting claims and not the 'escrow arrangements'. I do not accept that submission. At the forefront of the arguments raised by Gilbert + Tobin in its letter of 28 June 2017 was the contention that Eastern Goldfields had no primary obligation to pay $5 million and the consequences that flowed from this were Investmet had no liability as a guarantor and ' . . . [GR Engineering] has no entitlement under the escrow arrangements or otherwise to the Shares (as defined in the 'Guarantee)'. Although the initial focus of the dispute may have been the liability to pay the $5 million, the dispute was 'with respect to the escrow arrangements'.

Had a dispute arisen between all the Parties?

75 GR Engineering submits that any dispute that arose was not between 'the Parties' because it was not a dispute between *all* the Parties (that is GR Engineering, Eastern Goldfields and Investmet) but, at most, a dispute between GR Engineering and Eastern Goldfields. GR Engineering points out Gilbert + Tobin's letter dated 28 June 2017 in which it first challenged GR Engineering's entitlement to a release of the share transfer recorded that it was acting on behalf of Eastern Goldfields and no mention was made of Investmet. It was submitted on Squire Patton Boggs's behalf that in circumstances in which Mr Fotios was a director of both Eastern Goldfields and Investmet there was an air of unreality about the contention that there was not a dispute between all the 'Parties' simply because Investmet had not expressly articulated a position.

76 There are a number of matters which both highlight the commonality of interest between Eastern Goldfields and Investmet and give rise to an inference that as at 29 June 2017 Investmet's position in

respect of the escrow arrangements was the same as that of Eastern Goldfields.

77 Those matters are: first, Squire Patton Boggs acted on behalf of Eastern Goldfields and Investmet in the negotiations preceding the execution of the Guarantee Deed and the Escrow Agreement. Secondly, in an email sent by Mr Rear of Squire Patton Boggs to GR Engineering on 1 June 2017 Mr Rear recorded that Mr Fotios controlled Investmet. Thirdly, the Guarantee Deed and the Escrow Agreement were sent to Mr Fotios for execution and he signed them on behalf of Eastern Goldfields and Investmet. Fourthly, Mr Fotios also signed the share transfer on behalf of Investmet. Fifthly, the potential adverse effect on GR Engineering's ability to sell the shares as a consequence of Mr Fotios being a director of both Eastern Goldfields and Investmet was taken into account in cl 3.3(c) of the Guarantee Deed. The inference that Investmet's position was the same as that of Eastern Goldfields was not negated by the fact that Gilbert + Tobin recorded that it was instructed by Eastern Goldfields and did not mention Investmet.

78 I make a factual finding that as at 29 June 2017 Investmet disputed GR Engineering's entitlement to the release of the share transfer and that thus there was a dispute between all the 'Parties' in respect of the escrow arrangements. Subsequent events confirmed that this was so. In this action Gilbert + Tobin filed a memorandum of appearance on behalf of both Eastern Goldfields and Investmet and in March 2018 Gilbert + Tobin filed and served a defence on behalf of Investmet in which Investmet disputed that the escrow arrangements were binding and maintained that GR Engineering was not entitled to the release of the share transfer.

Disposition

79 It follows from the conclusions that I have reached on the construction of the Escrow Agreement and the existence of a dispute between the Parties with respect to the escrow arrangements that the first issue must be resolved in Squire Patton Boggs's favour: it did not breach the Escrow Agreement as alleged by GR Engineering.

80 In those circumstances the second issue does not arise for determination. I will, however, state in summary form the views that I would have come to had I resolved the constructional issue and the issue about whether cl 8 was engaged in GR Engineering's favour.

81 Had I concluded the issue of contractual construction in GR Engineering's favour I would necessarily have concluded that Squire Patton Boggs's failure to release the share transfer was a breach of the Escrow Agreement. In those circumstances Squire Patton Boggs would have been found to have adopted a construction of the Escrow Agreement that was held by this court to be incorrect. The constructional question was not straightforward and in the counterfactual under consideration I do not consider that making the constructional choice that it did would constitute gross negligence, if indeed it amounted to negligence.

82 Likewise if I assume that I had found on the facts that the conditions to be satisfied for cl 8 to operate were not met because there was not a dispute between all the Parties with respect to the escrow arrangements, I do not consider that making an incorrect assessment of those facts in the manner alleged by GR Engineering was an error of sufficient gravity as to constitute gross negligence.

83 Having regard to the conclusions I have expressed it is unnecessary for me to consider the issue estoppel argument raised by Squire Patton Boggs.

84 GR Engineering's action against Squire Patton Boggs will be dismissed.

85 By counterclaim Squire Patton Boggs seeks a declaration that GR Engineering is liable to indemnify it in respect of 'any liability (other than due to gross negligence or wilful misconduct) and its costs associated with the performance of the Escrow Agreement'. Squire Patton Boggs claims that it has suffered loss and damage in the form of the costs incurred by it in defending the claim brought by GR Engineering.

86 Clause 7.3 of the Escrow Agreement imposed a joint and several obligation upon the Parties to indemnify and hold Squire Patton Boggs harmless from any liabilities or claims, including reasonable legal fees, which Squire Patton Boggs may incur or sustain as a result of its performance under the Escrow Agreement except if the liability or claim was due to the gross negligence or wilful misconduct of Squire Patton Boggs.

87 In the light of the conclusions that I have reached in respect of GR Engineering's claim I consider that Squire Patton Boggs is entitled to the benefit of the indemnity provided for by cl 7.3 of the Escrow

Agreement. I will hear from the parties as to whether the declaration sought by Squire Patton Boggs is the appropriate relief in the circumstances.

88 I will hear the parties as to costs.

I certify that the preceding paragraph(s) comprise the reasons for decision of the Supreme Court of Western Australia.

JB
Associate to the Honourable Justice Tottle

5 DECEMBER 2019