EDITORIAL

John Twyford

Your Editor once heard his Honour Judge Amsberg in the NSW District Court describe legal costs in Shakespearean terms thus:

Costs droppeth as the gentle rain from heaven upon the place beneath: it is twice bless'd him that gives and him that takes. (Merchant of Venice, Act iv, Scene i).

In the first paper of this issue Justice Beazley explains the difference between offers to settle made pursuant to the principles stated in *Calderbank v Calderbank* and offers made pursuant to the Uniform Civil Procedure Rules 2005. Her Honour sets out with great clarity consequences of making offers under either regime. Depending on the outcome of the litigation and the heeding of the advice in the article, one or other of the parties referred to by the Bard will be happy. What is certain is that legal practitioners acting for clients in litigation must understand and apply the rules appropriately.

Patrick Mead carefully reviews the authorities relating to insuring and exclusion clauses in contract works policies. Clearly the cost of rectifying defect work is denied under such policies but a controversy arises as to the extent of the cover available for damage/loss consequent on the defective work. The author points to the fact that this will depend on the circumstances of the incident and the text of the policy.

Here, it is interesting to see how the need to replace a second and third coat of paint because of the failure of the primer coat can be characterised as resulting from defective work whereas the need to replace a layer of contract holding a fibreglass sewage tank in place was part of the defective work.

David Newey in a short note reminds us what every lawyer knows but does not always put into practice – the need to record agreements in writing.

Barry Tozer points to a situation that arose under Standards Australia's document AS4902–2000 where the latent condition clause was unaltered but the contractor nevertheless suffered a considerable loss because of changes to the definition clause. This was a change that could easily have been overlooked in a review of the terms of the contract and as the author remarked 'enough said'.

A very interesting article from the law firm Thomson Playford describes how the NSW Government is picking up the pieces after the HIH demise. A newly created government agency has assumed the liability to HIH policy holders under the terms of the home owner's warranty policy and after making payouts for defective work has sought to recover from the delinquent contractors. The author (and apparently the agency) does not rate the chances of recovery highly.

Nick Rudge and Lucinda Hill note how careful drafting of amendments to AS2124–1992 can give the superintendent an absolute discretion in exercising his or her reserve power to grant an extension of time. In the case under discussion this had serious delay consequences for the contractor.

From time to time many of us have heard the London Court of International Arbitration praised for its competence and fairness without really knowing much about how the court works. Clearly, international arbitration is the appropriate way to resolve commercial disputes between

parties of different nationalities. Richard Harding, in a detailed article, makes it clear just how the court works. The work is developed by reproduction of some of the relevant rules of the court.

Every law student is familiar with the case of *Hadley v Baxendale*. It is encouraging to know that the authority is still attracting attention. Andrew Kelly discusses the case in the context of contractual clauses intended to exclude liability for consequential loss. In doing so he offers some helpful advice for both contractors and principals.

Paul Muscat draws our attention to the substantial fines being imposed (by the Queensland courts) on developers whose operations pollute adjacent waterways. Here we have come a long way since *Mayor of Bradford v Pickles* [1895] AC 587!

Nick Rudge and Anna Thwaites discuss the question of whether or not a subcontractor owes a duty of care to a subsequent purchaser of a building. The article refers to an illuminating discussion by Byrne J of the Victorian Supreme Court as to the meaning of the expression 'vulnerability'.

Doug Jones continues the discussion of commercial arbitration with some timely advice as to the precision needed in drafting arbitration clauses.

Geoff Wood, Andrew Chew and Benjamin Urry discuss the application of OH&S regimes to alliance partners.

James Thompson describes the role of causation in negligence cases. The 'but for' test with which most of us are familiar has undergone some refinement; mostly from the House of Lords.

Scott Budd and Philip Woods discus a decision of the High Court reversing a decision of the Court of Appeal of South Australia allowing a subcontractor to sue a principal on the basis of unjust enrichment. Had the South Australian decision stood, a real Pandora's Box would have been opened.

Finally, Robert Fenwick Elliot has been kind enough to review a book edited by Keith Pickavance entitled *Construction Law and Management*. Clearly, the book will be of interest to many ACLN readers.