

COURT REJECTS BANK'S CLAIM THAT MISDESCRIPTION IN BONDS PRECLUDED FULFILMENT OF BONDS

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Legal Briefings - By **Andrew Eastwood** and **Simone Fletcher**

Simic v New South Wales Land and Housing Corporation [2016] HCA 47 is an important reminder of the utility of the equitable remedy of rectification, with the High Court confirming that while at law a written instrument which contained an incorrect name and ABN would be construed as a reference to that (incorrect) entity, the parties will in equity be taken to have intended that the correct party be named.

Nebax Constructions Pty Limited (Nebax) had contracted with New South Wales Land and Housing Corporation (the Corporation) for certain demolition and construction work. The bank issued two performance bonds, which incorrectly referred (by name and ABN) to New South Wales Land & Housing Department rather than the Corporation. Since the principal named in the bonds did not exist, the bank refused to honour them.

At first instance and before the NSW Court of Appeal, the bank was ordered to pay the amounts owing to the Corporation on the basis that an incorrect name and ABN of the beneficiary did not preclude the fulfilment of the bonds, because it could be construed that the Corporation was the intended entity.

On appeal, the Court held that the lower courts' construction was not open because the Corporation and a 'department' of the New South Wales Government are legally distinct. References to the underlying contract in the bonds were irrelevant for the purposes of construction since the bank was not required or intended to be concerned with the terms of the underlying contract, given the nature of performance bonds and guarantees. The Court endorsed the principle of 'autonomy'.

However, the Court held that recourse could be had to the equitable remedy of rectification in order to make a written instrument conform to the true agreement of the parties where the writing by common mistake fails to accurately express that agreement (which, in this case, was clearly that the Corporation be the stated principal under the bonds).

This article is part of a series highlighting a six judgments in the retail banking sector delivered by Australian courts last year covering a range of issues arising in banks' engagement with their clients, contractual arrangements and the application of standard terms and conditions. The cases provide a number of cautions for banks seeking to navigate through various traps. [Click here](#) to view the full list.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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