Brian Leigh Smith & Gillian Kenway v Coastivity P/L & Philip Martin [2008] Adj.L.R. 04/11

JUDGMENT . McDOUGALL J . Supreme Court New South Wales, Equity Division, T&C List. 11th April 2008

1 The plaintiffs (the Owners) and the first defendant (Coastivity) were parties to a deed made on 2 March 2006. By that deed, the parties agreed to carry out the "Project" defined in it: the development of certain land at Tweed Heads by the construction on that land of six residential units. The Owners agreed to contribute the land, and Coastivity its skills as a developer. Profits or losses from the venture were to be shared in agreed proportions. The Owners purported to terminate the deed by letter dated 26 October 2006. Coastivity seeks payment for services provided by it prior to termination. It sought to use the mechanisms of the *Building and Construction Industry Security of Payment Act* 1999 (the Act). The essential questions for decision are whether that Act is applicable, and whether the decision of an adjudicator upon a payment claim made by Coastivity is valid or void.

The issues

2 The issues raised by those questions are:

(1) Whether under the deed Coastivity undertook to supply related goods and services for another party;

(2) Whether under the deed the consideration for such related goods and services as Coastivity might have undertaken to supply was to be calculated other than by reference to the value of those goods and services; and

(3) Whether, if the first issue were to be answered "no" or the second issue were to be answered "yes", there were any available discretionary grounds for the refusal of relief to the Owners.

3 It was common ground that the first and second issues raised questions as to one of the basic and essential requirements for the existence of a valid adjudication determination: namely, the existence of a construction contract to which the Act applied. See ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSW LR 421 at 441 [53] (Hodgson JA, with whom Mason P and Giles JA agreed). Although the written outline of submissions for Coastivitiy suggested that in one respect the Owners' challenges did not raise what I might call any "***Brodyn***" ground for review, Mr Scruby of counsel, who appeared for Coastivity at the hearing, renounced the point.

The deed

4 The background to and purposes sought to be achieved by the deed were set out in its recitals:

A. The Owners are the Registered Proprietors of land situated at 40 Dry Dock Road, Tweed Heads South in the State of New South Wales and being the whole of the land contained in Folio Identifier B/385567 (hereinafter called "the Land").

B. Coastivity is a developer and has certain skills in developing residential land.

C. The Parties are desirous of constructing upon the land a residential development consisting of six (6) residential units (hereinafter called "the Project").

D. The intention of the Parties in undertaking the Project upon the Land is to sell all units in the Project and to contribute to the Project and share the profit and loss from the Project as set out in this Deed.

E. The Parties have agreed to enter into this Deed of Agreement for the purposes of conduct the project.

5 Operative provisions of the deed on which the parties placed reliance included clauses 2, 3, 4, 5 and 7:

2. Contribution

(a) The Owners will contribute the land to the Project, and the parties agree that for the purposes of this Deed, the Land is valued at $450,000.00 and is subjected to an existing mortgage of approximately $270,000.00. The title to the land will remain registered in the name of the Owners.

(b) Coastivity will co-ordinate equity raising of $200,000.00 from private investors which may be itself and/or other investors in the project. These funds will form an opening balance of the bank account and will be used as required by the project including the paying of preliminary costs. These funds are to be distributed by agreement with all Parties.

(c) The balance of the funds to complete the project will be borrowed from a financial institution and will be secured over the land by First Mortgage. The loan funds will be drawn progressively and used to pay contractual costs with the builder, and other costs of the project.

3. Distribution of Property

(a) Upon the sale of the units in the Project the proceeds will be distributed as follows:-

(i) All Real Estate Agent's commission and legal costs of the sale;

(ii) Mortgagee repayments as required by the Mortgagee;

(iii) Repayment of all other borrowings (whether form Coastivity or a third party);

(iv) Payment of all other costs associated with the Project.

…

(vi) The sum of $450,000.00 less initial mortgage held by the Owners to the Owners.

(vii) The balance to be divided as to:-

(a) Sixty one (61%) to the Owners;

(b) Twenty five percent (25%) to Coastivity;

(c) Fourteen (14%) to the private investors who contribute funds in accordance with Paragraph 2.

(b) Should the sale of the units fail to realize a profit, then any loss shall be paid as to:-

(i) Seventy percent (70%) by the Owners.

(ii) Thirty percent (30%) by Coastivity.

4. Appointment of Builder

(a) The parties acknowledge that Garry Charles Watson is a Director of Coastivity and is also a Registered Builder.

(b) The parties agree to contract with Garry Charles Watson to build the project at construction cost plus fifteen percent (15%) plus G.S.T. The contract shall be a standard building contract.

(c) When working plans become available, Coastivity agrees to provide as accurate as possible full estimate summary of cost for the construction of the project and agrees to keep the Owners informed at all reasonable times of the cost of the project during the course of construction.

5. Appointment of Project Co-Ordinator

(a) The Parties acknowledge that the Owners shall be entitled to have input in respect of the design of the project. However Coastivity will co-ordinate all preliminary enquiries including:-

(i) Equity raising as required in Paragraph 2 above;

(ii) A design concept including working with all consultants, town planners, architects and engineers.

Upon approval of the project by the Tweed Shire Council then the parties agree that Coastivity will be the Project Co-Ordinator and will control, manage, co-ordinate and supervise the Project and will cause the Project to be carried out with the due expedition. Coastivity will also co-ordinate all sales marketing.

(b) The Owners, as Registered Proprietors of the land will sign all necessary documents as required to enable the Project to proceed.

(c) A Bank Account will be established in the name of all Parties for the Project, which shall require the signature of one of the Owners and Coastivity to operate.

7. Dealings with Property

(a) The Owners acknowledge that they must not sell, transfer or assign their interest in the Land other than provided for in this Deed without the previous written consent of Coastivity.

(b) The Owners consent to Coastivity registering a caveat over the land (at the cost of the project) to protect it's interest in this Agreement.

(c) This Deed shall give to Coastivity an interest in the Land upon the terms and conditions set out herein.

6 Clause 3(a)(v) was deleted, and the deletion was initialled.

Negotiations leading to the making of the deed

7 The parties negotiated in the latter half of 2005 and the early part of 2006 to carry out the "Project" defined in recital C, or some similar project. From time to time, they produced and revised spreadsheets which set out the estimated costs that would be incurred and the estimated return that would be generated. The spreadsheets also set out how the estimated return would be distributed.

8 An early version of the spreadsheet projected a net profit of $404,976.00. It suggested that from this so called net profit, Coastivity would be paid a fee for management of $22,500.00 "on purchase of site and start on BA", and a further fee of $99,900.00 "paid in equal monthly amounts (in arrears)" thereafter. There was thus derived a "profit after expenses" of $282,576.00. (The combination, in the one document, of the concepts of "net profit" and "profit after expenses", in differing amounts, may seem to be incongruous; but nothing turns on this.) The net profit after expenses so derived was shown to be distributed as to 65% to "investors" (the Court was informed, without objection, that this referred to the Owners) and as to 35% to Coastivity. Coastivity's 35% was quantified at $98,802.00 and this was designated, in handwriting, as a "development fee".

9 A subsequent version of the spreadsheet was produced (according to a handwritten notation) on 23 February 2006 (less than two weeks before the deed was made). It was annotated in hand "Spreadsheet on which agreement to go ahead". That spreadsheet computed a "net profit" of $396,932.00. There being no additional expenses (i.e, no amounts to be paid "for management" to Coastivity, as in the prior spreadsheet), the "profit after expenses" was shown in the same amount. That profit was to be distributed as to 75%, or $297,699.00, to the Owners; and as to 25%, or $99,233.00, to Coastivity. The Owners' share of profit was said to be "r*eturn for putting up land*". Coastivity's share was said to be its "development remuneration."

10 In its submission to the second defendant (the adjudicator), Coastivity said that the sum of $99,233.00 (which I infer to be the sum referred to in the most recent version of the spreadsheet) was "development costs allocated to it to pay accounts… and also to compensate it for fees for wages and outgoings in coordinating consultants… as well as the ongoing construction management". (If the "accounts" in question were expenses of the project, that submission was incorrect as clause 3 of the deed makes clear.) Coastivity also said in those submissions that the latest version of the spreadsheet was the basis of the "estimate financials" in the deed – i.e, as I understand it, the basis on which the division of profit (should it have materialised) was to be carried out.

Work performed by Coastivity

11 Mr Garry Watson, the director of Coastivity referred to in clause 4 of the deed, gave evidence of work actually carried out by Coastivity in relation to the project between March and September 2006. He said that the work included the following matters:

(1) Obtaining valuations of the land;

(2) Engaging third parties to carry out work for the development such as preparing drawings or reports;

(3) Calling for and receiving fee proposals and tenders;

(4) Calling for and receiving reports on the development;

(5) Providing instructions to others in relation to the development;

(6) Seeking finance for the development; and

(7) Undertaking "works to clear boundary corners at the property for the purpose of having the land surveyed".

The payment schedule, adjudication application and determination

12 It appears to be common ground that the Owners' "termination" of the deed was effective to discharge the parties from any future performance obligation. In passing, I note that by their letter of 26 October 2006, the Owners undertook to pay "any outstanding invoices pertaining to obtaining the DA".

13 On 16 March 2007, Coastivity served on the Owners a document purporting to be a payment claim under the Act. It claimed $53,109.33. The amount claimed fell into some five categories:

(1) Amounts paid "to consultants, contractors and service suppliers to obtain Development consent …"

(2) Builder's margin on expenditure calculated at 15% in accordance with clause 4 of the deed;

(3) Interest on funds said to have been contributed to the joint venture;

(4) Administration costs for telephone, postage and photocopying and stationary expense; and

(5) "Project coordination, consulting and management fee for works carried out and submission of plans for council DA approval and preliminary constructions works".

14 The last item was broken up into what were called "related goods and services", including design, surveying and other costs; and what was called "construction work", including some site clearing and the boring of test holes for soil testing. The total amount claimed for the fifth item - $33,000.00 (representing 330 hours of work at a rate of $100.00 per hour) was not allocated between the related goods and services and construction work to which reference was made.

15 The Owners neither provided a payment schedule nor paid the claimed amount. Accordingly, on 29 March 2007, Coastivity notified the Owners of its intention to proceed to adjudication (see s17(2)(a) of the Act). The Owners did not avail themselves of this further opportunity to provide a payment schedule.

16 On 13 April 2007, Coastivity applied to an authorised nominating authority, Adjudicate Today, for adjudication of its payment claim. Adjudicate Today, referred the application to the adjudicator, who accepted the application on about 17 April 2007.

17 The adjudicator made his determination available to the parties on about 3 May 2007. In relation to the five categories of claim that I have summarised above, he determined as follows:

(1) He allowed this item in the amount claimed, $10,054.52.

(2) He did not allow this item, on the stated ground that the deed "does not define what constitutes a construction cost and whether the expenditures are included in the construction costs". Accordingly, he was not "satisfied… that the expenditure is excluding in the construction costs".

(3) He did not allow this item either, on the basis that he was not satisfied that Coastivity had demonstrated "any entitlement to the interest charged as claimed".

(4) He allowed this item in the amount claimed, $260.00.

(5) He allowed this item in the amount claimed, $33,000.00. The adjudicator "reviewed the documents submitted" and was "satisfied that [Coastivity] has carried out the project coordination and [accepted] the amount claimed of $33,000.00 as the value of this work."

18 The adjudicated amount was thus $47,645.97. The adjudicator determined also that the Owners should pay adjudication fees, in the amount of $1,925.00.

19 Coastivity has recovered judgment against the Owners for an amount representing the adjudicated amount together with the adjudication fees and interest.

First issue: related good and services

Relevant provisions of the Act

20 By s4 of the Act, a construction contract is defined to mean "a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party".

21 I pause to note two things:

(1) Neither counsel dwelt on the concluding words of the definition ("for another party"). I am prepared to assume, but do not hold, that the qualification conveyed by those words will be met if one party to a contract performs construction work, or supplies related goods and services, for the joint benefit of itself and another party to that contract, even if their relationship under the contract should be characterised as one of partnership or joint venture.

(2) The only candidate which Coastivity propounded as constituting a construction contract was the deed.

22 Construction work is defined by s5 of the Act, and related goods and services are defined by s6. Although most of the debate focused on related goods and services, it is necessary to have regard to s5 to the extent that one of Coastivity's subsidiary arguments referred to s5 (1)(e). I set out those sections:

5 Definition of "construction work"

(1) In this Act, construction work means any of the following work:

(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures forming, or to form, part of land (whether permanent or not),

(b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, power-lines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for purposes of land drainage or coast protection,

(c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems,

(d) the external or internal cleaning of buildings, structures and works, so far as it is carried out in the course of their construction, alteration, repair, restoration, maintenance or extension,

(e) any operation which forms an integral part of, or is preparatory to or is for rendering complete, work of the kind referred to in paragraph (a), (b) or (c), including:

(i) site clearance, earth-moving, excavation, tunnelling and boring, and

(ii) the laying of foundations, and

(iii) the erection, maintenance or dismantling of scaffolding, and

(iv) the prefabrication of components to form part of any building, structure or works, whether carried out on-site or off-site, and

(v) site restoration, landscaping and the provision of roadways and other access works,

(f) the painting or decorating of the internal or external surfaces of any building, structure or works,

(g) any other work of a kind prescribed by the regulations for the purposes of this subsection.

(2) Despite subsection (1), construction work does not include any of the following work:

(a) the drilling for, or extraction of, oil or natural gas,

(b) the extraction (whether by underground or surface working) of minerals, including tunnelling or boring, or constructing underground works, for that purpose,

(c) any other work of a kind prescribed by the regulations for the purposes of this subsection.

23 The regulations have not prescribed work for the purposes of s5(2)(c), or goods and services for the purposes of s6(1)(c) or s6(2).

The Owners' submissions

24 Mr Jennings of counsel, for the Owners, submitted that:

(1) The relevant focus is on what Coastivity undertook pursuant to the deed to do;

(2) None of the obligations cast on Coastivity by the deed fell within the definition of related goods or services (with the exception of the subsidiary argument to which I have referred, it was common ground that those obligations did not amount to an undertaking to carry out construction work);

(3) Nor, to the extent that it was relevant, did any of the work that according to Mr Watson Coastivity actually performed fall within the definition of related goods and services.

25 Mr Jennings submitted that, for activities to be related goods and services, they must:

(1) Be supplied "in relation to construction work" (s6(1)); and

(2) Fall within one or other of the categories listed in s6(1)(a) (as to goods) or (b) (as to services).

26 Mr Jennings submitted that, there being no question of the supply of goods, the claims stood or fell as one for the supply of services. On that basis, he submitted, it failed, because neither the services that Coastivity undertook pursuant to the deed to provide, nor the services that in fact it provided, fell within any of the categories listed in para (b).

27 Mr Jennings did not submit that what might be called project management activities could never amount to related services. Nor did he submit that the activities apparently coordinated and managed by Coastivity could not be related services. His submission was that the management and coordination of the provision of those services was not itself a related service, because it was neither the provision of a service of the kind referred to in para (b)(ii) nor an advisory service of the kind referred to in para (b)(iii).

28 At this point, I should note that it was common ground that in s6(1)(b)(iii), the words "advisory services" qualified each of the preceding described services:

"building, engineering, interior or exterior decoration or landscape".

29 Although the language of the subparagraph is expressed with less than complete clarity, I think that the common ground taken by the parties on this point of construction is correct.

Coastivity's submissions

30 Mr Scruby submitted that Coastivity's role as project coordinator did impose on it obligations whereby it undertook to supply related goods and services. He referred in particular to:

(1) The obligation under the first part of clause 5(a) to "coordinate all preliminary enquiries including… [a] design concept including working with all consultants, town planners, architects and engineers"; and

(2) The obligation under the second part of clause 5(a) to act as "Project Co-Ordinator" and to "control, manage, coordinate and supervise the Project and… cause the Project to be carried out with… due expedition".

31 Mr Scruby submitted that these obligations fell within s6(1)(b)(iii) or alternatively within s6(1)(b)(ii).

32 In this context, Mr Scruby submitted that Coastivity's obligations of necessity extended beyond mere coordination etc and must have extended to what he called "interacting with the Owners" in the performance of those obligations. That interaction, he submitted, must have been by way of advice. Thus, he submitted, there were advisory services of the kind referred to in subpara (iii).

33 Further, Mr Scruby submitted that the obligations undertaken by Coastivity pursuant to the first part of clause 5(a) of the deed were operations which were preparatory to construction work of the kind referred to in s5(1)(a) or (b) or (c). Thus, he submitted, those services should be regarded as themselves constituting construction work. (This is what I have referred to earlier as a subsidiary argument based on s5.)

Decision

34 The question to be decided in relation to this issue requires attention to be focused on the obligations that are undertaken under the contract that is alleged to be a construction contract. Work in fact performed is at best of limited relevance. If it can be seen as falling within the obligations undertaken, it goes no further than the contract (although it may provide concrete examples, or demonstrations, of the obligations undertaken). To the extent that it goes further than the contract, it is presumably to be regarded as having been undertaken under some sort of variation or ad hoc agreement. In this case, as I have said, the only candidate for the role of "construction contract" was the deed; and neither party suggested that there had been any variation to it.

35 The definition of "construction contract" does not require that all the work undertaken to be performed, or all the goods and services undertaken to be provided, pursuant to the contract should be construction work or related goods and services as defined. It is sufficient if some of them fall within the definition. Thus, it is not to the point that some of the obligations undertaken by Coastivity (for example, in relation to raising finance) do not amount to related services. The question must be whether any of the other obligations undertaken fall within the statutory definition.

36 The prefatory words to s6(1)(b) are "services of the following kind". The following subparagraphs enumerate four different kinds of services in subpara (ii) and five different kinds of advisory services in subpara (iii). For a service to be a related service then (leaving out the provision of labour – subpara (i)), it must correspond substantially to one of the nine services listed.

37 It follows that Coastivity's reliance on subpara (ii) must fail. It was not obliged to provide architectural, design, surveying or quantity surveying services in relation to the construction work that undoubtedly would be performed if the deed had been carried into execution. Nor, to the extent that it matters, did any of the services actually provided by Coastivity fall within any of those categories.

38 For essentially similar reasons, Coastivity's submissions based on subpara (iii) must also fail. Even if Coastivity should be regarded as having performed advisory services of some sort (and the payment claim does not assert that it did), they were not advisory services of one or other of the listed kinds.

39 In truth, I think, Coastivity's case based on either subpara (ii) or subpara (iii) can succeed only if the introductory words to para (b) are to be read as "services of the following kind, or in relation to such services". But the introductory words do not so read; and there is no basis for implying them by some process of construction.

40 I accept that the performance of Coastivity's obligations under clause 5(a) would have required it to coordinate, or control, manage, supervise and coordinate, the provision of services falling within either or both of subparas (ii) and (iii). But it did not thereby undertake itself to provide those services; and, on the evidence, it did not do so.

41 That leaves the subordinate argument based on s5(i)(e). There are at least three problems. The first is that the Act consistently differentiates between the carrying out of construction work on the one hand and the supply of related goods and services on the other. That distinction may be seen in:

(1) s3(1) of the Act (setting out the object of the Act);

(2) the definition of "construction contract" in s4;

(3) the exception set out in s7(2)(c);

(4) the statutory right to progress payments given by s8(1) and in the following sections dealing with the reference date on which that right accrues and the quantification of that right;

(5) s13(2)(a), (identifying a requirement to be set out in a payment claim); and

(6) s22(4) (dealing with the way in which a prior determination of the value of construction work or related goods and services is to be treated in a subsequent adjudication).

42 It would be strange, to say the least, if that careful differentiation could be elided by the proposition inherent in Mr Scruby's subsidiary submission.

43 The second problem is that more than elision may be involved. If the submission be correct, there would be no point in the distinction between construction work and related services, because all of the services described in s6, if in truth they amount to "operations", could be said to form an integral part of, or to be preparatory to, or required to render complete, construction work of the kind described in s5(1)(a), (b), and (c).

44 The third problem (related to the second) is one to which I have just adverted: the difficulty of characterising the provision of a service as an "operation", particularly having regard to the nonexclusive list of operations in subparas (i) to (v) of s5(i)(e).

45 It follows that Coastivity did not undertake under the deed to provide related good or services, nor did it undertake to carry out construction work.

Second issue: calculation of consideration

46 This issue arises if I am wrong in my conclusion that Coastivity did not undertake under the deed to carry out construction work or to supply related goods and services for another party.

Relevant provisions of the Act

47 Section 7 of the Act sets out the circumstances in which the Act does, and does not, apply to construction contracts. Section 7 (2)(c) provides:

7 Application of Act

…

(2) This Act does not apply to:

…

(c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.

48 Section 7(5) provides that the Act does not apply to any construction contract, or class of construction contract, prescribed by the regulation for the purposes of s7. No contract, or class of contracts, has been prescribed.

49 As I have noted already, s8 of the Act gives a statutory right to progress payments, and s9 sets out the way in which the amount of a progress payment is to be ascertained. By s9(b), if the contract does not provide for the calculation of the amount of the progress payment, it is to be "calculated on the basis of the value of construction work carried out or undertaken to be carried out… (or of related goods and services supplied or undertaken to be supplied) under the contract".

50 Section 10 sets out how construction work and related goods and services are to be valued. Subsection (2) reads as follows:

10 Valuation of construction work and related goods and services

…

(2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued:

(a) in accordance with the terms of the contract, or

(b) if the contract makes no express provision with respect to the matter, having regard to:

(i) the contract price for the goods and services, and

(ii) any other rates or prices set out in the contract, and

(iii) any variation agreed to by the parties to the contract by which the contract price, or any other rate or price set out in the contract, is to be adjusted by a specific amount, and

(iv) if any of the goods are defective, the estimated cost of rectifying the defect,

and, in the case of materials and components that are to form part of any building, structure or work arising from construction work, on the basis that the only materials and components to be included in the valuation are those that have become (or, on payment, will become) the property of the party for whom construction work is being carried out.

51 Before I move to the parties' submissions, I should note that:

(1) Neither party submitted that the exception from operation of the Act set out in s7(2)(b) – relating to the carrying out of the residential building work in certain circumstances – applied; and

(2) Coastivity did not submit that if on its proper construction the consideration for any related goods and services supplied by Coastivity were to be calculated otherwise than by reference to the value of the goods and services supplied, then there was a question raised under s34 of the Act (which deals with contracting out and related matters).

The Owners' submissions

52 Mr Jennings submitted that the only "consideration payable" to Coastivity for the performance of its obligations under the deed was to be found in the agreement for the division of any profit that might be made. He submitted that although the profit was to be calculated after taking into account all expenses (including, no doubt, expenses incurred or authorised by Coastivity in the performance of its obligations under clause 5(a)), it did not amount to anything that could be described as a valuation of the services involved in the performance of those obligations.

53 Mr Jennings submitted that this conclusion did not undermine the legislative purpose stated in s3(1) of the Act, or the underlying philosophy enunciated in the second reading speech to the extent that this was relevant. He submitted that the deed provided for what was in all but name a joint venture under which each party was to

contribute disparate (and indeed incommensurable) resources, and was entitled to share, in defined ways, in the success or failure of the project. Mr Jennings submitted that the Act on its proper construction was not intended to apply, and did not apply, to joint venture agreements.

54 Further, Mr Jennings submitted, clause 3 of the deed, construed in context, did not give Coastivity any right to remuneration. It defined the services that Coastivity was to provide. The only consideration payable for those services was, as already indicated, the entitlement to share in any profit.

55 Mr Jennings submitted that the deed was not ambiguous. However, if it were, he submitted that the Court could take into account, in resolving any ambiguity, the matters of history to which I have referred above. He placed particular reliance on the last spreadsheet, which made the point that Coastivity's only entitlement to remuneration was to be found in the profit share arrangements, and on the way in which Coastivity had described that spreadsheet in its submissions to the adjudicator.

Coastivity's submissions

56 Mr Scruby submitted first of all that even if the only right that Coastivity had was its right to share in any profit made, that nonetheless represented the value of the services provided by Coastivity in earning that profit share. He pointed to cases dealing with the phrases "determined by reference to" and "by reference to" in different statutory contexts. For the former, Mr Scruby relied on the decision of Cripps JA in ***Miller v CSR Timber Products Pty Ltd*** (1993) 29 NSWLR 611 at 625, dealing with the *Workers Compensation Act* 1987 (NSW). For the latter, Mr Scruby relied on the decision of Weinberg J in ***Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission*** (1998) 91 FCR 8 at 30 (dealing with the *Racial Discrimination Act* 1975 (Cth)).

57 Mr Scruby's next submission focused on the claims that the adjudicator allowed. He submitted that each was calculated by reference to the value of the services provided. Thus:

(1) The first item allowed – consultants' and contractors' charges – reflected the value of the underlying services as calculated by the service providers in their invoices;

(2) The second item allowed – administrative costs – reflected the actual costs of the services in question; and

(3) The third item allowed – Coastivity's charges for its (i.e. Mr Watson's) time - was valued at an hourly rate of $100.00.

58 In the alternative, Mr Scruby relied on clause 3(a)(iv) of the deed, which required the "payment of all other costs associated with the Project" before any payment out to the parties was made. This, he submitted, extended to the repayment to Coastivity of preliminary and preparatory costs such as that claimed by it.

Decision

59 Some indication of what the legislature had in mind when it referred to the concept of value is to be found in s10: specifically, as to related goods and services, in ss(2). Section 10 makes reference to the kinds of matters that one would ordinarily expect to be considered in valuing construction work (ss(1)) or related goods and services (ss(2)). Although s7 appears in Part 1 of the Act and s10 appears in Part 2, there is no reason to think that the legislature intended that value, for the purposes of s7, should be anything different to the concept of value described in s10. Section 10, after all, states how construction work and related goods and services are to be valued; and the value of construction work or related goods and services is one of the referents in s7(2)(c).

60 There are other problems confronting this part of Coastivity's submissions. The first is that it is necessary, for the purposes of those submissions, that the profit share mechanism is to be regarded as the contractual method for valuing (in this case) related goods and services supplied by Coastivity under the deed. In other words, for the purposes of s10(2)(a), the profit share arrangement constitutes "the terms of the contract" that provide how related goods and services are to be valued. Plainly enough, that process of valuation can only be conducted once the project has been brought to completion and final accounts can be taken. But if the deed is a construction contract, Coastivity would be entitled to progress payments on a monthly basis (s8(2)(b)). (Mr Scruby did not submit that this was a contract providing for only one reference date – namely, at the completion of the project and the taking of accounts. If I may say so, he was wise not to do so, since it would mean that the payment claim was hopelessly premature.)

61 Mr Scruby sought to counter this problem by saying that monthly progress payments could be valued in accordance with s10(2)(b). But it is difficult to reconcile that with the proposition that it is necessarily inherent in his primary submission: namely, as I have said, that the profit share mechanism provides the contractual method for determination of the value of the services supplied by Coastivity.

62 I accept that the words "by reference to" are capable of indicating a broad relationship between the concepts, or things, that they connect. That is the point of the authorities upon which Mr Scruby relied. To my mind, the fact that those authorities deal with radically different statutory context does not necessarily invalidate the point, although it would be necessary to look at the particular context to see, as a matter of construction, whether a broad or a narrow concept of connectivity is imported by those words in a particular case. But that does not resolve the problem, which is that in my view the notion of an entitlement to share in profit is fundamentally inconsistent with the concept of value, or valuation, as it is used in the relevant sections of the Act.

63 Another problem is, as Mr Jennings submitted, that if the contractual mechanism for profit share is to be taken as defining the value of the services supplied by Coastivity, then those services will not necessarily have a positive value. If the project were carried through to completion and returned a loss, Coastivity would be obliged to bear

30% of the loss. On Mr Scruby's argument, the value of its services would be whatever negative amount was returned by carrying out this calculation.

64 I accept that the value of services may be fixed by reference to matters that do not fall strictly within s10(2)(b). Thus, in *Biseja v NSI Group* [2006] NSWSC 835, I held that a formula which valued project management services (agreed by the parties in that case to be related services) at a percentage of total construction costs did not attract the operation of s7 (2)(c). But although the determination of the value of those services in that case would always depend on a prior determination of the value of the construction work carried out, that value could be determined from month to month (by looking at the value of construction work performed in the month in question) and would always be a positive figure. That is a long way removed from the facts of this case.

65 Mr Scruby called in aid the second reading speech (Hansard, Legislative Assembly, 8 September 1999 at 103 and following). In the course of the second reading speech, the then Minister said, with reference to what became s7 (2), (3) and (4):

"particular types of contract are excluded from the operation of the legislation. The main exclusions are: … contracts where the payment is not made in monetary terms, for example, a contract where in return of carrying out construction work, the contractor is to receive the right to lease or operate the building or structure…"

66 I do not regard that as being of any assistance in the present case. It will be observed that the Minister talked of "contracts where the payment is not made in monetary terms". But s7(2)(c) is not cast in those terms, although it would include a contract of the kind instanced by the Minister. I am required to construe the words of the enactment. It appears that, for whatever reason, the legislature chose to enact a formula that differs in a significant way from the formula used by the Minister in his second reading speech.

67 Mr Scruby's second point was based on clause 3(a)(iv). He submitted that this gave Coastivity a right to repayment of expenses paid by it.

68 This submission takes clause 3(a)(iv) out of context. The context includes clause 2, with its requirements to set up a project account into which equity contributions are to be paid, out of which project costs are to be paid (clause 2 (b)); and as to the borrowing of funds to complete the project, which funds will be used to pay "contractual costs with the builder, and other costs of the project" (clause 2(c)).

69 The parties contemplated that costs incurred before the proceeds of sale of the units became available would be paid out of the sources described in clause 2(b) or (c). However, to ensure that the profit or loss to be distributed was accurately calculated, they included subpara (iv) in clause 3(a). In context, I think, what subpara (iv) intended to catch was any costs owing to external parties, not amounts owing to one party or the other.

70 Indeed, if Mr Scruby's submission were to be accepted, it would subvert one evident purpose of the deed: namely, to remunerate Coastivity only by a share of profits. On Mr Scruby's submission, all costs payable (or repayable) to Coastivity, including for its obligations under clause 5(a), would be payable under clause 3(a)(iv), before profit or loss could be determined. If, after payment of those costs, a profit still resulted then Coastivity would be entitled to its stipulated share of that profit.

71 Thus, I conclude, the consideration payable to Coastivity for any services to be provided by it under the deed was a consideration calculated otherwise then by reference to the value of those services. It follows that, even if the deed does amount to a construction contract, the Act does not apply to it.

Third issue: discretion

Coastivity's submissions

72 Mr Scruby submitted that, even if the Owners had made out their case that the determination was void, the Court had a discretion whether or not to grant declaratory relief, and should exercise that discretion against that grant of relief. He relied on the Owners' failure to raise the issues by way of payment schedule, and thus on their failure to raise those issues in the adjudication (of course, they could not have done so: s20(2B)).

73 Mr Scruby relied on two decisions in support of the proposition that there is a discretion to refuse declaratory relief. Those decisions were my decision in *Austruc v ACA* [2004] NSWSC 131, and the decision of Barrett J in *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152.

The Owners' submissions

74 Mr Jennings submitted that there was no relevant discretion. If the determination was void, he submitted, the Court should so declare.

Decision

75 My decision in ***Austruc*** does not support Coastivity's submission. There are two reasons:

(1) It was a case decided before the Court of Appeal gave its decision in *Brodyn*, and thus the relevant issues were whether there had been jurisdiction or error of law on the face of the record, or denial of natural justice (see *Austruc* at [57], and the cases there cited).

(2) It was a decision on an application for an interlocutory injunction. Thus, there was a general question of discretion, of the kind common to all such applications (see ***Austruc*** at [96] and following). The two specific discretionary issues that I raised in *Austruc* at [56] and [71], although relating to the failure of the respondent to put certain matters to the adjudicator, nonetheless were appropriate to be considered in relation to the general discretionary point.

76 The decision of Barrett J in ***Shellbridge*** cannot be distinguished in the same way. It was a post ***Brodyn*** case (see *Shellbridge*) at [4]). Further, it was a final hearing.

77 Barrett J concluded that the plaintiff had not made good its case that the determination was void. Nonetheless, his Honour made some observations as to whether declaratory relief would have been granted had he concluded in favour of the plaintiff. He noted at [36] that the claim was one involving only $14,025.00. He noted further at [37] and [38] that any judgment obtained pursuant to an adjudication certificate was provisional and not final, and did not prevent the litigation, on a final basis, of whatever disputes there might be under the contract. His Honour noted also at [37] that an unsuccessful principal with a strong cross-claim might seek to obtain a stay, and that the limitations imposed by s25 (4) of the Act on setting aside a judgment did not apply to an application for a stay.

78 Barrett J concluded that in an appropriate case the Court might consider those matters in deciding whether or not to grant a declaration. His Honour expressed himself at [39] in terms that suggested that there was a discretion, in respect of which such factors might be relevant:

> *[39] These points should be borne in mind by principals or proprietors who consider themselves to have good claims in contract or on other grounds outside the Act and, at a first stage, suffer an adverse determination by an adjudicator involving a modest sum. The consequences the Act produces go, in commercial terms, to matters of cash flow and credit risk without definitive and final creation of legal rights. Where the amount involved in a determination is small, the availability to a disappointed principal or proprietor of the avenues referred to by Handley JA [in **Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd** (2005) 6L NSWLR 385 at 389 [21]] and a perception that they are more appropriate avenues might be factors that influence the discretion that this court exercises upon an application for declaratory relief of the present kind.*

79 A determination that is void has no legal effect. It creates neither right nor liability. The claimant is not entitled to be paid the adjudicated sum; and the respondent is not liable to pay it. In those circumstances, I think, there is but limited room for the operation of any discretion against the making of a declaration that the determination is void.

80 The declaration of right is now a statutory remedy. The limits of the power to grant discretionary relief are extremely wide, and as the majority (Mason CJ, Dawson, Toohey and Gaudron JJ) said in ***Ainsworth v Criminal Justice Commission*** (1992) 175 CLR 564 at 582, the jurisdiction to grant a declaration is constrained only "by the considerations which mark out the boundaries of the judicial power." Thus, the person seeking declaratory relief must have a real interest in the subject matter of the suit; the relief must be directed at the determination of legal controversies and not to the resolution of abstract or hypothetical questions; and a declaration will not be granted if its grant would produce no foreseeable consequences for the parties. I accept that the decision in *Ainsworth* reflected the concept of "matter" under *The Constitution*. Nonetheless, the decision is a potent reminder of the width of the power to grant declaratory relief.

81 Whether the considerations to which their Honours referred reflect discretionary considerations, or whether they reflect limits on the jurisidiction to grant a declaration, they are irrelevant in the present case. The grant of the declaration sought would meet all the requirements stated by their Honours, and would constitute an exercise of judicial power.

82 There may remain, in particular cases, truly discretionary grounds for the refusal of declaratory relief. Thus, perhaps, relief may be declined where the controversy in respect of which the declaration is sought is of a kind that the legislature has thought fit to refer to a specialist tribunal, and where that tribunal possess full power to resolve the controversy (see ***Blank v Beroya Pty Ltd***) (1967) 92 WN (NSW) 24: a case involving the *Landlord and Tenant (Amendment) Act* (1948)). Even then, if there are particular reasons favouring the grant of a declaration, the Court may do so (see for example ***Mayne Nickless Ltd v Commissioner of State Revenue*** (**Vic**) (1996) 96 ATC 5056). Declaratory relief may be refused where there is no proper contradictor (for example, in criminal cases: ***Connor v Sankey*** [1976] 2 NSWLR 570; but contrast *Sankey v Whitlam* (1978) 142 CLR 1). Again, the Court is generally loathe to interfere in committal proceedings (***Conwell v Tapfield*** [1981] 1 NSWLR 595; *Csidei v Anderson* [1977] 1 NSWLR 747; ***Imperial Tobacco Ltd v Attorney-General*** [1981] AC 718). None of those factors, nor any similar factor, is present in this case.

83 If the submission in relation to discretionary considerations were intended to refer to traditional equitable principles relating to the grant of equitable relief (for example, matters such as laches, unclean hands or a refusal to offer to do equity) then different considerations may apply. I am by no means certain that those principles are at all relevant to the decision to grant or withhold declaratory relief once the ground for the grant of a declaration of right has been made out. That is because a declaration of right is not an equitable remedy. Nor, for that matter, is it a remedy known to the common law. It is a statutory remedy (***Mayfair Trading Co Pty Ltd v Dreyer*** (1958) 101 CLR 428.

84 In ***Gillett v Halwood Corporation Ltd*** (NSW Court of Appeal, 26 March 1998, unreported; BC 9800883) the appellant (plaintiff below) had sought a declaration that certain agreements made between the respondents (defendants below) were void under the then *Strata Titles Act* 1969. The respondents challenged the grant of declaratory relief on grounds, among other things, of laches, acquiescence and delay. Priestley JA (with whom Handley and Powell JJA agreed) said at BC 60 that these matters could not be raised "against the claims for declarations of legal findings of the kind made by the appellant". Although his Honour's conclusion was said to have been based on an acknowledgment made in the course of argument (a somewhat harsh reading of the

transcript of argument), it is nonetheless clear that, to the extent that there had been a concession, his Honour thought that it was one properly made.

85 The consequences of the conceptual distinction between the statutory remedy of declaration of right on the one hand and a truly equitable remedy (delivery up of securities given for an illegal and unenforceable loan) on the other may be seen by comparing ***Chapman v Michaelson*** [1909] 1 Ch 238 with ***Lodge v National Union Investment Co Ltd*** [1907] 1 Ch 300. In *Chapman*, the respondent sought a declaration that a mortgage given by him to the appellant was illegal and void. He did not offer to do equity. Eve J granted the declaration sought without imposing any terms on the respondent ([1908] 2 Ch 612). The Court of Appeal upheld the decision of Eve J. In doing so, their Lordships denied that the relief sought by the appellant was equitable relief, and denied that the appellant was obliged to offer to do equity as the price of obtaining such relief. They distinguished the decision in *Lodge*, which Fletcher Moulton LJ described at 242 as "an action for true equitable relief".

86 In *Lodge*, the plaintiff sought a declaration that certain moneylending transactions, including mortgages or other securities given by him, were illegal and void. He sought also delivery up of the various security documents. Alternatively, he sought a declaration that the transactions in question amounted to a mortgage, that he was entitled to an account, and that he had a right to redeem on the taking of accounts. Parker J held that the plaintiff was not entitled to the order for delivery up. His Lordship said that, notwithstanding that the transactions in questions were illegal and void, the plaintiff could not have the return of his securities without paying at least the balance of principal due: i.e., without doing equity. His Lordship did however order that upon payment by the plaintiff to the defendant of certain specified sums, the defendants should deliver up to the plaintiff the securities in question.

87 In summary, whilst I do not conclude that there is no discretion attending the grant of a declaration of right once the basis for the grant has been made out, I think that the relevant discretionary considerations are severely limited; and that they do not include the discretionary considerations traditionally thought to attend the grant or refusal of purely equitable relief.

88 In the present case, and again relying on what Barrett J had said in ***Shellbridge,*** Mr Scruby submitted that the amount at stake was small, and that the Owners had a remedy at law. As I have noted, the amount at stake in ***Shellbridge*** was $14,025.00. The amount at stake in this case, by reference to the judgment that has been recovered, is $50,894.60.

89 It is difficult to conclude that a sum of money is so trifling as not to warrant the intervention of the Court if a ground for intervention is made out. The amount at stake, in round figures of $51,000.00, is small in relation to the amounts at stake in many of the cases in the Technology and Construction List of this Court. But what might be thought to be small compared to the amounts at stake in mega-litigation may be of very great significance to the parties. Thus, I think, the Court should be slow to withhold relief simply because of an impression that, viewed objectively, the amount at stake is small. I do not think that the question is one that can be resolved purely in objective terms.

90 Mr Scruby did not in submissions differentiate between discretionary considerations attaching to the grant of declaratory relief and discretionary considerations attaching to the grant of the injunctive relief sought. Prayer two of the summons seeks an order restraining Coastivity from enforcing its rights under the determination or the judgment founded on it. I accept that broader discretionary considerations might be applicable to a claim for relief in these terms, compared to a claim for declaratory relief. Nonetheless, once it has been concluded that the "right", the enforcement of which is sought to be restrained, is founded on an act that is void, strong reasons would need to be shown before injunctive relief were withheld on discretionary grounds.

91 In my view, there are no discretionary circumstances sufficient to warrant withholding the grant of injunctive relief as sought in prayer two of the summons.

92 It follows that there are no discretionary reasons why the relief sought should not be granted.

Conclusion and orders

93 The Owners have made good their claim to the declaratory and injunctive relief sought. Coastivity has not made good its submission that there are any discretionary grounds for the refusal of that relief.

94 I make a declaration in accordance with prayer one of the summons.

95 I make an order in accordance with prayer two of the summons.

96 I will hear the parties on costs.

C Jennings (Plaintiffs) instructed by GBF e-Lawyers
R Scruby (Defendants) instructed by Gillis Delaney Lawyers