JUDGMENT : Bergin J : New South Wales Supreme Court : 13th April 2005

1 This is an application by the plaintiff, Co-ordinated Construction Co Pty Limited, brought by Summons for a permanent injunction restraining the first defendant, Climatech (Canberra) Pty Ltd, from obtaining an adjudication certificate under s 24 of the *Building and Construction Industry Security of Payment Act* 1999 (NSW) (the Act), consequent upon an adjudication determination by the second defendant, Gerald Raftesath (the Determination). The plaintiff also seeks an order restraining the third defendant, LEADR, from issuing an adjudication certificate in respect of or arising from the Determination. The plaintiff also seeks a declaration that the Determination is void or alternatively an order in the nature of certiorari, pursuant to s 69 of the *Supreme Court Act* 1970 (NSW), quashing the Determination.

2 The application was heard on 3 March 2005 when Mr M G Rudge SC leading Mr M Christie of counsel appeared for the plaintiff and Mr D D Feller SC leading Mr D M Lowenstein appeared for the first defendant. The second and third defendants have filed submitting appearances.

The Contract

3 The plaintiff, as contractor, retained the first defendant (the defendant) as subcontractor to provide air conditioning and mechanical services for the refurbishment project of the Gazebo Hotel in Elizabeth Bay Road, Elizabeth Bay, Sydney. The contract was dated 23 June 2003 and incorporated subcontract conditions AS 4903-2000 as amended by the parties (the Contract).

4 During the period April 2004 to December 2004 the defendant submitted to the plaintiffs what has been referred to as "variation claims" numbered V16, V23, V24, V25, V28, V29, V31 and V35. The tax invoices in respect of each of these claims were in identical form for the months of April, May and June 2004, being respectively V16, V23 and V24. Each of the invoices claimed "site supervision costs" for two named employees and "office overheads" at $29,959.18. Attached to each of the invoices was what was referred to as an "EOT Invoice Calculation". Those calculations provided a "Formula" in respect of the two employees. The first entry under this heading, relating to the first employee, was "$75 x 38 x 52/12". The second entry, in relation to the second employee, was "$45 x 38 x 52/12". The "Formula" in respect of overheads was recorded as: "Total Overheads (Average 01/05/03 to 31/05/04) 12 x 25.87% (Less RL, MK and IB Actual Wages)". There was then a Formula in respect of two different employees, the first recorded as "$200,000/12 x 25.87%" and the second as $125,000/12 x 24.87%".

5 The tax invoices for the months July to December 2004 were in identical terms except for the reduction in the amount by $7,410 for the absence of the second employee from the claims relating to site supervision costs. The total in those invoices was therefore $7,410 less than the earlier invoices.

6 Each tax invoice included the statement: "This invoice is submitted under clause 34.9 of the Contract (Delay Damages)". Payment claims 19 and 20, each of which categorized the EOT claims as "variations", stated that the Payment Claims were made under the Act and that "EOT claims are submitted under clause 34.9 of the contract (Delay Damages) and are also related to EOT awarded on 3 September 2004". That latter reference was to a letter from the Contract Superintendent to the defendant advising that he had assessed "in accordance with contract clause 34 and 34.5" the new dates for practical completion contained in the letter. That letter "instructed" the defendant to complete the Contract in accordance with the new dates for practical completion.

7 These claims were not paid and the defendant submitted an adjudication application under cover of its letter dated 28 January 2005. On 7 February 2005 the plaintiff submitted its response to the adjudication application. On 21 February 2005 the second defendant provided the Determination to the parties in which the plaintiff was required to pay the defendant the sum of $588,275.15.

8 The parts of the Contract relevant to this application are as follows (the italics indicate that those words are the subject of definition in the Contract):

3.4 Time and progress

34.1 Progress

The Subcontractor shall ensure that WUS reaches practical completion by the date for practical completion.

34.2 Notice of delay

The Subcontractor shall promptly and in any event not later than ten (10) days after the Subcontractor first became aware or ought reasonably to have become aware that anything, including an act or omission of the Main Contractor, the Subcontract Superintendent or the Main Contractor's employees, consultants, agents or other contractors (not being employed by the Subcontractor) may delay the WUS, notify the Subcontract Superintendent in writing of the nature and where possible the extent of the delay. If the Subcontractor fails to give such a notice within the said period of ten (10) days then the Subcontractor shall not be entitled to any EOT arising out of or connected with or in any way brought about by any delay associated with the cause so detailed.

34.3 Claim

The Subcontractor shall be entitled to such extension of time for carrying out WUS (including reaching practical completion) as the Subcontract Superintended assesses ('EOT'), if:

(a) the Subcontractor is or will be delayed in reaching practical completion by a qualifying cause of delay; and

(b) within ten (10) days after the delay first occurs, the Subcontractor gives the Subcontract Superintendent a written claim for an EOT which must include:

(i) a detailed statement of the facts on which the claim is based; and

(ii) a precise identification of the activities affected;

and demonstrating by reference to the activities of the Subcontract Program how the delay involves an activity which is or by virtue of the delay becomes critical to the maintenance of progress in the execution of the Subcontract Works so as to achieve practical completion.

If further delay results from a qualifying cause of delay evidenced in a claim under paragraph (b) of this subclause, the Subcontractor shall claim an EOT for such delay by promptly giving the Subcontract Superintendent a written claim evidencing the facts of that delay.

34.4 Assessment

When both non-qualifying and qualifying causes of delay overlap, the Subcontract Superintendent shall apportion the resulting delay to WUS according to the respective causes' contribution.

In assessing each EOT the Subcontract Superintendent shall disregard questions of whether:
(a) WUS can nevertheless reach practical completion without an EOT; or
(b) the Subcontractor can accelerate,
but shall have regard to what prevention and mitigation of the delay has not been effected by the Subcontractor.

The Subcontract Superintendent shall assess any EOT in units of working hours rounded to the nearest half working day (where appropriate).

34.5 Extension of time

Within 35 days after receiving the Subcontractor's claim for an EOT, the Subcontract Superintendent shall give to the Subcontractor and the Main Contractor a written direction evidencing the EOT so assessed. IF the Subcontract Superintendent does not do so, there shall be a deemed assessment and direction for an EOT as claimed.

Notwithstanding that the Subcontractor is not entitled to or has not claimed an EOT, the Subcontract Superintendent may, for the benefit of the Main Contractor and not the Subcontractor, at any time and from time to time before issuing the final certificate direct an EOT. For the sake of clarity, the Subcontract Superintendent shall have no obligation to direct an EOT if the Subcontractor is not entitled to or has not claimed an EOT in accordance with the provisions of the Subcontract. …

34.9 Delay Damages

For every day the subject of an EOT for a compensable cause and for which the Subcontractor gives the Subcontract Superintendent a claim for delay damages pursuant to subclause 41.1, damages certified by the Subcontract Superintendent under subclause 41.4 shall be due and payable to the Subcontractor.

The payment by Main Contractor of such delay damages shall be the sole remedy of the Subcontractor for the events or circumstances giving rise to the delay in respect of which the delay damages are payable and are accepted by the Subcontractor in full and final satisfaction of any claim that the Contractor may have against the Main Contractor or the Subcontract Superintendent, the Principal or any other employee or agent of the Principal for any act or omission of any or all of them and whether in contract, tort, statute, unjust enrichment or any other bases of claim.

36 Variations

36.1 Direction variations

The Subcontractor shall not vary WUS except as directed in writing.

The Subcontract Superintendent, before the date of practical completion, may direct the Subcontractor to vary WUS by any one or more of the following which is nevertheless of a character and extent contemplated by, and capable of being carried out under, the provisions of the Subcontract (including being within the warranties in subclause 2.2):
(a) increase, decrease or omit any part;
(b) change the character or quality;
(c) change the levels, lines, positions or dimensions;
(d) carry out additional work;
(e) demolish or remove material or work no longer required by the Main Contractor.

36.2 Proposed variations

The Subcontract Superintendent may give the Subcontractor written notice of a proposed variation.

The Subcontractor shall as soon as practicable after receiving such notice, notify the Subcontract Superintendent whether the proposed variation can be effected, together with, if it can be effected, the Subcontractor's estimate of the:
(a) effect on the Subcontractor's program (including the date for practical completion): and
(b) cost (including all warranties and time-related costs, if any) of the proposed variation.

The Subcontractor Superintendent may direct the Subcontractor to give a detailed quotation for the proposed variation supported by measurements or other evidence of cost.

The Subcontractor's costs for each compliance with this subclause shall be certified by the Subcontract Superintendent as moneys due to the Subcontractor.

36.3 Variations for convenience of Subcontractor

If the Subcontractor requests the Subcontract Superintendent to direct a variations for the convenience of the Subcontractor, the Subcontract Superintendent may do so. The direction shall be written and may be conditional. Unless the direction provides otherwise, the Subcontractor shall be entitled to neither extra time nor extra money.

36.4 Pricing

The Subcontract Superintendent shall, as soon as possible, price each variation using the following order of precedence:
(a) prior agreement;
(b) applicable rates or prices in the Subcontract;
(c) rates or prices in a priced bill of quantities, schedule of rates or schedule of prices, even though not Subcontract documents, to the extent that it is reasonable to use them; and
(d) reasonable rates or prices, which shall include a reasonable amount of profit and overheads,
and any deductions shall include a reasonable amount for profit but not overheads.

That price shall be added to or deducted from the subcontract sum.

37 Payment
37.1 Progress claims
The Subcontractor shall claim payment progressively in accordance with Item 37.

An early progress claim shall be deemed to have been made on the date for making that claim.

Each progress claim shall be given in writing to the Subcontract Superintendent and shall include details of the value of WUS done and may include details of other monies then due to the Subcontractor pursuant to provisions of the Subcontract. …

41.1 Notice of Claims
All money claims, whether for damages, compensation, unjust enrichment, restitution or adjustment to the subcontract sum, all matters of interpretation and clarification of this Agreement and all claims whether in contract, tort (including negligence), unjust enrichment or otherwise (hereinafter collectively referred to as a "Claim") shall be dealt with in accordance with this Clause.

This subclause and subclause 41.4 shall not apply to any Claim, including a claim for payment (except for a Claim which would, other than for this subclause, have been included in the final payment claim), the communication of which is required by another provision of the Contract

41.2 Claims to be Specified
Each Claim in respect of which there is a separate legal entitlement shall be in writing and shall specify:
(a) the perceived legal basis of a claim including where appropriate a reference to the clause of this Subcontract under which the Claim is made.
(b) The facts relied upon in support of the Claim in sufficient detail to permit verifications; and
(c) Details of the quantification of the sums claimed then known to the subcontractor and the manner in which such sums have been calculated.

41.3 Time Limit
Subject to any other provision of this subcontract which provides a time limit in which to bring a Claim, in which case the specific time limit in that clause shall prevail, the subcontractor shall not have any right to submit any Claim, initiate any action or proceeding against the Main Contractor and shall have No Claim in respect of any matter, fact or thing whatsoever arising out of or in connection with or under this Subcontract or the Subcontract Works unless the Subcontractor not later than fourteen (14) days after the Subcontractor first became aware or ought reasonably to have first become aware of the commencement of the occurrence of the events or circumstances on which the Claim is based, lodges the claim in writing with the Subcontract Superintendent in accordance with the requirements of Clause 41.2.

41.4
Within 28 days of receipt of Claim referred to in subclause 41.1 above, the Subcontract Superintendent shall assess the Claim and notify the parties in writing of the decision. Unless a party within a further 14 days of such notification gives a notice of dispute under subclause 42.1 which includes such decision, the Subcontract Superintendent shall certify the amount of that assessment to be monies then due and payable.

9 The definitions in the Contract relevant to this matter are as follows:
compensable cause means:
(a) any act, default or omission of the *Subcontract Superintendent,* the *Main Contractor* or its consultants, agents or other contractors (not being employed by the *Subcontractor*); or …
(c) those listed in *Item* 35;

qualifying cause of means: ***delay***
(a) any act, default or omission of the *Subcontract Superintendent,* the *Main Contractor* or its consultants, agents or other contractors (not being employed by the *Subcontractor*); or …
(c) other than:
(i) a breach or omission by the *Subcontractor*
(ii) industrial conditions or inclement weather whether occurring before or after the *date for practical completion*; and
(iii) stated in *Item* 32;

the Subcontract Works means the whole of the *work* to be carried out and completed in accordance with the *Subcontract*, including *variations* provided for by the *Subcontract*, which by the *Subcontract* is to be handed over to the *Main Contractor*;

variation has the meaning in clause 36;

work includes the provision of materials;

WUS (from 'work under the Subcontract') means the *work* which the *Subcontractor* is or may be required to carry out and complete under the *Subcontract* and includes *variations,* remedial *work*, *construction plant* and *temporary works,*

The Determination

10 The only part of the Determination for consideration in this case is contained in paragraphs 18-37. The focus of the parties' submissions was upon the following paragraphs of the Determination:

Extension of Time Claims

18 Variation Claims V16, V23, V24, V25, V26, V28, V29, V31 and V35 all advance claims for payment consequent upon what the Claimant contends was an extension of time for completion. The Respondent advances a number of reasons why these claims should be disallowed, and it is convenient to consider each of them in turn.

19. The Respondent says (paragraph 24 of its submissions) that unless the delays are included in the value of a variation, such claims are claims for damages which are not properly claimable under the Act. It relies on ***Kembla Coal & Coke –v- Select Civil & Ors*** *[2004] NSWSC 628 and* ***Quasar Construction –v- Demtech Pty Ltd*** *[2004] NSWSC 116, and seeks to distinguish* ***de Martin & Gasparini –v- Energy Australia & Anor*** *[2002] NSWCA 330, which is relied upon by the Claimant.*

The crux of the matter is whether the amounts claimed are delay damages within the meaning of Clause 34.9 of AS 4903-2000 which provides: *"For every day the subject of an EOT for a* ***compensable cause*** *and for which the* ***Subcontractor*** *gives the* ***Subcontract Superintendent*** *a claim for delay damages pursuant to sub-clause 41.1, damages certified by the* ***Subcontract Superintendent*** *under clause 41.4, damages certified by the Subcontract Superintendent under clause 41.4 shall be due and payable to the* ***Subcontractor.*** *…"*

The original date for practical completion was 30 March 2004 (see Item 11 of Annexure A to the subcontract). On or about 3 September 2004, the Respondent's Subcontract Superintendent notified the Claimant of altered dates for "practical completion". The final completion date specified in the attachment to this letter was 1 February 2005. In its response, apparently sent on 6 September 2004, this last date was stated by the Claimant to be "achievable". Not withstanding that the cautious language of its letter of 3 September avoided reference to an extension of time, the Respondent's letter is headed "Works Progress & Practical Completion". It contained an instruction to complete "your agreements for the nominated levels as the determined practical completion dates as listed in the attached schedule". Furthermore it referred to revised dates as having been assessed in accordance with Clause 34 and 34.5. It seems to me that thereby the Respondent brought about an extension of time under the subcontract, opening the door for the Claimant to proceed with a claim for delay costs under the contract. Resulting as they do from an extension of time for completion, these claims are variation claims and are properly included in progress claims.

11 The second defendant made the following additional relevant findings:

- *The Contract Superintendent had directed an extension of time under clause 34.5 of the Contract which was "necessary" to enable the defendant to complete the work and to remain on site beyond the original contract period which contemplated completion by 30 March 2004 (par 22);*
- *The delay in question was a compensable cause within the meaning of clause 34.9 that entitled the defendant to claim damages (par 23);*
- *The tax invoices and the relevant progress claims satisfied the requirements of clause 41.2 (par 25);*
- *When a claim is made under clause 34.9, the circumstances on which the claim for "delay damages" or "delay costs" is based is the default of others which establishes the compensable claim, and the granting by the Contract Superintendent of the EOT, without which "delay damages would not be payable" (par 26);*
- *The defendant did as required by clause 41.3, giving notice in accordance with the requirements of clause 41.2 quantifying month by month the "monthly delay costs" (par 28);*
- *The legal basis for each claim is identified as being clause 34.9 of a Contract and the facts relied on clearly enough were the delay in time for completion month by month after 30 March 2004 (par 30); and*
- *The details provided in the attachments to the invoices are the basis of the claimed variations and on their face they seem to comprise proper components of "delay costs" which should be accepted as being incurred because of the delay occasioned by others so as to make them compensable costs (par 37).*

The Act

12 Under s 8 of the Act a person who has undertaken to carry out construction under a construction contract or supply related goods and services under the contract is entitled to a progress payment. Other relevant sections of the Act are as follows:

13 Payment Claims

(1) A person referred to in section 8 (1) who is or who claims to be entitled to a progress payment (the ***claimant****) may serve a payment claim on the person who under the construction contract concerned, is or may be liable to make the payment.*

(2) A payment claim:

(a) must identify the construction work (or related goods and services) to which the progress payment relates, and

*(b) must indicate the amount of the progress payment that the claimant claims to be due (the **claimed amount**), and*

(c) must state that it is made under this Act.

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.

6 Definition of "related goods and services"

*(1) In this Act, **related goods and services**, in relation to construction work, means any of the following goods and services:*

(a) goods of the following kind:

(i) materials and components to form part of any building, structure or work arising from construction work,

(ii) plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work,

(b) services of the following kind:

(i) the provision of labour to carry out construction work,

(ii) architectural, design, surveying or quantity surveying services in relation to construction work,

(iii) building, engineering, interior or exterior decoration or landscape advisory services in relation to construction work,

(c) goods and services of a kind prescribed by the regulations for the purposes of this subsection.

*(2) Despite subsection (1), **related goods and services** does not include any goods or services of a kind prescribed by the regulations for the purposes of this subsection.*

(3) In this Act, a reference to related goods and services includes a reference to related goods or services.

13 The plaintiff seeks a permanent injunction against the second and third defendants on the basis that, in allowing the claims arising out of EOTs, the second defendant failed to comply with the basic and essential requirement of the Act. The failure was said to arise in the following way: (1) the Act requires payment claims to identify (a) the "construction work to which the progress payment relates", and (b) the "claimed amount" (s 13(2)(a)&(b); (2) the Act requires that the claimed amount and the progress payment be "for construction work carried out" (s 4); (3) delay damages arising from EOTs are not amounts due "for construction work carried out"; and (4) a basic and essential requirement of the Act – that the claimed amount and the amount awarded be for construction work carried out – has not been complied with by the awarding of such amount in the Determination. The plaintiff conceded that this alleged failure could not be brought within the list of requirements referred to in ***Brodyn Pty Ltd v Davenport*** [2004] NSWCA 394 at [53] per Hodgson JA. However it was submitted that such list was not intended to be exhaustive and that this alleged failure could appropriately be included in such a list.

14 The parties also argued this case on the broad suggested basis that it is important to decide generally whether claims for delay damages are properly the subject of payment claims under the Act because claims for EOT and delay damages or delay costs make up a large proportion of claims in the construction industry and there needs to be some certainty as to whether such claims are appropriately the subject of payment claims and determinations under the Act. I accept that there are many such claims in the construction industry and I will deal with the broader

submissions later in this judgment, however this case is a challenge to the second defendant's Determination in respect of this particular Contract with its own special facts and requires decision on that basis.

15 It is necessary to decide whether the second defendant was entitled to conclude that these claims were variations under the Contract. If they were, they fell within the definition of "work" under the subcontract (WUS) and were able to be valued as WUS and claimed as a progress payment. The plaintiff submitted that the second defendant's finding that they were variations was wrong. The second defendant concluded in par 18 of his Determination that: "*Resulting as they do from an extension of time for completion, these claims are variation claims and are properly included in progress claims*".

16 Work under the subcontract (WUS) is defined as "work" which the defendant is, or may be, required to carry out and complete under the subcontract, and "*includes variations, remedial work, construction plant and temporary works*". "Work" is defined as including the provision of materials. Variation is defined as having the meaning in clause 36. Clause 36 of the Contract prohibits the defendant varying WUS, except as directed in writing. The Superintendent may direct such a variation as set out in clause 36.1. Variations are defined to be (a) an increase, decrease or omission of any part of the work; (b) a change in the character or quality of the work; (c) a change in the levels, lines, positions or dimensions of the work; (d) the carrying out of additional work; or (e) the demolition or removal of materials or work no longer required by the Main Contractor.

17 Under clause 37 of the Contract the defendant was required to give each progress claim in writing to the Superintendent and was required to include "details of the value of WUS done and may include details of other monies then due to the subcontractor pursuant to provisions of the subcontract" (cl 37.1).

18 The tax invoices state that they are submitted "under clause 34.9 of the Contract". Clause 34.9 is not a clause "under" which claims are required to be submitted. It is a clause that gives to the subcontractor an entitlement to be paid for "every day the subject of an EOT for a compensable cause" in certain circumstances. Those circumstances are: (1) if the subcontractor has given the Contract Superintendent a claim for delay damages "pursuant to clause 41.1"; and (2) if the Superintendent has certified damages under clause 41.3.

19 Clause 41.1 relates to, inter alia, "all money claims", and clause 41.3 requires the subcontractor to lodge a claim within 14 days of becoming aware of the commencement of the occurrence of events or circumstances on which the claim is based. Clause 41.4 requires the Contract Superintendent to "assess" the claim within 28 days of its receipt, and to notify the parties of the decision in writing. Unless the superintendent receives a notice of dispute in respect of the notified decision, the superintendent is required to certify "the amount of that assessment to be monies then due and payable." That is the contract machinery or mechanism for quantification of amounts due and payable in respect of "all money claims", including delay damages under the Contract.

20 The second defendant based his conclusion regarding the existence of variations under the contract on the terms of the letter of 3 September 2004. In that letter the Superintendent referred to the revised dates for practical completion as having been assessed in accordance with clause 34 and 34.5 notwithstanding that Clause 34.4 of the Contract provided that the Superintendent "shall disregard" questions of whether the "WUS can nevertheless reach practical completion without an EOT". The second defendant concluded that the plaintiff brought about an extension of time under the subcontract, thus "opening the door" for the defendant to "proceed with a claim for delay costs under the contract".

21 Caution, sometimes rather colourfully expressed, has been suggested in the drafting of contracts and in the manner in which contract superintendents administer construction contracts in relation to variations and EOTs. In "Delay and Disruption" (2001) Vol 17 *Building and Construction Law* 372, at 381, the learned author, John Dorter, wrote:

The old adage of "time for time and money for money" has gone in most construction contracts. Not only does the contractor want to protect itself from liquidated damages by getting extensions of time (and the principal sometimes wishes to protect itself from losing its liquidated damages by ensuring that the contractor is entitled to an extension of time instead of relief from liquidated damages), but the contractor wants compensation for what the delay costs it, both directly and indirectly.

Generally, the contractor cannot obtain that monetary compensation for delays under the guise of a variations claim because the latter is properly restricted to variations to the works, or work, under the contract, as distinct from the contractor's program for constructing the works. There is a practice by some superintendents of attempting to combine a claim procedure for delay costs with a claim for variations but it is generally not wise. Not only does such a practice infringe the normal situation referred to but such superintendents should remember the scathing criticism of Bray CJ:

I must say that the departure from traditional terminology in amending the well-known variation clause so as to include, not only an addition to the work, but a change in the time provisions in the contract is not only anomalous but deplorable. It is like tipping an entirely gratuitous truck load of manure into this already sufficiently muddied stream.

22 In this latter regard Mr Dorter referred to the decision in ***In Re an Arbitration Between Taylor Woodrow International Limited and the Minister of Health*** [1978] 19 SASR 1, a case specially stated by arbitrators to the Court in an arbitration that arose out of a building contract between Taylor Woodrow as the Builder and the Minister of Health as the Proprietor in respect of buildings at the Flinders Medical Centre in South Australia. The Chief Justice was considering the terms of clause 24(i) of the Contract and dealing with the question as to whether the Builder was entitled to be reimbursed for "loss and expense" under that clause. The loss and expense for which the Builder had

not at that time been reimbursed, was for *"additional loss and expense alleged to have been incurred as the result of labour directly employed by the Builder being unproductive as a result of periods of delay for which extensions of time had been granted"*.

23 Clause 24 (i) entitled the Builder to *"reimbursement of loss or expense incurred by him as a result of delay in the progress of the Works"*. Various causes of delay were set out within the subclause, but most relevantly Bray CJ said at 11: *What, then, is loss or expense within the meaning of clause 24 (i)? I can only say that it is a loss or expense which the builder would not have incurred if the cause for delay had not existed. The words in question are wide. They contemplate a simple relation of cause and effect between the loss or expense and the delay. Such loss or expense to be reimbursable must have been incurred as a result of the delay. Mr Bell [for the Minister] endeavoured to distinguish between foreseeable and unforeseeable loss or expense. I do not think that such a distinction is relevant. We are not assessing damages for breach of contract according to the rules of common law as laid down in such cases as* ***Hadley v Baxendale*** *(1854) 9 EX 341 (156 ER 145) and* ***Victoria Laundry (Windsor) Ltd v Newman Industries Ltd*** *[1949] 2 KB 528. There is no breach of contract necessarily involved here. On the contrary we are construing the express words of the Contract conferring a right on the Builder. I see no reason to exclude a claim for loss of productivity from the words "loss or expense" if a causal relationship between the loss of productivity and the delay is shown. The word "loss", it seems to me, was put there in addition to the word "expense" to show that the right was not restricted to the reimbursement of money spent, which would be an expense, but extended to loss of a less easily quantifiable kind. There is no qualifying adjective like "direct" prefixed to the words.*

I enter two caveats here. Of course the builder has to act reasonably and to do everything he can to minimise the potential loss or expense, whether, for example by discharging workmen, if that would be the less expensive course, or by employing them in some alternative and productive way. He has to do these things if possible, both because it is his duty to minimise the damage under the general law and because of the express provisions of clause 24 (i)(iv). But he may be able to show that a prudent man in his position would have thought it the lesser evil to keep the men together and employed even unproductively, and that he was able to use their services elsewhere or to use them as profitably as if there had been no delay.

24 After referring to the common law rules relating to damages for breach of contract the Chief Justice went on to say at 13: *I repeat here that it is not a question of breach of contract but of applying the actual words of the contract, but nevertheless mutatis mutandis I think the above remarks are applicable. My view therefore is that if the builder can prove that as a result of any delay falling within clause 24(i) he has suffered a loss by reason of unproductive labour which he would not have suffered if the delay had not occurred, and if at the same time he can bring himself within the other conditions of clause 24(i), and if he acted reasonably in the circumstances, he is entitled to recover the amount of that loss in so far as he has not already recovered it under some other head, and it must be estimated by the architect or by the Arbitrators, if the matter is left to them, as a jury would have estimated it after having taken into account all the contingencies, probabilities and chances involved. If it is incapable of precise estimate, nevertheless a general estimate must be attempted.*

25 The Builder in that case had relied upon clause 1(e) of the Contract which referred to "loss, expense or damage". Bray CJ said at 13: *I would add that if I am wrong in thinking that 24(i) still applies to the contract and the builder therefore is driven back on clause 1 (e), if it is applicable, I think that the same principles will apply, because I think that the same simple casual relationship is contemplated by each clause, except, indeed, that clause 1(e) may go further still because adds the word "damage" to the words "loss" and "expense".*

26 In the present case the second defendant did not analyse how the claims were properly categorised as variations, other than to say that they arose out of extensions of time. The letter of 3 September 2004 directed the defendant to complete "your agreements for the nominated levels as the determined practical completion dates as listed in the attached schedule". The schedule then listed the various levels in the two buildings (the Tower building and the Court building) with dates for the completion of each of those levels. The defendant responded by letter on 6 September 2004 indicating the needs it then had in respect of commencing and/or completing the works on these levels by the new dates.

27 Clause 36.1 of the Contract effectively defines a variation and does not seem to me to fall foul of Bray CJ's criticism in *Taylor Woodrow*. Although clause 36.2 does combine the concepts of additional work and additional time in that it contemplates the subcontractor giving an estimate of the effect of any proposed variation on the program "including the date for practical completion" (cl 36.2(a)) and any "time-related costs", it is part of the necessary process for the pricing of the proposed variation. The "pricing" of the variation by the superintendent requires the inclusion of a "reasonable amount of profit and overheads" and once that price is assessed it is "added to or deducted from the subcontract sum".

28 The letter of 3 September 2004 was in my view correctly described by the second defendant as bringing about an extension of time (par 19). However the "instruction" to complete the Contract by the new dates for practical completion does not seem to me to fall within the definition of variation in clause 36.1 of the Contract. It was not an increase, decrease or omission of any part of the work (cl 36.1(a); it was the same work but to be completed by a later date. Although the letter of 6 September 2004 indicates that there may be some problems in respect of completing the works by the new dates because certain aspects of the work of other trades necessary to be completed prior to the installation of the air-conditioning would not be done, such problems do not change the "quality" or "character" of the defendant's contracted work (cl 36.1(b). The direction did not change the levels, lines, positions or dimensions of the work (cl 36.1(c); nor did it require the defendant to carry out additional work but

rather, the same work to be completed by a later date (cl 36.1(d). The direction could not be characterised as demolishing or removing material or work no longer required by the plaintiff (cl 36.1(e)).

29 There was no pricing of a variation for the purposes of adding that amount to the subcontract sum. The parties proceeded upon the basis that this was the granting of an extension of time for which the defendant was entitled to delay damages under clause 34.9 as claimed pursuant to clause 41 of the Contract. Such amounts were still able to be claimed as part of the progress payment under clause 37.1 of the Contract as "other monies then due to the subcontractor pursuant to provisions of the subcontract" but were not valued as part of the WUS because they were not variations.

30 It seems to me that the second defendant fell into error in his construction of the Contract in concluding that these were variation claims. Such an error is not in my view a failure to comply with the "basic and essential requirements" of the Act as that concept is explained in ***Brodyn Pty Ltd v Davenport***. This adjudicator was making a bona fide attempt to comply with his obligations under the Act and all other ancillary matters to give to him the jurisdiction to do so had been complied with. In those circumstances the plaintiff is not entitled to the relief sought in the Summons. I do not need to decide whether such an error and the consequential awarding of the claimed amounts is conduct that would extend the *Brodyn* categories because there is, in my view, a further basis upon which the second defendant was entitled to allow the claims, dealt with below in what I have referred to as the broader arguments of the parties.

31 It was submitted that this case was a "re-run" of the issues in ***Co-ordinated Construction Co Pty Limited v J M Hargreaves and Ors*** [2005] NSWSC *77*. In that case McDougall J posed two questions: (1) was it open to the Adjudicators, in their Determinations as to the amount of the progress payment to be paid by the plaintiff to the defendant, to include an amount of "delay damages" pursuant to clause 34.9 of the Contract; and (2) if it was not open to them to do so, then, because they did, are their Determinations thereby void? His Honour did not answer the first question but took the course of assuming the answer to be no, on the assumed basis that delay damages were not payable for construction work done or undertaken to be done, or for related goods or services provided or undertaken to be provided, pursuant to a construction contract [40]. However in respect of the answer to the second question, his Honour concluded that the awarding of "delay damages" under clause 34.9 could not be said to be a breach of a basic and essential requirement for, or an essential pre-condition of, a valid determination [*47*]. His Honour decided that the fact that the amount was included in the adjudicated amount did not render the determination void [53].

32 The plaintiff in that case also submitted that the Determinations were "unlawful" in the sense of that word as used by McHugh, Gummow, Kirby and Hayne JJ at paragraph [100] in *Project Blue Sky Inc and Ors v Australian Broadcasting Authority* (1998) 194 CLR *355* at 393. McDougall J concluded that they were not. I do not accept that it is appropriate to describe this litigation as a "re-run" of the *Co-ordinated Construction Co Pty Limited v J M Hargreaves and Ors* litigation. I do accept that there are similar issues raised but there is a different Determination to be considered on the special facts of this case.

33 The plaintiff submitted that delay damages are not able to be included in payment claims because it is impermissible to characterise them as being "for construction work" as defined in the Act. In support of this submission the plaintiff relied upon ***Quasar Constructions v Demtech Pty Ltd*** [2004] NSWSC 116 in which Barrett J said:

> *27. In my judgment, the submission made on behalf of the plaintiff is correct. Paragraph (a) of the definition of "progress payment" not only refers to a "final payment", it also refers to that payment being "for construction work carried out … under a construction contract". The focus is thus upon work actually done. Once that work is identified, it is necessary to see that the payment in question is payment "for" that work. The payment must accordingly be found to have the character of remuneration or reward referrable to the doing of the work. If, as in the present case, particular work is specified as the totality of the contracted work and a particular sum is provided for as the remuneration or reward referable to the totality of the contracted work, but only part of the contracted work is done, the whole of that sum (or so much of it as has not already become payable) simply cannot represent a sum payable "for" the part of the work actually done.*

34 In ***Kembla Coal & Coke v Select Civil &Ors*** [2004] NSWSC 628 McDougall J said:

> *73. Section 5 of the Act defines "construction work". The definition comprehends, in substance, the actual work of building (including demolition) and actual work or operations ancillary thereto (including cleanings, site clearance, off-site fabrication, site-restoration and the like). It is, in general terms, limited to physical activities. …*
>
> *105. It is apparent that Barrett J in Quasar considered that the word "for" should be given a narrow meaning. It is clear that his Honour regarded this conclusion as required by the language of the Act: in particular, s 13 (2) (b) (which refers to the "the claimed amount") and the definition in s 4 of the expression "claimed amount". However, as I have noted, s 13(2)(a) requires the identification of "the construction work … to which the progress payment relates": not "for which the progress payment is claimed". The definition of "claimed amount" in s 4 certainly uses the word "for". However, it qualifies the entire definition by the concluding words "as referred to in section 13". That seems to me to indicate that the legislature regarded the relevant connection as one that could be expressed as either "progress payment claim for construction work" or "progress payment relating to construction work". That does not seem to me to require that the word "for" be given a narrow construction.*

35 The defendant submitted that the definition of "construction work", in the Act should not be limited to "work actually done" or only "physical activities" as referred to in these two judgments. It was submitted that notwithstanding that s

5 of the Act descends into particular detail, the term "construction work" is simply a reference to a genus of work compared to, for example, shipbuilding work. Thus, it was said, the reference in the definition of "claimed amount" to an amount claimed to be due "for construction work carried out" is a reference to work of that type as opposed to only physical activities that took place. That the Act may refer to a genus of work, i.e. construction work, does not really assist the defendant because of the pre-requisite in the definition of the claimed amount having to be for an amount for such work having been "carried out".

36 The defendant utilised the example of a crane on site for the duration of a construction contract that may be inoperative for periods of time. It was submitted that it would be absurd to suggest that the cost of that crane for the entire duration of the contract was not a cost for the construction work, even though it may only be in actual operation for 20% of the time or 50% of the time. It was submitted that the cost of the crane in that example is no different to the cost of indolent downtime of labour at the commencement, halfway through or any other time during the project.

37 The crane example seems to me to be more appropriately utilised in analysing s 8(1)(b) of the Act, pursuant to which a person who has undertaken to supply related goods and services under the contract is entitled to a progress payment, and s 13(2)(a) of the Act, pursuant to which a payment claim must identify the related goods and services to which the progress payment relates. "Goods" include "plant or materials (whether supplied by sale, hire or otherwise) for use in connection with the carrying out of construction work": (s 6 (1)(a)(ii)). The crane example falls squarely within the provision of "goods" as defined in the Act "for use in connection with the carrying out of construction work". The words in brackets referring to the alternatives of sale or hire, contemplate those costs of provision of that plant being recoverable in the progress payment and in the payment claim. The fact that the crane is not in actual operation for 20% or 50% of the time does not mean that the cost of hiring it for its provision "in connection with the carrying out of construction work" is to be reduced. The provision of this plant is obviously in connection with the carrying out of construction work and the so-called "down-time" is neither here nor there. If the contract is not completed by the anticipated practical completion date and there is a necessity for the crane to stay on the site for a longer period of time, the cost of the additional hiring fees of the crane for the extra time the crane is on site seems to me to be clearly claimable in a payment claim as a related good supplied for use in connection with the carrying out of construction work: s 13(2)(a); s 6(1)(b).

38 That example may be used analogously to the provision of "related services", which are defined in the Act to include "the provision of labour to carry out construction work": s 6 (1)(b)(i). Notably, that definition is not expressed as "*the provision of labour for construction work carried out*". Rather, it seems to me to envisage, consistently with the practical reality of the construction industry, the provision of the labour force for the particular project that will be available "to carry out construction work". It is that "provision" that is able to be the subject of the progress claim and a payment claim under the Act. It also seems to me to encompass not only the cost of the labour but also the cost of what is needed to be in a position to enable its "provision", for instance, a proportion of the overheads of the business. If the labour force is provided on days when there is no "construction work" for it to carry out on the site caused by any qualifying reasons under the relevant contract, then it seems to me that the Act contemplates that, because labour was "provided" on site "to carry out construction work", the contractor is still entitled to be paid for the cost of that provision as a "related service". If the Superintendent awards an EOT, delay damages or costs may be claimed as an amount for that related service. However this must be subject to the terms of the particular contract between the parties.

39 The Contract in this case required the defendant to provide this related service, and permitted payment for the provision of labour even whilst there was no construction work to actually carry out. This is seen in the regime for extensions of time under clause 34, the capacity to claim delay damages under clauses 41 and 34.9 and the entitlement to include such amount in progress claims under clause 37.1. Thus there is a proper basis for the allowance of the extension of time claims per se as a "related service" under the Act and irrespective of whether they were variations.

40 I am satisfied that the plaintiff is not entitled to the relief it seeks in the Summons. The Summons is dismissed. If the parties are unable to agree on a costs order they should seek to restore the matter to the List for argument by no later than 29 April 2005.

M. G. Rudge SC and M. Christie (Plaitiff) instructed by Colin Biggers & Paisley
D. D. Feller SC and D. M. Lowenstein (First Defendant) instructed by James R Knowles Lawyers