JUDGMENT McDougall J New South Wales Supreme Court. 23rd July 2004

Introduction

1 The plaintiff ("Kembla") as principal and the defendant ("Select") as contractor entered into a contract on about 9 October 2001 ("the contract") whereby Select undertook to carry out remedial works for Kembla at Coalcliff. The contract was a "construction contract" as that expression is defined in s 4 of the *Building and Construction Industry Security of Payment Act* (1999) (NSW) ("the Act").

2 On 1 April 2004, Select served a payment claim on Kembla, claiming an amount of $2,554,898.25. (It is not immediately apparent whether this amount included or did not include GST.)

3 On 19 April 2004, Kembla provided a payment schedule to Select in which it valued the claim at nil.

4 On 4 May 2004, Select made an adjudication application to the third defendant. The third defendant referred it to the second defendant ("the adjudicator"), who accepted the adjudication application and was thereby taken to have been appointed to determine it.

5 Kembla lodged its adjudication response with the adjudicator on 12 May 2004.

6 The adjudicator made his determination on 28 May 2004 ("the determination"). He determined, among other things, that Kembla should pay Select $1,761,886.70 exclusive of GST.

7 In these proceedings, Kembla seeks, among other things, an order that the determination be quashed. It has obtained interlocutory relief restraining Select from taking steps, in effect, to enforce the determination; and has paid into Court the amount determined by the adjudicator.

The bases of challenge

8 Kembla claims that the adjudicator:

(1) Fell into jurisdictional error in determining that an amount was due by Kembla to Select in respect of the payment claim, because there was no reference date to which the payment claim related and, therefore, no entitlement to a progress payment under s 8(1) of the Act.

(2) Erred in law, and in so doing exceeded his jurisdiction, because he determined the adjudication application on the basis that the amendments made by the *Building and Construction Industry Security of Payment (Amendment) Act* 2002 (NSW) ('the Amendment Act") to ss 4 and 13(1) of the Act applied.

(3) Erred in law, and in so doing exceeded his jurisdiction, by making allowance in the determination for costs of preparation of the claim.

(4) Erred in law, and in so doing exceeded his jurisdiction, by allowing in the determination an amount for delay costs and delay damages.

(5) Erred in law, and in so doing exceeded his jurisdiction, by allowing in the determination an amount for compound interest.

First and second challenges (reference date; commencement of amendments)

The facts and relevant contractual provisions

9 By cl 42.1 of the contract read in conjunction with annexure A, payment claims were to be made monthly.

10 By cl 42.7, a final payment claim could be made "[w]ithin 28 days after the expiration of the Defects Liability Period", or where there is more than one, of the last to expire.

11 By cl 37 read in conjunction with the annexure, the Defects Liability Period was 26 weeks commencing "on the Date of Practical Completion".

12 It appears to be common ground that the Date of Practical Completion was 13 September 2003.

13 If the defects liability period is counted to start on 13 September 2003, then it expired on 12 March 2004. If, however, it is counted to start from 13 September 2003, then it expired on 13 March 2004 (ie, so that the first day of the defects liability period is 14 September 2003), then it expired on 13 March 2004. (I interpolate that, although the parties disagree as to the date on which the count of 26 weeks should start, they agree with the arithmetical results of the alternative contentions that I have just stated.)

14 Clause 37 provides that a direction of the kind purportedly given by the Superintendent on 25 March may be given "[a]t any time prior to the 14th day after the expiration of the Defects Liability Period".

15 On 25 March 2004, the Superintendent under the contract purported to direct Select, pursuant to cl 37, to rectify a number of specified omissions or defects in the works. Select received a copy of that letter by facsimile transmission on 25 March 2004. However, a number of photographs that were attached to the letter (and by which at least some of the specified omissions or defects were defined) were illegible. Select received the original letter, with legible photographs, on 26 March 2004.

16 As I have already noted, Select's payment claim was served on Kembla on 1 April 2004 (if it matters, the claim was dated 31 March 2004). The payment claim described itself as a "Final Payment Claim".

17 Some of the alleged defects specified in the Superintendent's letter of 25 March 2004 were rectified on 2 April 2004 (as to the insertion of missing step irons – U-shape steel bars installed in access or drainage pits greater than 1.2 metres in depth – and as to removal of construction material from the site) and 7 April 2004 (as to supply of omitted documents, namely the "as built" programme, an environmental compliance audit and a number

of quality assurance records). These were the only matters that Select admitted were defects and that, therefore, it was liable to rectify.

18 Kembla submits that, consistent with cl 37, three separate further defects liability periods commenced: 2 April 2004 to 1 October 2004 in respect of the step irons, the same in respect of the removal of construction material, and 7 April 2004 to 6 October 2004 in respect of the supply of omitted documents.

19 The uncontroverted evidence of Select is that the payment claim dated 31 March 2004 and lodged with Kembla on 1 April 2004 included an amount of $924 for an additional 231 plants that had been supplied (as the Superintendent accepted) and had been claimed in an earlier progress claim. Select says that by s 13 of the Act it was entitled to include that amount in a further progress claim. It says that the final payment claim, including that claim, was for this reason also a progress claim for the purposes of s 13.

The relevant principles: jurisdictional error

20 In ***Musico v Davenport*** [2003] NSWSC 977, I discussed the concept of jurisdictional error at paras [46]-[54]. I did so by reference, in particular, to ***Anisminic Ltd v Foreign Compensation Commission*** [1969] 2 AC 147 and ***Craig v The State of South Australia*** (1995) 184 CLR 163.

21 I concluded in ***Musico*** that relief would lie for jurisdictional error: including in that term refusal to exercise jurisdiction; acting in excess of jurisdiction; and jurisdictional error of law on the face of the record. As I made plain in ***Abacus v Davenport*** [2003] NSWSC 1027 at [17], I was not in *Musico* "intending to express in a comprehensive way all the grounds on which review might be available."

22 The question of jurisdictional error was considered by the High Court of Australia in ***Minister for Immigration and Multicultural Affairs v Yusuf*** (2001) 206 CLR 323. At 351 [82], McHugh, Gummow and Hayne JJ said (omitting footnotes): *"It is necessary, however, to understand what is meant by "jurisdictional error" under the general law and the consequences that follow from a decision-maker making such an error. As was said in **Craig v South Australia** …, if an administrative tribunal (like the Tribunal)*

"falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it".

"Jurisdictional error" can thus be seen to embrace a number of different kinds of error, the list of which, in the passage cited from Craig, is not exhaustive … . Those different kinds of error may well overlap. The circumstances of a particular case may permit more than one characterisation of the error identified, for example, as the decision-maker both asking the wrong question and ignoring relevant material. What is important, however, is that identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. Nothing in the Act suggests that the Tribunal is given authority to authoritatively determine questions of law or to make a decision otherwise than in accordance with the law … ."

23 At 351-352 [83], their Honours said: *"… In particular, it is important to recognise that, if the Tribunal identifies a wrong issue, asks a wrong question, ignores relevant material or relies on irrelevant material, it "exceeds its authority or powers". If that is so, the person who purported to make the decision "did not have jurisdiction" to make the decision he or she made, and the decision "was not authorised" by the Act."*

Jurisdictional fact

24 In ***Timbarra Protection Coalition Inc v Ross Mining NL*** (1999) 46 NSWLR 55, Spigelman CJ (with whom Mason P and Meagher JA agreed), considered the concept of jurisdictional fact at 63-65 [37]–[44]. His Honour said at [44]: *"The authorities suggest that an important, and usually determinative, indication of parliamentary intention [to make something a jurisdictional fact], is whether the relevant factual reference occurs in the statutory formulation of a power to be exercised by the primary decision-maker or, in some other way, necessarily arises in the course of the consideration by that decision-maker of the exercise of such a power. Such a factual reference is unlikely to be a jurisdictional fact. The conclusion is likely to be different if the factual reference is preliminary or ancillary to the exercise of a statutory power. …"*

25 It is apparent from his Honour's analysis that a jurisdictional fact is one that must be seen to exist before the statutory power can be exercised. Thus, as his Honour pointed out at [41], even where as a matter of construction, the legislature empowers the primary decision-maker authoritatively to determine the existence or non-existence of the jurisdictional fact, a court with judicial review jurisdiction may enquire into the determination of that jurisdictional fact – ie, into the reasonableness of the determination (***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** [1948] 1 KB 223) - but cannot itself determine the actual existence or non existence of the relevant facts. As Jordan CJ pointed out in ***Ex parte Mullen; Re Hood*** (1935) 35 SR (NSW) 289, 298 (in a passage cited with approval by Spigelman CJ in ***Timbarra*** at 64-65 [43], the question, whether a particular matter is one the actual existence of which is a condition of the existence of jurisdiction to determine matters or is a matter that arises for decision in the exercise of that jurisdiction, is often difficult, and is normally to be determined by implication from the language of the relevant legislation.

26 In the present case, Kembla submits and Select agrees that the existence in fact of a reference date under s 8(1) of the Act is a jurisdictional fact. For reasons that I will explain, I do not think that this is correct.

The Amendment Act

27 It is also necessary to consider the amendments effected by the Amendment Act, and the transitional provisions in the Act relating to those amendments.

28 In s 4 of the Act as originally enacted, the expression "progress payment" was defined to mean "a payment to which a person is entitled under section 8". The Amendment Act added to this the proposition that a progress payment includes, without affecting the entitlements under s 8, three specified kinds of payment: final payments, one-off payments and "milestone" payments.

29 Section 13 was amended in a way that may be demonstrated thus:

"13 Payment Claims

*(1) A person referred to in section 8(1) who is or who claims to be entitled to a progress payment under a construction contract **(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."*

30 The words (and commas) that I have underlined were inserted into the subsection by the Amendment Act. The words that I have shaded were deleted from the subsection by the same Act.

31 Before the commencement of the Amendment Act, Pt 2 of Schedule 2 to the Act (Schedule 2 contained Savings and Transitional Provisions, and was given effect by s 37) read as follows:

"2 Certain construction contracts not affected

A provision of this Act does not apply to a construction contract entered into before the commencement of that provision."

32 The Amendment Act added the following Pt 3 to Schedule 2:

"3 Application of amendments

***An amendment made to this Act by the* Building and Construction Industry Security of Payment Amendment Act 2002** *does not apply to or in respect of a payment claim served before the commencement of the amendment and any such payment claim is to be dealt with in accordance with this Act as if the amendment had not been made."*

Analysis: jurisdictional fact

33 As s 13(1) now stands, a person who is or who claims to be entitled to a progress payment ("the claimant") may serve a payment claim. The person on whom the claim is served ("the respondent") may reply by providing a payment schedule (s 14). If the parties remain in dispute then the claimant may apply for adjudication. The respondent may lodge an adjudication response (s 20). The adjudication response is not to include "any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant" (s 20 (2B)). In determining the entitlement (if any) of the claimant, the adjudicator is to consider only the matters specified in s 22(2). Those include the payment claim, together with its supporting documents, and the payment schedule, together with its supporting documents.

34 It would follow that the adjudicator cannot determine the entitlement of the claimant by reference to any "defence" that is not contained in the payment schedule (or in any other "matter" to which the adjudicator can have regard under s 22(2)). Conversely, the adjudicator is required to determine only those matters that are raised in the material to which, under s 22(2), he or she can have regard.

35 It is a necessary consequence of the amendments effected by the Amendment Act that a person may make a payment claim without being, in fact or in law, entitled to be paid a progress payment. But the statutory mechanism must still be followed through. The respondent, should it wish to dispute the claim, must provide a payment schedule. If the matter goes to adjudication and the respondent still wishes to oppose the claim it must provide an adjudication response. If the relevant disentitling circumstance is not alleged in the payment schedule or in the adjudication response, then the likely, and perhaps inevitable, consequence is that the adjudicator will determine the claimant's entitlement without regard to that circumstance. Indeed, I think, s 22(2) of the Act effectively recognises that this may be so.

36 If the flaw in the claimant's entitlement is the absence of some factual circumstance, and if (as I think is the case) the adjudicator may nonetheless determine the application in the claimant's favour (because absence of that factual circumstance has not been relied upon as a ground of opposition), then it is hard to see how that factual circumstance could be characterised as a "*jurisdictional fact*".

37 It is one thing to say that s 8 of the Act specifies the entitlement to a progress payment as something existing "*[o]n and from each reference date under a construction contract.*" It is quite something else to say that the reference date is thereby made a jurisdictional fact if the matter goes to adjudication. If the payment claim has no reference to a reference date, that may be a valid basis of opposition. But it does not mean that the claimant is anything other than "*a person who … claims to be entitled to a progress payment*". It does not mean that the adjudicator is required to make a positive finding as to a reference date, or that the adjudicator can rely on the absence of a reference date to find against the claimant where that point has not been raised by the respondent in its payment schedule or adjudication response.

38 If the existence of a reference date were regarded as a jurisdictional fact – something to be proved as a matter of fact before the adjudicator could proceed – then the adjudicator would be required to consider that matter explicitly. Further, it is at least arguable that it would not be a fact that could be established by the agreement, admission or concession of the parties. In other words, the parties could agree, for the purpose of the adjudication, that the claim was made by reference to a reference date under the contract: and yet, if this proved not to be the case, the respondent could later (subject to what I say in para [110] below as to discretionary considerations) take the point in proceedings to quash the determination.

39 The Act does not specify, expressly or by implication, that an adjudicator is required to be satisfied as to the relevant reference date before proceeding further with the adjudication. Instead, I think, it leaves it to the parties (in the usual case, the respondent) to raise the point if it is appropriate to do so. If the point is raised, then it is one that the adjudicator can determine. For the reasons given by Spigelman CJ in ***Timbarra*** at 65 [44], that would suggest that the existence of a relevant reference date is not a jurisdictional fact.

40 Kembla relied on the decision of Einstein J in ***Emag Constructions Pty Limited v High Rise Concrete Contractors (Aust) Pty Limited*** [2003] NSWSC 903. In that case, as appears from para [56], the adjudicator determined that the adjudication application had been served on 4 June 2003, whereas the court held that it was served no earlier than 12 June 2003. The time within which the respondent could lodge its adjudication response was, therefore, 19 June 2003. In fact, it was lodged on 16 June 2003. But the adjudicator held that it was out of time and did not consider it. Einstein J said that the adjudicator thereby misled and impeded the respondent as to its entitlement to lodge an adjudication response. More significantly, his Honour held that the determination was made before the end of the period within which the adjudication response might be lodged: and this was expressly forbidden by s 21(1) of the Act. As I read his Honour's reasons, it was this last circumstance that, as he said, "vitiates the validity of the adjudicator's determination". His Honour did not hold that the determination was vitiated because the adjudicator erroneously found, as a jurisdictional fact, that the adjudication application had been served on a particular date. It was vitiated because the adjudicator made his determination at a time when, by statute, he could not do so. I do not think that the decision in *Emag* provides any support for Kembla's position on this issue.

41 All of this assumes that the relevant transitional provision is that contained in Pt 3 of Schedule 2 to the Act rather than in Pt 2 of that schedule. In my judgment, it is Pt 3 that is relevant for present purposes. Part 2 was intended to ensure that, when the Act originally commenced, a provision of the Act would not apply to a construction contract entered into before the commencement of that provision. I do not think that it was intended, following the commencement of the Amendment Act, that Pt 2 would apply not just to what I might call the original provisions of the Act but also to the provisions introduced, or amended, by the Amendment Act. That was clearly the function of Pt 3. There can have been no other legislative purpose underlying Pt 3.

42 If, as I think is the case, it is Pt 3 that is relevant, then it is accepted that the relevant provisions are those as amended.

43 I therefore do not consider that the first and second challenges show that the adjudicator proceeded without jurisdiction, because of the absence of a necessary jurisdictional fact.

44 In case I am wrong in this analysis, I will consider the submissions of the parties based on the provisions of cl 37 of the contract, the Superintendent's direction given on 25 March 2004 and the consequence of the payment claim's including (as it did) an amount admitted but unpaid that was included in an earlier claim.

Analysis: clause 37; Final Payment Claim

45 Clause 42.7 provides that a "Final Payment Claim" is to be made "[w]ithin 28 days after the expiration of the Defects Liability Period or where there is more than one, the last to expire". The submission for Kembla was that a separate Defects Liability Period specified in a direction given under cl 37 was, therefore, to be considered in applying cl 42.7.

46 It will be noted that cl 37 refers to a Defects Liability Period commencing on the Date of Practical Completion. The expression "Defects Liability Period" is not otherwise defined in the contract. However, the contract and its annexure direct attention to "Separable Portions" of the Works.

47 It is agreed that there were three separable portions. Of those, separable portion 2 could not be commenced until after completion of separable portion 1, and separable portion 3 was "to be considered as Provisional and may be deleted from the Scope of Works of this Contract".

48 In the annexure to the contract, there was specified a defects liability period for separable portion No. 1 of "*26 weeks from completion of Portion 2*". There were specified for separable portions Nos. 2 and 3 defects liability periods of "26 weeks".

49 The reference in cl 42.7 to "*more than one*" Defects Liability Period is, therefore, capable of picking up the separate defects liability periods for the separable portions of the works. However, at least as to separable portions Nos. 1 and 2, it would appear that the defects liability periods are concurrent. The question is whether the reference in cl 42.7 to "more than one defects liability period" also includes any defects liability period arising as the result of a direction given by the Superintendent pursuant to clause 37. Kembla submits that it does. Select submits that it does not.

50 There is a practical problem with Kembla's submission. A claim under cl 42.7 is to be lodged "within 28 days after the expiration of" the relevant Defects Liability Period. A direction under cl 37 may be given up to 14 days

after the expiration of the Defects Liability Period that commences on the Date of Practical Completion. Select could, in theory, lodge a Final Payment Claim under cl 42.7 on the day following the expiration of the Defects Liability Period (or the last of any several Defects Liability Periods). That would be a valid final payment claim under cl 42.7. However, the Superintendent could, within the next 12 or 13 days, give a direction under cl 37 that included a specified separate Defects Liability Period for works of rectification. On Kembla's argument, the effect of that direction would be retrospectively to deny to Select the ability to lodge a Final Payment Claim. The inevitable consequence of Kembla's submission is that a claim that was properly lodged as, and is properly to be regarded as, a Final Payment Claim could lose that character retrospectively because of a direction given under cl 37.

51 On balance, and notwithstanding that problem, I think that the expression "Defects Liability Period" in cl 42.7 should include not only one arising expressly under the contract or, where there are separate periods for separable portions of the works, each such period, but also one arising pursuant to a direction given by the Superintendent under cl 37. That seems to be confirmed by the statement in cl 37 that "Clause 37 shall apply in respect of the Work of Rectification and the Defects Liability Period for that Work of Rectification".

52 The construction is also consistent with the philosophy, clearly apparent in the contract, that no final accounting between the parties should take place until all work has been completed and all defects have been rectified. If they are not rectified by the Contractor then, as cl 37 makes clear, they may be rectified by the Principal at the Contractor's expense and the cost "shall be a debt due". It would be strange to enable the Contractor to ignore its obligations in respect of defects rectification (including under any extended Defects Liability Period arising from a direction of the Superintendent) but, at the same time, obtain final payment, without deduction, of all money owing to it by the Principal.

Validity of the clause 37 notice: issues

53 That would therefore raise the question, whether the clause 37 notice was given in time. That turns on two things. Firstly, whether the Defects Liability Period commenced on the Date of Practical Completion (13 September 2003) so that it expired on 12 March 2004, or from the Date of Practical Completion, so that it expired on 13 March 2004. If the former date is correct, it will also require consideration of the question, whether the partially illegible direction sent by facsimile transmission on 25 March 2004 was effective as a direction under cl 37, or whether it was receipt of the completely legible copy on 26 March 2004 that constituted the effective direction.

Time commencing "on" a day

54 In ***Ex parte Toohey's Ltd: Re Butler*** (1934) 34 SR (NSW) 277, Jordan CJ at 285-286 said: *"The general rule is that in computing a period of time from the date, or the day of the date, of a deed, or any fixed day – that day is prima facie to be excluded, but the context or other admissible evidence may show that it is to be included; whereas in computing a period of time which commences on a fixed day, that day is included … ".*

55 Similar views have been expressed in England: see ***Zoan v Rouamba*** [2000] 1 WLR 1509, 1516-1517 (Chadwick LJ); ***Trow v Ind Coope (West Midlands) Ltd*** [1967] 2 QB 899, 923, 925-926 (Salmon LJ); and ***Sidebotham v Holland*** [1895] 1 QB 378, 382 (Lindley LJ, with whom Lord Halsbury agreed). The effect of those decisions is summarised by what Salmon LJ said in ***Trow*** at 926: ***"Sidebotham v Holland*** *seems to me to re-affirm what has hitherto never been doubted, namely that when a period of time is required to be calculated as beginning on or with a certain date, that date must be included in the calculation."*

56 Kembla relied upon statements in **Norton on Deeds** (Wm W Gaunt & Sons, Inc 1981) at 178-179 and Lewison, **The Interpretation of Contracts** (2nd Ed, Sweet and Maxwell, 1997) at 368-370. The passages from **Norton** relied upon do not deal in terms with the computation of a period of time that begins "on", rather than "from", a date. The passages relied upon from Lewison do, but in my opinion they misstate the effect of the authorities. Thus, at 370, Lewison relies on the judgment of Lindley LJ in ***Sidebotham,*** for the proposition "*that it makes no difference whether the term is said to begin "from" or "at' or "on"* a day. However, as Salmon LJ in ***Trow*** made clear, Lindley LJ was not seeking to displace the well settled principles of construction relating to the computation of periods of time running from a particular day. Further, as Lindley LJ made clear, the particular proposition was one relevant to the validity of a notice to quit; and I do not think that his Lordship intended it to be read any wider.

57 There is another problem with Lewison, in that it refers in a footnote to *Trow,* but only to the dissenting judgment of Lord Denning MR. It does not refer to the judgment of Salmon LJ (or to the short judgment of Harmon LJ, who with Salmon LJ constituted the majority); and, as I have shown, Salmon LJ clearly demonstrates that different considerations apply where the computation is expressed to commence "on", rather than "from", a particular day.

58 In any event, I think that the question is for present purposes effectively settled by what Jordan CJ said in ***Ex parte Toohey's****;* and, particularly where his Honour's analysis is consistent with subsequent authority, I should not be distracted from it by expressions of opinion in learned writings.

59 In the present case, the introductory words of cl 37 - specifying that the Defects Liability Period *"shall commence on the Date of Practical Completion"* are in clear contrast to other provisions of the contract where expressions such as "*within [28 or 14 or 7] days after …* " are used: see, by way of example only, cls 35.5, 38, 42.1, 42.5, 42.7 and 42.8 (this list is by no means comprehensive).

60 In context, I think that the drafting distinction must be taken to be deliberate, and that the parties must have intended to intend, by referring to a Defects Liability Period commencing on the Date of Practical Completion, that the date of commencement was included within that Defects Liability Period.

61 It follows that the relevant notice is the facsimile version, because the posted (and fully legible) version was not "given" to Select within the period allowed by cl 37. (I interpolate, in case it is not clear, that Kembla did not suggest that the posted version was "given" within time even if its submissions as to the proper construction of cl 37 were rejected.)

Validity of the notice – legibility etc

62 In my judgment, the version of the direction that was given by facsimile transmission on 25 March 2004 must be taken to be a valid direction to the extent that, read as a whole, it identified any particular omission or defect. If the identification of a particular defect depended upon the photographs – ie, if the defect could not be identified except by looking at the photographs – then the direction was not, in my judgment, effective. Where, however, identification of the defect did not require reference to a photograph (either because the document itself did not refer to a photograph or because, where it did, Select did not need to look at the photograph to identify the defect) then the direction was sufficient. I see no reason why the entirety of the direction should be struck down because part of it was inadequate. That would be so whether the inadequacy arose because identification of the defects necessarily required reference to the photographs, and the photographs were not legible, or because identification of the defect was, for any other reason, insufficient.

63 Further, I think, the matter is to be looked at objectively, by enquiring what the notice would convey (as to any particular alleged defect) to a reasonable and competent contractor in the position of Select.

64 The identification of the missing step irons was in the following terms: *"§ Missing Step Irons – The Precast Access Pit in embankment between Day Storage Pond and Sedimentation Basin (Refer to Drawing No. DN 31905-021, Section 4 does not have any step irons as required by the Drawings and the Specification" (Reference Note 3 on Drawing No. 31905-018 & Specification Part 304 Cl 4.1). (Refer to Photograph 9759)"*

65 I do not think that a competent contractor in the position of Select would have needed to refer to the photograph to understand the nature of the defect that was alleged. The particular access pit was described both by its location and by reference to drawings. That it did not have step irons was a matter that could hardly be (and was not) disputed. That step irons were required was, again, a matter that could hardly be (and was not) disputed. In any event, the requirement was made clear by reference to the Drawings and the Specification. The photograph can only have been intended to confirm, without the need for further inspection, that the required step irons had not been fixed in the access pit. It cannot have been required as part of the identification of the defect.

66 It may very well be that other defects referred to in the direction could only be identified by reference to photographs (for example, references to water ponding in certain places, or to revegetation being missing or inadequate in certain places). However, since those matters were not in contest before me, I do not need to express a conclusion. It is sufficient to say that I see no reason to think that the illegibility of the relevant photograph in any way invalidated the specification, as a defect, of the missing step irons.

67 I therefore conclude that the copy of the cl 37 notice given by facsimile transmission on 25 March 2004 was effective in respect of the missing step irons.

68 Mr Miller of Counsel, who appeared for Select, submitted that the missing step irons were not a defect, or were at most a minor defect. He referred to uncontroverted evidence that it took approximately 30 minutes to install them at a total cost of $200. It may very well be that the absence of the step irons would not have justified (as, apparently, it was not in fact relied upon to justify) the withholding of Practical Completion. That would be so (and, presumably, was in fact so) because the absence of the step irons was a "*minor omission or minor defect*" of the kind referred to in paragraph (a) of the definition of Practical Completion in Clause 2. However, it does not seem to me to follow that, nonetheless, the absence of those step irons was not an omission or defect, completion (or rectification) of which could properly be directed under cl 37. Nor does it follow that Kembla was not entitled to a further Defects Liability Period, in respect of the step irons once they were installed, equivalent to that which would have applied to them had they been installed, as they should have been, as part of the Works that were effected prior to the Date of Practical Completion.

69 Further, and in any event, Select did not ask the Court to review, in this regard, the decision of the Superintendent; and indeed, I do not think that the Court has any such power of review.

70 It would follow from all this that if I were wrong in my conclusion that the existence of a reference date is not a jurisdictional fact, then (unmeritorious as it may seem) the absence of the step irons, and the cl 37 direction in respect of them given on 25 March 2003, means that there was no reference date under cl 42.7 in respect of which the relevant claim, as a Final Payment Claim, could properly be regarded as having been given.

71 It would also follow that even if the Final Payment Claim incorporated (as is permissible) elements that had been included in a prior payment claim, it would not thereby be valid. That circumstance (assuming it to exist) does not take away the necessity for the payment claim to be made on or from a reference date.

Third challenge (preparation costs)

The facts and relevant contractual provisions

72 By s 4 of the Act, a "progress payment" is defined to mean "a payment to which a person is entitled under section 8" and to include the kinds of payments specified in paras (a), (b) and (c) of the definition.

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.

74 Section 8 gives to a person "who has undertaken to carry out construction work under" a construction contract an entitlement to a progress payment (I omit, as presently irrelevant, any reference to the supply of related goods and services.) That right accrues *"on and from each reference date under a construction contract"*. Section 8(2) defines the expression "reference date". Relevantly, for present purposes, it is a date determined in accordance with the terms of the contract as a date on which a claim for a progress payment may be made (s 8(2)(a)).

75 Section 9 describes how "a progress payment to which a person is entitled in respect of a construction contract" is to be quantified. It is either "the amount calculated in accordance with the terms of the contract" (para (a)) or, if the contract does not expressly provide for this, "the amount calculated on the basis of construction work carried out or undertaken to be carried out ... under the contract" (para (b)).

76 Section 10 describes how construction work is to be valued. The primary method of valuation, and that applicable for present purposes, is set out in s 10(1)(a), which requires the valuation to be "in accordance with the terms of the contract".

77 As I have already noted, s 13 sets up the mechanism by which a claimant may assert its entitlement to a progress payment. Sub s (2) requires the identification of *"the construction work ... to which the progress payment relates"* (para (a)). Section 13(2)(b) refers to the concept of the *"claimed amount"*. Perhaps unnecessarily, and certainly confusingly, that expression is defined in s 4 to mean *"an amount of a progress payment claimed to be due for construction work carried out ... , as referred to in section 13"*.

78 It is accepted that the adjudicator included, in the amount that he determined to be payable by Kembla to Select, amounts totalling $232,000 for "preparation costs" in respect of two (numbers 067 and 075) of the numerous variations that were comprehended by Select's payment claim and adjudication application. These costs are said to be payable under the last paragraph of cl 40.5 of the contract. That clause says, in substance, that if the Superintendent directs Select to provide a detailed quotation for a variation, supported by measurements or other evidence of cost, then Select is entitled to be paid "the reasonable cost for preparing the measurements or other evidence of cost that has been incurred over and above the reasonable overhead cost."

79 Kembla sought to characterise the claim for preparation costs as a claim for damages. In this, it referred to an expert determination that had taken place in March/April 2003. Select's position paper given to the expert relied in terms on cl 40.5 as the basis of its entitlement to preparation costs. The expert, however, did not allow that as a contractual claim but allowed it as "damages". Relying upon this history, Kembla submitted that I could "comfortably" infer that the claim for preparation costs in the adjudication application was a claim based on Select's success in the expert determination process and was therefore a claim for damages.

80 I do not accept this submission. For reasons that I give below, I think that the claim for preparation costs is a contractual entitlement. I do not know on what basis the expert decided that the claim was not one that could be sustained under the contract but was one that could be sustained as damages. However, I am not bound by his determination. Further, in circumstances where the claim was expressly advanced before the expert on the basis of a contractual entitlement, I see no reason to infer that this ground was abandoned in favour of the ground upon which the expert relied.

81 The submission for Select was that the Superintendent had given it a direction under cl 40.3. Kembla questioned whether the document relied upon was capable of being construed as a direction under cl 40.3.

82 It is accepted that Kembla did not take this point in its adjudication response. It did not submit to the adjudicator that the amount of a progress claim could only be an amount payable for construction work (or, irrelevantly for present purposes, the supply of related goods or services); and, specifically, that it could not include an amount for the costs of preparation of a claim.

Analysis

83 An entitlement to a progress payment arises from the undertaking to carry out construction work, or to supply related goods and services, under a construction contract (see s 8(1)). However, where that entitlement exists, its quantification is, in the first instance, to be carried out in accordance with s 9(a). That is an entitlement *"in respect of a construction contract."* It is to be *"calculated in accordance with the terms of the contract"*.

84 Thus, where the contract provides a mechanism for quantification of a progress payment, it is that mechanism which is to be adopted. There is no provision in the Act that in terms requires the reading down of a contractual mechanism so that it would allow only the cost of, rather than the cost relating to, the carrying out of construction work or the supply of related goods and services.

85 It would be extraordinary if a claimant were entitled to be paid a particular amount or cost under the contractual mechanism, but not under the statutory procedure. There is nothing in the history or terms of the Act that suggests that it was intended to restrict any contractual entitlement to, or as to the quantification of, a progress payment. Indeed, as Austin J observed in ***Jemzone v Trytan*** [2002] NSWSC 395 at [37], the Act *"generally leaves it to the construction contract to define the rights of the parties but makes "default provisions" to fill in the contractual gaps*

…". I do not think that the amendments to the Act that were effected by the Amendment Act in any way undermine the force of his Honour's observation. Indeed, I think, the amendments reinforce what his Honour said. Section 3(4) was amended by the Amendment Act to provide, among other things, that the Act "does not limit … any other entitlement that a claimant may have under a construction contract".

The decision in Quasar v Demtech

86 Kembla relied upon the decision of Barrett J in ***Quasar Constructions v Demtech Pty Ltd*** [2004] NSWSC 116. I have already said that I do not think that the entitlement to preparation costs is, in the context of the particular contract, an entitlement to damages. But because Kembla relied upon ***Quasar*** also in connection with delay costs (the fourth challenge), I should consider the submission at this point.

87 ***Quasar*** was a case where *"the … contract did not make provision for any system of progress payments in the ordinary sense"* (para 35). Accordingly, as Barrett J said, the builder's entitlements and their quantification fell to be determined by the regime set out in ss 8(2)(b), 9(b) and 10(1)(b). The task of the adjudicator *"involved calculation of the value of the construction work carried out or undertaken to be carried out … in accordance with s 10(1)(b) and involving a value arrived at having regard to the matters specified in sub paras (i) to (iv) of s 10(1)(b)."* Barrett J held that because the adjudicator did not do that, but, instead, calculated an entitlement on the assumption that the contract in its entirety had been performed by completion, or substantial completion, of all specified work, he fell into jurisdictional error. I respectfully agree with that conclusion.

88 Barrett J noted at para [30] that, by reference to s 3(1), *"[a] progress payment is thus something to be recovered "in relation to the carrying out of … work"."* He said at para [31], referring to s 13(2)(a) and to the definition of "Claimed Amount", that *"[t]he words "for construction work" describe the necessary link between work and payment".* I respectfully agree with his Honour's observation.

89 At para [32], Barrett J concluded, conformably with ***Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd*** [2003] NSWSC 266 and ***Paynter Dixon Constructions Pty Ltd v J F & C G Tilston Pty Ltd*** [2003] NSWSC 869, that a payment claim would not be invalid simply because it included "matter arguably beyond its permitted scope".

90 However, his Honour said at para [33], following the judgment of Bergin J in ***Paynter Dixon*** at paras [33]-[35], it did not follow "that an element on account of extension of time, delay, disruption or any other perceived wrong can properly be taken into account in an adjudication, as distinct from a payment claim".

91 At [34], Barrett J concluded that *"[t]he clear message throughout the Act is … that any "progress payment" … can only have that character if it is "for" work done or, where some element of advance payment has been agreed, "for" work undertaken to be done."* His Honour said that *"[t]he relevant concepts do not extend to damages for breach of contract, including damages for the loss of an opportunity to receive in full a contracted lump sum price."*

92 I agree that a calculation of entitlement under ss 9(b) and 10(1)(b) is a calculation of the value of construction work carried out or undertaken to be carried out, made by reference only to the matters specified in s 10(1)(b). I accept that there is no room in such a calculation for any amount that is payable by way of damages for breach of contract. However, I do not accept that it follows either from the structure of the Act or from the analysis of Barrett J in ***Quasar*** that this last conclusion must necessarily apply where:

(1) the entitlement (even though it may be equivalent to an entitlement to damages) is given by the express terms of the contract as an element of a progress payment; and

(2) the calculation of that entitlement is, therefore, carried out pursuant to ss 9(a) and 10(1)(a).

93 Kembla relies on para [34] of *Quasar,* to which I have referred in para [91] above. If I may say so with respect, I do not think that the width of expression of para [34] is justified by the wording of the Act. Nor do I think that it was necessary for the actual decision in *Quasar* – with which, as I have indicated, I am wholly in agreement. I therefore do not think that para [34] supports Kembla's position in the present proceedings.

The statutory scheme

94 Section 3(1) states the object of the Act: " *… to ensure that any person who undertakes to carry out construction work … under a construction contract is entitled to receive, and is able to recover, progress payments **in relation to the carrying out of that work** …* " (my emphasis).

95 Section 3(2) specifies the means by which that entitlement is enforced as being a grant of "*a statutory entitlement to **such a payment** …* " (my emphasis).

96 The definition of *"progress payment"* refers to the entitlement "under section 8" and, without limitation, extends to final payments, single or one-off payments and milestone payments.

97 Section 8(1) gives to *"a person … who has undertaken to carry out construction work under [a construction] contract"* an entitlement to a progress payment.

98 By s 9(a), the amount of the progress payment *"in respect of a construction contract"* is, where the contract deals with the matter, "the amount calculated in accordance with the terms of the contract".

99 Where the contract provides for quantification of a progress payment, s 10 is not engaged. Section 10 is only engaged where the contract does not so provide. That is the situation covered by s 9(b). It is in that case (in contrast to the width of the language in para (a)) that the quantification is *"on the basis of the value of construction work …* ". Section 10 then specifies how construction work is to be valued.

100 Section 13 deals with payment claims. By sub s (2), a payment claim is to identify the construction work to which the progress payment relates (para (a)) and indicate the *"claimed amount"* (para (b)). Section 4 defines the claimed amount as "*an amount of a progress payment claimed to be due for construction work carried out … as referred to in section 13*".

Payment "for construction work"

101 This raises the question of what is meant by "for". In other words, it asks what is the relationship between the amount and the construction work so that one may say that the former is "for" the latter?

102 A glance at a dictionary will show the range of meanings that the word "for" can convey. A glance at the authorities will show that the construction to be given the word is very much a matter of context. Thus, in ***State Government Insurance Office (Queensland) v Crittenden*** (1966) 117 CLR 412, it was held unanimously that the word "for" in s 3(1) of the *Motor Vehicles Insurance Acts* 1936 to 1961 (Qld) should be given a wide construction. The question was whether a statutory contract of insurance against liability "for accidental bodily injury" extended to a claim for loss of service or consortium. The court held unanimously that it did.

103 McTiernan ACJ said at 414: *"The word "for" has a sense identical and coextensive with "on account of". … The action for loss of service or consortium extends to cases of negligent driving of motor vehicles occasioning such deprivation. This remedy exists independently of the rights of the injured party. But upon analysis of the circumstances the damages recoverable for such loss are "on account of" the injury caused by the negligent driving."*

104 Taylor J at 415-416 pointed out that the word "for" if read alone and given ***"literal significance"*** might indicate a narrow degree of connection, but that whether it should be given a ***"narrow literal significance"*** required its statutory context to be considered. His Honour concluded at 416 "that it is impossible to give to the word "for" any narrower meaning than would be indicated by the expression "in respect of"."

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 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 claimed 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.

106 Accordingly, in the context of the Act – specifically, having regard to the objects of the Act as stated in s 3 (see paras [95] and [96] above) - and the recognition, through s 9(a), of the primacy of contractual quantification where that is available (see para [98] above, and see also s 3(4): the Act does not limit contractual entitlements), I think that a progress payment may include an amount for preparation costs where the contract so provides. In other words, where the contractual assessment of a progress payment (to which, pursuant to s 9(a), effect is to be given) includes preparation costs as a component of the entitlement, I do not think that the Act should be construed so as to deprive the claimant of that entitlement. It would be an extraordinary result if an assessment of the claimant's rights by the Superintendent, or other appropriate person having that function under the contract, included (as the contract demands) any applicable amount of preparation costs, but if the adjudicator's determination could not.

107 I therefore conclude that, to the extent that the adjudicator did include an amount for preparation costs, he did not fall into jurisdictional error. At the risk of repetition, I stress that this conclusion applies only to an entitlement pursuant to a relevant contractual provision to which, under s 9(a), effect is to be given. It does not apply to the case where the entitlement is to be assessed under s 9(b) by reference to the factors described in s 10(1)(b). In this latter case, as I have said, I agree with the conclusion of Barrett J in ***Quasar.***

108 As I have noted in para [81] above, there may have been a question between the parties as to whether the Superintendent had in fact given a direction under cl 40.3. That is a question of fact that was for the adjudicator to determine. Presumably, in coming to his decision that preparation costs were allowable, the adjudicator decided that there had been a direction under clause 40.3. If that express or implicit decision be incorrect (and there was no material put to me to suggest that it was), the resulting error would be one within jurisdiction.

109 I therefore conclude that the third challenge does not show that, in awarding an amount for preparation costs, the adjudicator acted in excess of his jurisdiction.

Discretionary considerations

110 Even if I were wrong in this conclusion, I would not grant relief by reason of the matters raised under the third challenge. That is because the relevant challenge was not taken before the adjudicator. As a matter of discretion, and consistent with what I said in ***TransGrid v Walter Construction Group*** [2004] *NSWSC 21 at para [67],* I think that the parties should be held, in substance, to the case that they sought to make out before the adjudicator. Any other approach could permit a party with a good point to take its chances on other points before the adjudicator, whilst holding back the particular point, and raise it in a challenge in this Court if the outcome of the adjudication were not to its liking. Of course, this cannot be a universal rule. There may be cases where it is appropriate to

permit a party to rely on a ground that was not taken before the adjudicator. But in the present case, there is no evidence to suggest why this is so.

Fourth challenge (delay costs and delay damages)

The facts

111 Clause 40.3 of the contract provided that, absent agreement between the Superintendent and Select, any variation directed or approved by the Superintendent should be valued under cl 40.5. Clause 40.5(f) reads as follows:

"*(f) If the valuation relates to extra costs incurred by the Contractor for delay or disruption, the valuation shall include a reasonable amount for overheads but shall not include profit or loss of profit;*".

112 Kembla submits that *"a significant proportion of the balance of Variation Claims 067 and 075 respectively can be allocated to delay costs and/or breaches of contract otherwise claimed by Select pursuant to the Contract."* It submits that *"[a] claim for delay is by its very nature a claim for damages"* and that "*the true juristic nature of delay costs [as] a claim for damages*" is not changed because *"[t]he contract in the present case expressly provides for delay costs"* (outline of submissions dated 11 June 2004, paras 20, 26).

113 Select accepted that variation claim 067 "*does incorporate a time cost element*", but submitted that this element "is not a "**delay claim**" per se in the sense of it being alleged that Select was delayed in the commission of its contract works". It submitted further *"that there is no separate time (or delay) separately costed into"* variation claim 075 (outline submissions dated 15 June 2004, para 29).

114 In paragraph 17.4 of the determination, the adjudicator stated:

"17.4 I note that the relief sought in the claims [variation claims 067 and 075] are [sic] couched in the Amended Points of Claim in the alternative terms of contractual rights, damages and rights under the Trade Practices Act. Consistent with the limits upon my jurisdiction found in the [Building and Construction Industry Security of Payment] Act, I do not base this Determination in any way, on any Trade Practices Act count, or any entitlement to damages outside the context of the Contract. …"

115 Kembla submits that the adjudicator thereby both recognised that delay costs were "in the nature of an allowance for damages" (outline of submissions dated 11 June 2004, para 27) and confirmed that he included such an allowance in his determination.

The principles

116 It may be correct to say in some circumstances that a delay claim is a claim for, or in the nature of a claim for, damages. Kembla relied upon **Keating on Building Contracts** (7th ed, Sweet and Maxwell, 2001) at 264-265 in support of this proposition. However, at 265 [8-63], the learned authors state that the distinction between claims under and for breach of contract "*should always be sharply observed*". They continue: *"Most sophisticated building contracts give the contractor contractual rights to additional payment in circumstances some of which may also, or might otherwise, be breaches of contract by the employer. Such rights are usually additional to, and not in substitution for, the contractor's common law remedy of damages for breach of contract. A claim under the contract will depend on the relevant terms."*

117 As the passage from **Keating** that I have cited shows, there can be no hard and fast rule that a delay claim must always be a claim for damages. The precise nature of the claim will require consideration of the relevant terms of the contract.

118 Kembla also relied on Dorter and Sharkey, **Building and Construction Contracts in Australia** (Thomson LBC, looseleaf) at [9.390]-[9.520]. I do not think that the authors expressed any view contrary to the proposition that I have just enunciated.

119 In support of its submission that a claim for delay costs could not form an ingredient of a progress payment, Kembla relied upon the judgment of Barrett J in ***Quasar***. I have considered in paras [87] to [91] the relevant aspects of his Honour's reasoning.

Analysis

120 The contractual entitlement to delay costs under cl 40.5 arises in terms where a valuation of a variation is to be made. The various paragraphs of the sub clause specify the way in which the valuation is to be made. The relevant paragraph, (f), applies where the variation (or the execution of the work comprised in the variation) has led to delay or disruption, as a result of which the Contractor has incurred extra costs. It says how those extra costs are to be treated: namely, by including *"a reasonable amount for overheads"*, but excluding "*profit or loss of profit*".

121 I do not think that this can be equated to a claim for damages. It is, on its face, the bargain of the parties as to how the Contractor is to be compensated for an element of the true cost of carrying out a variation. In any event, assuming that the variation is "within the general scope of the Contract" (cl 40.1), the Contractor is bound to execute it. It follows that a direction to perform a variation within the general scope of the contract cannot be a breach of contract. If there is no breach of contract, there can be no liability for damages; or, more accurately, the concept of damages is irrelevant. See ***Exports Credits Guarantee Department v Universal Oil Products Co*** [1983] 1 WLR 399, 402 (Lord Roskill, with whom all other members of the House of Lords agreed). An amount of money payable upon the happening of a specified event other than a breach of a contractual duty owed by the

contemplated payor to the contemplated payee is not (as his Lordship made clear at 403) an amount payable by way of damages for breach of contract.

122 I do not think that the adjudicator in his determination at para 17.4 stated that he was allowing delay costs as an allowance for damages. Indeed, I think, he was doing no more than reminding himself (correctly) that if delay costs were only available as damages, then he could not award them. Further, for the reasons given in paras [87] to [91] above, I do not regard the decision of Barrett J in *Quasar* as disentitling Select to an allowance for delay costs under cl 40.5.

Discretionary considerations

123 In any event, if I were wrong in concluding that there was no jurisdictional error, I would not, in the exercise of my discretion, grant relief, for the reasons given in para [110] above.

Fifth challenge (compound interest)

The facts and relevant contractual provisions

124 Clause 42.9 of the contract provided that overdue money should bear interest at the rates stated in the Annexure and otherwise at the rate of 18% per annum. It specified that "[i]nterest shall be compounded at six monthly intervals".

125 In Annexure A, the interest rate was stated (I do not think that the obviously incorrect reference to cl 46 matters) as 8%.

126 Under s 11(2) of the Act, interest is payable at the higher of the rates prescribed under the *Supreme Court Act* from time to time in respect of unpaid judgments or at the rate specified in the construction contract.

127 By s 95 of the *Supreme Court Act* 1970, read in conjunction with Pt 40 r 7, the prescribed rate of interest on judgments is determined by reference to Schedule J to the Rules.

128 The adjudicator dealt with interest in para 34 of the determination. He concluded, in my judgment correctly, that the rate to be applied was that specified in Schedule J: relevantly, at all times material to his consideration, 9% per annum.

129 It is not apparent from the determination itself that the adjudicator allowed an amount of compound interest. However, Select concedes that its claim for interest in respect of variation claims 067 and 075 included interest compounding at six monthly rests in accordance with cl 42.9.

Analysis

130 Kembla submits that a claim for compound interest is a claim for damages: ***Hungerfords v Walker*** (1989) 171 CLR 125. Accordingly, it submitted that the adjudicator had no jurisdiction to allow an amount for compound interest.

131 Select submits that the arbitrator was entitled to award an amount for compound interest because there was a contractual entitlement.

132 I do think that there is a distinction in principle between delay costs and compound interest. Where a variation is directed, and the effect of execution of the variation is to delay the works in some relevant respect, then the true cost to the builder of carrying out the variation includes not only the actual cost of the construction work comprised in that variation but also the cost to the builder of delay occasioned by execution of that work. However, interest (whether compound or otherwise) is of a different character. It is in terms, as cl 42.9 makes clear, an entitlement to compensation for the wrongful withholding of money that is due and payable.

133 I therefore do not think that my analysis in respect of entitlement to delay costs is determinative of the claim for compound interest.

134 In principle, I think, a claim for interest on unpaid progress payments (and for present purposes the distinction between simple and compound interest may be ignored) is not sufficiently related to the construction work "for" which the progress payment is claimed to be itself an element of that progress payment. In principle, therefore, I think that the analysis of Barrett J in ***Quasar*** applies to claims for interest on unpaid progress payments.

135 It may be, under a particular form of contract, that the amount of a progress claim is expressly specified to include interest on any amounts earlier payable under the contract that were paid late. If that were the case (so that, for example, the Superintendent were required to assess it and include it as an element of a progress claim), it might be something that an adjudicator could take into account in a determination under the Act. However, since there is no such provision in this contract, I express no concluded view on this point.

136 In principle, therefore, I think that the adjudicator erred, and exceeded his jurisdiction, in allowing (if he did) a claim for compound interest. However, it was not submitted to him that he could not include, in the adjudicated amount, any amount for unpaid interest. It was not submitted to him that Select had no entitlement under the Act (or under the contract in so far as s 9(a) directed attention to the contract) to receive an amount of compound interest as part of its progress payment or the adjudicated amount of that progress payment. Thus, for the reasons that I have already indicated (see para [110] above), I do not think that it is appropriate to grant prerogative relief. Further, as to discretionary considerations, I think that it is relevant to bear in mind that there is a contractual entitlement to compound interest, although not as an element of a progress claim. In principle, therefore, to the extent that the adjudicated amount included an amount for compound interest, it did not give Select something to which, otherwise, it had no entitlement.

Conclusions and order

137 I therefore conclude that the claim for prerogative relief fails, in some cases as a matter of principle, and in some cases as a matter of discretion.

138 I order that the summons be dismissed. I will hear the parties on costs.

M Christie/J M White (Plaintiff) instructed by Sparke Helmore
D T Miller (First Defendant) instructed by Henry Davis York
Submitting appearance (Second Defendant)