Peninsula Balmain P/L v Abigroup Contractors P/L No1 [2002] Adj.L.R. 07.03

Court of Appeal, New South Wales before Mason P : Stein JA : Hodgson JA : 3rd July 2002

1 **MASON P**: I agree with the reasons of Hodgson JA as set out below.

2 **STEIN JA:** I also agree with Hodgson JA.

3 **HODGSON JA:** On 30 November 2001, Barrett J in the Construction List of the Equity Division made the following orders disposing of proceedings brought by the respondent Abigroup Contractors Pty. Limited (Abigroup) against the appellant Peninsula Balmain Pty. Limited (Peninsula), arising out of an agreement dated 20 March 1998 by which Abigroup was to perform construction and related works for a development being carried on by Peninsula at Balmain:

1. That, pursuant to Part 72 rule 13(1), the report of Mr. T.M. McDougall dated 19 February 2001, together with the supplementary report dated 27 February 2001, delivered to the Court be adopted, varied by disallowing the variation VPR32.

2. That judgment be entered for the plaintiff in these proceedings against the defendant in the sum of $2,870,260.50 together with interest thereon at the rates applicable under Schedule J to the Supreme Court Rules from 1 December 1999 to the date of judgment.

3. That the Further Amended Cross Claim be dismissed.

4. That the defendant pay the costs of the plaintiff in these proceedings from and including 26 May 2000 as either agreed or assessed on a party and party basis.

5. That the defendant forthwith return to the plaintiff the following bank guarantees:

(a) bank guarantee No 123940-071-104 dated 8 June 2000 in the amount of $2,595,000;

(b) bank guarantee No 123940-071-075 in the amount of $652,000;

(c) bank guarantee No 123940-071-076 in the amount of $652,500, as referred to in paragraph 3 of the Short Minutes of Order by Einstein J on 2 June 2000;

(d) bank guarantee No 891 in the sum of $200,000; and

(e) bank guarantee No 892 in the sum of $250,000.

Peninsula appeals to this Court from those orders.

CIRCUMSTANCES

4 Peninsula's development at Balmain involved substantial re-construction and refurbishment of two factory buildings, so as to convert them into residential flats, and also construction of additional town houses, the whole development to be known collectively as the Peninsula Apartments.

5 For the purposes of this development, Peninsula (then named Waterview Apartments Pty. Limited) entered into an agreement for the provision of project management services dated 28 May 1997 with a related company The East Asia Property Group Australia Pty. Limited (East Asia). Under this agreement, Peninsula is called the Principal and East Asia is called the Project Manager. The relevant provisions of this agreement are cl.2, concerning the Project Manager's responsibility and authority, and cl.5 concerning services to be provided by the Project Manager. These clauses are in the following terms:

2. PROJECT MANAGER'S RESPONSIBILITY AND AUTHORITY

2.1. Service - The Project Manager shall perform the services referred to in this Agreement and in performance of these services the Project Manger shall exercise all reasonable skill, care and diligence, in conformity with the normal standards of professional practice in the completion of the Project.

2.2. Authority - The Principal authorises the Project Manager to act as the Principal's Agent in all matters relating to the design and construction of the project.

2.3. Variation to design - The Project Manager shall not make any material alteration to, addition to, or omission from the approved design without the consent in writing of the Principal, except in case of urgency during construction, in which case he shall notify in writing the Principal's Representative promptly.

2.4. Consultants - The Project Manager will appoint and direct all other consultants required in the execution of the project.

2.5. Inspection - The services to be provided by the Project Manager include contract administration. The Project Manager will certify in writing to the Principal on completion of the Project that inspections were carried out during construction, and that the buildings and other works have been completed generally in accordance with the contracts and to the Project Manager's satisfaction.

2.6. Confidentiality - Except as required in his duties to the Principal, the Project Manager will never directly or indirectly use, disseminate, disclose, lecture upon, publish or reveal his work or any information or communications communicated to or by him on any way relating to the Project and his services, consultations and advice in connection therewith or the result thereof without the consent in writing of the Principal, not to be unreasonably withheld.

5. SERVICES TO BE PROVIDED BY THE PROJECT MANAGER

5.1. The services to be provided by the Project Manager to the Principal under this Agreement are summarised hereunder:

5.1.1. - Assistance in the establishment of detailed client brief

5.1.2. - Organisation of site survey, and geo- technical survey

5.1.3. - Appointment of all sub-consultants (architects, engineers, etc.)

5.1.4. - Preparation of concept designs

5.1.5. - Value Management appraisal

5.1.6. - Liaison with appropriate authorities
5.1.7. - Preparation of detailed designs
5.1.8. - Preparation and constant monitoring of detailed budget
5.1.9. - Preparation of working drawings and specifications
5.1.10. - Obtaining of all necessary authority approvals
5.1.11. - Recommendation of most appropriate form of building contract
5.1.12. - Preparation of tender documents/form of contract
5.1.13. - Pre-qualification of tenderers
5.1.14. - Assessment/ recommendation of successful tenderer
5.1.15. - Overview of contract signing by contractor and client
5.1.16. - Administration of construction contract, verification of progress payments
5.1.17. - Quality control of all building works
5.1.18. - Constant co-ordination with client regarding mechanical and electrical fitout
5.1.19. - Processing of any valid variations
5.1.20. - Issuing of final certificate on completion
5.1.21. - Supervision of defects liability period.

6 The building contract is dated 20 March 1998, and is expressed to be between Peninsula as Principal and Abigroup as Contractor, and it provides for the works to be carried out for a "guaranteed maximum price" of $26.1 million. The contract incorporates the Australian Standard General Conditions of Contract (AS2124-1992) with certain modifications and additions provided by special conditions.

7 Clause 2 of this contract contains the following definition of "*superintendent*": *`Superintendent' means the person stated in the Annexure as the Superintendent or other person from time to time appointed in writing by the Principal to be the Superintendent and notified as such in writing to the Contractor by the Principal and, so far as concerns the functions exercisable by a Superintendent's Representative, includes a Superintendent's Representative.*

East Asia is stated in the Annexure to the contract to be the Superintendent.

8 Clause 23 concerning the Superintendent is as follows:

23 SUPERINTENDENT

The Principal shall ensure that at all times there is a Superintendent and that in the exercise of the functions of the Superintendent under the Contract, the Superintendent -
(a) acts honestly and fairly;
(b) acts within the time prescribed under the Contract or where no time is prescribed, within a reasonable time; and
(c) arrives at a reasonable measure or value of work, quantities or time.
If, pursuant to a provision of the Contract enabling the Superintendent to give directions, the Superintendent gives a direction, the Contractor shall comply with the direction.
In Clause 23 'direction' includes agreement, approval, authorization, certificate, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement.
Except where the Contract otherwise provides, a direction may be given orally but the Superintendent shall as soon as practicable confirm it in writing.
If the Contractor in writing requests the Superintendent to confirm an oral direction, the Contractor shall not be bound to comply with the direction until the Superintendent confirms it in writing.

9 Clause 35 deals with times for commencement and practical completion. The relevant parts of this clause are cls.35.1, 35.2, 35.5 and 35.6. These parts are in the following terms:

35 TIMES FOR COMMENCEMENT AND PRACTICAL COMPLETION

35.1 Time for Commencement of Work on the Site

The Contractor shall give the Superintendent 7 days' notice of the date upon which the Contractor proposes to commence work on the Site.
The Superintendent may reduce the period of notice required.
The Contractor shall commence work on the Site within 14 days after the Principal has given the Contractor possession of sufficient of the Site to enable the Contractor to commence work.
The Superintendent may extend the time for commencement of work on the Site.

35.2 Time for Practical Completion

The Contractor shall execute the work under the Contract to Practical Completion by the Date for Practical Completion.
Upon the Date of Practical Completion the Contractor shall give possession of the Site and the Works to the Principal. ...

35.5 Extension of Time for Practical Completion

When it becomes evident to the Contractor that anything including an act or omission of the Principal, the Superintendent or the Principal's employees, consultants, other contractors or agents, may delay the work under the Contract, the Contractor shall promptly notify the Superintendent in writing with details of the possible delay and the cause.

When it becomes evident to the Principal that anything which the Principal is obliged to do or provide under the Contract may be delayed, the Principal shall give notice to the Superintendent who shall notify the Contractor in writing of the extent of the likely delay.
If the Contractor is or will be delayed in reaching Practical Completion by a cause described in the next paragraph and within 28 days after the delay occurs the Contractor gives the Superintendent a written claim for an extension of time for Practical Completion setting out the facts on which the claim is based, the Contractor shall be entitled to an extension of time for Practical Completion.

The causes are -

(a) events occurring on or before the Date for Practical Completion which are beyond the reasonable control of the Contractor including but not limited to -
industrial conditions;
inclement weather;

(b) any of the following events whether occurring before, on or after the Date for Practical Completion -
(i) delays caused by-
- the Principal;
- the Superintendent;
- the Principal's employees, consultants, other contractors or agents;
(ii) actual quantities of work being greater than the quantities in the Bill of Quantities or the quantities determined by reference to the upper limit of accuracy stated in the Annexure (otherwise than by reason of a variation directed under Clause 40);
(iii) latent conditions;
(iv) variations directed under Clause 40;
(v) repudiation or abandonment by a Nominated Subcontractor;
(vi) changes in the law;
(vii) directions by municipal, public or statutory authorities but not where the direction arose from the failure of the Contractor to comply with a requirement referred to in Clause 14.1;
(viii) delays by municipal, public or statutory authorities not caused by the Contractor;
(ix) claims referred to in Clause 17.1(v);
(x) any breach of the Contract by the Principal;
(xi) any other cause which is expressly stated in the Contract to be a cause for extension of time for Practical Completion.

Where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is not a cause referred to in the preceding paragraph, then to the extent that the delays are concurrent, the Contractor shall not be entitled to an extension of time for Practical Completion.

In determining whether the Contractor is or will be delayed in reaching Practical Completion regard shall not be had to -
- whether the Contractor can reach Practical Completion by the Date for Practical Completion without an extension of time;
- whether the Contractor can, by committing extra resources or incurring extra expenditure, make up the time lost.

With any claim for an extension of time for Practical Completion, or as soon as practicable thereafter, the Contractor shall give the Superintendent written notice of the number of days extension claimed.
If the Contractor is entitled to an extension of time for Practical Completion the Superintendent shall, within 28 days after receipt of the notice of the number of days extension claimed, grant a reasonable extension of time. If within the 28 days the Superintendent does not grant the full extension of time claimed, the Superintendent shall before the expiration of the 28 days give the Contractor notice in writing of the reason.

In determining a reasonable extension of time for an event causing delay, the Superintendent shall have regard to whether the Contractor has taken all reasonable steps to preclude the occurrence of the cause and minimise the consequences of the delay.

Notwithstanding that the Contractor is not entitled to an extension of time the Superintendent may at any time and from time to time before the issue of the Final Certificate by notice in writing to the Contractor extend the time for Practical Completion for any reason.
A delay by the Principal or the failure of the Superintendent to grant a reasonable extension of time or to grant an extension of time within 28 days shall not cause the Date for Practical Completion to be set at large but nothing in this paragraph shall prejudice any right of the Contractor to damages.

35.6 Liquidated Damages for Delay in Reaching Practical Completion

If the Contractor fails to reach Practical Completion by the Date for Practical Completion, the Contractor shall be indebted to the Principal for liquidated damages at the rate stated in the Annexure for every day after the Date for Practical Completion to and including the Date of Practical Completion or the date that the Contract is terminated under Clause 44, whichever first occurs.
If after the Contractor has paid or the Principal has deducted liquidated damages, the time for Practical Completion is extended, the Principal shall forthwith repay to the Contractor any liquidated damages paid or deducted in respect of the period up to and including the new Date for Practical Completion.

10 Clause 36, concerning delay or disruptions costs, is varied by the special conditions to read as follows:
The Contractor shall not be entitled to any costs, losses, expenses or damages whatsoever arising from any delay, disruption or interference to the work under the Contract or from the granting of an extension of time other than an instruction to cease work or an action by the superintendent or principal which affects the critical path programme. (Notwithstanding the contractors obligation to co-ordinate with the design team).

11 Clause 40 concerns variations, and the relevant parts are cl.40.1, 40.2 as varied by the special conditions, 40.3 and 40.4. These are in the following terms:

40. VARIATIONS

40.1 Variations to the Work

The Superintendent may direct the Contractor to-
(a) increase, decrease or omit any part of the work under the Contract;
(b) change the character or quality of any material or work;
(c) change the levels, lines, positions or dimensions of any part of the work under the Contract;
(d) execute additional work; and/or
(c) demolish or remove material or work no longer required by the Principal.
The Contractor shall not vary the work under the Contract except as directed by the Superintendent or approved in writing by the Superintendent under Clause 40.
The Contractor is bound only to execute a variation which is within the general scope of the Contract.
The Contractor shall not be bound to execute a variation directed after Practical Completion unless the variation is in respect of rectification work referred to in Clause 37.

40.2 PROPOSED VARIATIONS

Upon receipt of a notice in writing from the Superintendent advising the Contractor of a proposed variation under clause 40, the Contractor must:
A. advise the Superintendent of the effect which the Contractor anticipates that the variation will have on the construction program and time for Practical Completion; and
B. provide an estimate of the cost of the proposed variation.

40.3 Pricing the Variation

Unless the Superintendent and the Contractor agree upon the price for a variation, the variation directed or approved by the Superintendent under Clause 40.1 shall be valued under Clause 40.5.
The Superintendent may direct the Contractor to provide a detailed quotation for the work of a variation supported by measurements or other evidence of cost.

40.4 Variations for the Convenience of the Contractor

If the Contractor requests the Superintendent to approve a variation for the convenience of the Contractor, the Superintendent may do so in writing. The approval may be conditional.

12 Clause 44 concerns default and insolvency, and the relevant parts of this clause are cls.44.1-44.6, which are in the following terms:

44 DEFAULT OR INSOLVENCY

44.1 Preservation of Other Rights

If a party breaches or repudiates the Contract, nothing in Clause 44 shall prejudice the right of the other party to recover damages or exercise any other right.

44.2 Default by the Contractor

If the Contractor commits a substantial breach of contract and the Principal considers that damages may not be an adequate remedy, the Principal may give the Contractor a written notice to show cause.
Substantial breaches include but are not limited to -
(a) suspension of work, in breach of Clause 311;
(b) failing to proceed with due expedition and without delay, in breach of Clause 33.1;
(c) failing to lodge security in breach of Clause 5;
(d) failing to use the materials or standards of workmanship required by the Contract, in breach of Clause 30.1;
(e) failing to comply with a direction of the Superintendent under Clause 30.3, in breach of Clause 23;
(f) failing to provide evidence of insurance, in breach of Clause 21.1; and/or
(g) in respect of Clause 43, knowingly providing a statutory declaration or documentary evidence which contains a statement that is untrue.

44.3 Requirements of a Notice by the Principal to Show Cause

A notice under Clause 44.2 shall -
(a) state that it is a notice under Clause 44 of the General Conditions of Contract;
(b) specify the alleged substantial breach;
(c) require the Contractor to show cause in writing why the Principal should not exercise a right referred to in Clause 44.4;
(d) specify the time and date by which the Contractor must show cause (which time shall not be less than 7 clear days after the notice is given to the Contractor); and
(e) specify the place at which cause must be shown.

44.4 Rights of the Principal

If by the time specified in a notice under Clause 44.2 the Contractor fails to show reasonable cause why the Principal should not exercise a right referred to in Clause 44.4, the Principal may by notice in writing to the Contractor -

(a) take out of the hands of the Contractor the whole or part of the work remaining to be completed; or

(b) terminate the Contract.

Upon giving a notice under Clause 44.2, the Principal may suspend payments to the Contractor until the earlier of -

(i) the date upon which the Contractor shows reasonable cause;

(ii) the date upon which the Principal takes action under Clause 44.4(a) or (b); or

(iii) the date which is 7 days after the last day for showing cause in the notice under Clause 44.2.

If the Principal exercises the right under Clause 44.4(a), the Contractor shall not be entitled to any further payment in respect of the work taken out of the hands of the Contractor unless a payment becomes due to the Contractor under Clause 44.6.

44.5 Procedure when the Principal Takes Over Work

If the Principal takes work out of the hands of the Contractor under Clause 44.4(a) the Principal shall complete that work and the Principal may without payment of compensation take possession of such of the Constructional Plant and other things an or in the vicinity of the Site as are owned by the Contractor and are reasonably required by the Principal to facilitate completion of the work.

If the Principal takes possession of Constructional Plant or other things, the Principal shall maintain the Constructional Plant and, subject to Clause 44.6, on completion of the work the Principal shall return to the Contractor the Constructional Plant and any things taken under this Clause which are surplus.

44.6 Adjustment on Completion of the Work Taken Out of the Hands of the Contractor

When work taken out of the hands of the Contractor under Clause 44.4(a) is completed the Superintendent shall ascertain the cost incurred by the Principal in completing the work and shall issue a certificate to the Principal and the Contractor certifying the amount of that cost.

If the cost incurred by the Principal is greater than the amount which would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due from the Contractor to the Principal. If the cost incurred by the Principal is less than the amount that would have been paid to the Contractor if the work had been completed by the Contractor, the difference shall be a debt due to the Contractor from the Principal. The Principal shall keep records of the cost in a similar manner to that prescribed in Clause 41.

If the Contractor is indebted to the Principal, the Principal may retain Constructional Plant or other things taken under Clause 44.5 until the debt is satisfied. If after reasonable notice, the Contractor fails to pay the debt, the Principal may sell the Constructional Plant or other things and apply the proceeds to the satisfaction of the debt and the costs of sale. Any excess shall be paid to the Contractor.

13 Clause 46 concerns the time for notification of claims, and is in the following terms:

46 TIME FOR NOTIFICATION OF CLAIMS

46.1 Contractor's Prescribed Notice

The Principal shall not be liable upon any claim by the Contractor in respect of or arising out of a breach of the Contract unless within 28 days after the first day upon which the Contractor could reasonably have been aware of the breach, the Contractor has given to the Superintendent the prescribed notice.

The Principal shall not be liable upon any other claim by the Contractor for any extra cost or expense in respect of or arising out of any direction or approval by the Superintendent unless within 42 days after the first day upon which the Contractor could reasonably have 4 been aware of the entitlement to make the claim, the Contractor has given to the Superintendent the prescribed notice.

The prescribed notice is a notice in writing which includes particulars of all of the following -

(a) the breach, act, omission, direction, approval or circumstances on which the claim is or will be based;

(b) the provision of the Contract or other basis for the claim or proposed claim; and

(c) the quantum or likely quantum of the claim.

This Clause 46.1 shall not have any application to -

(i) any claim for payment to the Contractor of an amount or amounts forming part of s the Contract Sum or any part thereof;

(ii) any claim for payment for a variation directed by the Superintendent or to be made pursuant to Clause 12.3:

(iii) any claim for an extension of time for Practical Completion; or

(iv) the provisions of Clause 46.2.

46.2 Time for Disputing Superintendent's Direction

If the Superintendent -

(a) has given a direction (other than a decision under Clause 47.2) pursuant to the Contract; and

(b) has served a notice in writing on each party that if a party wishes to dispute the direction then that party is required to do so under Clause 47,

the direction shall not be disputed unless a notice of dispute in accordance with Clause 47.1 is given by one party to the other party and to the Superintendent within 56 days after the date of service on that party of the notice pursuant to Clause 46.2(b).

14 The special conditions added cls.55-7, which relate to latent defects and variations, and are in the following terms:

55. The Contractor warrants as an essential part of this Contract thoroughly and comprehensively:

1. the Contract intent is to provide all aspects of Work required in the spirit of the documents be they detailed or implied and/or necessary to complete the Works to a high quality of finish and workmanship.

2. the work shall be executed to the true intent and meaning of the Drawings and Specification taken together. Where any item of work is not indicated but is indispensably necessary it shall be executed at no additional cost to correspond with work of a similar nature in accordance with the best trade practice.

3. examined and checked the documents listed in the schedule attached hereto and other documents, reports, maps, surveys, diagrams and other information made available by or on behalf of the Principal;

4. examined and taken into consideration all information which is relevant to the risks, contingencies and other circumstances which would in any way affect the Contractor's ability to execute the Works in accordance with this Contract;

5. examined the Site and its surroundings and informed itself of the physical conditions of the Site including previous Works carried out on the Site and satisfied itself as to the suitability of those previous works;

6. informed itself of the scope of the works, the buildability of the Works and of the nature of the work and materials necessary for the execution of the Works and the work under this Contract;

7. made its own interpretation as to the difficulties of execution of the Works and the work under the Contract; and

8. satisfied itself that no claim for additional work, additional resources, extension of time or anything else will be made in respect of any Latent Conditions.

56. The Contractor will have no entitlement by way of a variation under clause 40 of this Contract or otherwise to any additional cost for carrying out work within the scope of the Works generally and specifically as ascertained by the Contractor under the preceding clause.

57. The Contractor must ensure that the Total Cost is not greater than the Guaranteed Maximum Price in accordance with the contract. The Principal shall not be obligated to pay the Contractor any more than the Guaranteed Maximum Price except in regard to variations or changes to the Scope of Works or adjustments in accordance with the contract required by the Principal.

15 The date for practical completion specified in the agreement was 1 March 1999. On 21 February 1999, the Superintendent wrote to Abigroup extending the date for practical completion to 26 April 1999. No other extension was sought or granted.

16 Work started in March 1998. Progress claims were submitted each month, and until about August 1999 payments were made for the amount recommended. Thereafter, no payments were made, because amounts claimed by Abigroup were exceeded by Peninsula's claims for liquidated damages for late completion.

17 On 10 November 1999, Abigroup commenced these proceedings, at that time claiming payment of its progress claim of 28 July 1999. On 12 October 1999, Peninsula filed a cross-claim seeking payment of liquidated damages.

18 On 16 November 1999, Abigroup issued a "show cause" notice concerning proposed suspension of the works. The next day, Peninsula issued a "show cause" notice concerning Abigroup's delays in completing the contract.

19 On 1 December 1999, Peninsula terminated Abigroup's employment with immediate effect, and it subsequently engaged another contractor to complete the works, at a cost of over $3.8 million.

20 On 2 December 1999, Hunter J in the Commercial List ordered by consent, pursuant to Pt.72 r.2 of the Supreme Court rules, that the whole of the proceedings be referred to a referee Mr. P.M. McDougall for enquiry and report. The referee's report was received by the Court in February 2001.

21 That report dealt with Abigroup's Third Further Amended Summons dated 8 June 2000 and Peninsula's Further Amended Cross-claim dated 22 December 1999.

22 Abigroup's claim was for damages for misleading conduct under the Trade Practices Act (arising from Peninsula's failure to disclose its agreement with East Asia) amounting to over $6.8 million, and similar damages allegedly arising from breach of cl.23 of the contract based on the same matter. In the alternative, Abigroup claimed moneys said to be due under the contract ($417,606.00), payment for variations ($1,916,303.00), delay costs ($2,582,502.00) and damages for wrongful termination of the contract.

23 Peninsula's cross-claim was for damages, including liquidated damages ($1,326,308.00), the cost of completing the works ($3,843,645.00) and damages for delay ($4,576,596.00).

24 The referee found that Peninsula breached cl.23 of the building contract by appointing East Asia as Superintendent, in circumstances where East Asia was engaged as Peninsula's agent in relation to all matters concerning the design and construction of the project. He held that Peninsula's failure to disclose the agency agreement amounted to misleading conduct under the Trade Practices Act. He found that, if Abigroup was

entitled to damages based on these matters, it was entitled to a quantum meruit for the work which it did of $2,874,817.00.

25 In relation to Abigroup's other claims, the referee found that the Superintendent should have extended the date for practical completion to 5 June 1999; and that having regard to the variations and delay costs, prior to consideration of Peninsula's cross-claim, Abigroup was owed $2,466,847.00 pursuant to the contract.

26 In relation to Peninsula's cross-claim, the referee found that, subject to whatever followed from Peninsula's breach of cl.23 and misleading conduct, Peninsula was entitled to terminate the contract on 1 December 1999 because of Abigroup's delay, and was entitled to liquidated damages for the period 5 June 1999 to 1 December 1999, namely $1,342,500.00. He went on to say that if the appropriate measure was not the liquidated damages, but unliquidated damages, the damages for delay would be $2,794,496.00. The referee found that Peninsula's damages arising from the termination of the contract included the costs of completion ($1,903,078.00), from which had to be deducted the unexpended balance of the contract sum ($122,296.00). This gave a total of $3,123,282.00. However, the referee noted that the figure of $1,903,078.00 was arrived at after deducting from the actual cost of completion the costs of $998,271.00 incurred between 16 January 2000 and 31 March 2000, some unidentified parts of which related to the cost of fixing water damage caused by a broken water pipe in a third floor apartment. The referee also noted that the true reasonable cost of completion amounted to $2,228,198.00.

PRIMARY JUDGE'S DECISION

27 Before the primary judge, Abigroup claimed judgment for damages for the cl.23 breach or misleading conduct under the Trade Practices Act amounting to over $2.87 million. Alternatively, Abigroup challenged the referee's finding that Peninsula was entitled to terminate the contract, challenged a finding disallowing its delay claim in relation to certain balconies, and also challenged the referee's finding in relation to two particular variations, namely VPR81 and VPR103.

28 Peninsula challenged the referee's findings concerning Abigroup's entitlement to an extension of time until 5 June 1999; and also challenged the referee's findings concerning certain variations, on the basis that the time requirements for claiming in relation to variations had not been complied with. Peninsula challenged the referee's findings in relation to calculation of Abigroup's costs of delay; and also challenged the findings in that they made no allowance for general damages for delay after completion. Peninsula challenged the findings in so far as they disallowed amounts in relation to rectifying water damage; and also challenged the findings concerning certain variations.

29 The primary judge upheld Abigroup's claim for damages based on misleading conduct under the Trade Practices Act, subject to a deduction of $9,113.00 by reason of his disallowance of variation VPR32, and awarded interest from 1 December 1999. Having regard to that finding, the remainder of the issues became irrelevant, but in any event the primary judge upheld the referee's findings on all matters apart from VPR32, in relation to which the primary judge upheld Peninsula's challenge.

GROUNDS OF APPEAL

30 Peninsula appeals from the primary judge's decision on the following grounds:

1 His Honour erred in holding that the Appellant engaged in misleading and deceptive conduct by not informing the Respondent that the Superintendent was the Appellant's agent for all matters relating to the project.

2. Further, or in the alternative, His Honour erred in holding that the Appellant engaged in misleading and deceptive conduct by not informing the Respondent that the Superintendent was the Appellant's agent for all matters relating to the project in circumstances where it was not established that the Appellant had intentionally refrained from so informing the Respondent.

3. His Honour erred in concluding that the dispute before the Court was a "no contract case" as opposed to a "different contract case".

4. His Honour erred in holding that the Respondent suffered loss by the alleged misleading and deceptive conduct.

5. His Honour erred in that he improperly exercised his discretion under s.87 Trade Practices Act 1974 (Cth) to award damages to the Respondent in the nature of a quantum meruit in circumstances where it had been found that the Appellant was lawfully entitled to terminate the Contract, the Respondent had not sought to set aside the Contract, and the effect of the Court's orders was to deprive the Appellant of damages that had accrued to it under the Contract at the date of termination.

6. His Honour erred in holding that the Respondent was entitled to the sum of $2,870,260.50 or any sum at all pursuant to s.87 Trade Practices Act 1974 (Cth).

7. His Honour erred in concluding that the Respondent was entitled to an additional 77 days extension of time notwithstanding that the Respondent had not complied with the condition precedent contained in clause 35.5 of the Contract.

8. His Honour ought to have held that the Respondent was not entitled to an additional 77 days extension of time, and that the Appellant was entitled to additional damages of $720,000.

9. His Honour found that the notification requirements in clauses 40.2 and 46.1 of the Contract constituted a condition precedent to recovery for certain variations, but erred in concluding that an estoppel arose to neutralise the condition precedent.

10. His Honour ought to have held that the Respondent was not entitled to payment for variations totalling $778,168 in value, in circumstances where it had not complied with the said condition precedent.

11. His Honour ought to have held that no estoppel arose to prevent the Appellant from relying upon the conditions precedent in clauses 40.2 and 46.1.

12. His Honour erred in allowing the Respondent's claim for delay costs in the sum of $948,390 or at all in circumstances where:
12.1 such claim was dependent on Variations 51R and 53R.1; and
12.2 such variations gave rise to no entitlement for the reasons advanced in grounds (9)-(11) above.

13. Further, or in the alternative to ground (12), His Honour erred in concluding that the delay costs pursuant to the Contract were not capped at $10,890 per day, and thus erred in allowing the Respondent delay costs of $948,390 as opposed to $591,750.

14. His Honour erred in concluding that the Appellant was not entitled to the sum of $998,271 in respect to the costs referrable to rectifying water damage as a result of a burst pipe on 16 January 2000, in circumstances where the Referee has wrongly held that the existence of insurance precluded recovery by the Appellant against the Respondent.
14A. To the extent that the Respondent is entitled to quantum meruit, the contract price constituted a ceiling and that in the circumstances the amount ought to be $2,350,753 instead of $2,870,260.50.

15. Further, and subject to grounds (6)-(13) above, His Honour erred in not adopting the Referee's findings that the Appellant was entitled on its cross claim to the sum of $3,123,282.

16. In the alternative, His Honour erred in disallowing the Appellant's cross claim by holding that the Appellant was not entitled to judgment in relation to its accrued contractual entitlements (being liquidated damages) up to 1 December 1999.

31 During the hearing of the appeal, Peninsula sought to add a further ground, ground 17, that his Honour erred in rejecting the tender of certain documents, being statements of Stephen Abbott dated 16 August 2000, of Gary Stagnitta dated 17 August 2000, and Glenn Johnson dated 17 August 2000. The Court refused leave for the addition of that ground.

32 Abigroup filed a Notice of Contention, alleging the following grounds:
1. The Appellant's continuing breach of clause 23 of the contract meant that the purported termination of the Contract by the Appellant on 1 December 1999 was ineffective.
2. The exclusion of the Respondent from the site by the Appellant on 1 December 1999 constituted repudiation of the Contract by the Appellant.
3. The Respondent accepted the Appellant's repudiation of the Contract by its letter dated 3 December 1999 and terminated the Contract.
4. As a result:
(a) the Respondent was entitled to recover reasonable remuneration for work performed on a quantum meruit basis; and
(b) the proper amount of that remuneration was the amount of $2,870,260.50 for which judgment was given for the Respondent in the Court below.

33 I will deal in turn with the following issues: first, the issue of misleading conduct and breach of cl.23 (grounds 1-3); second, the measure of damages from such matters (grounds 4-6 and 14A); third, matters relating to extension of time (grounds 7 and 8 and rejected ground 17); fourth, matters concerning variations and associated delay costs (grounds 9-13 and rejected ground 17); and fifth, the issue concerning the exclusion of water damage work from Peninsula's claim for the costs of completion (ground 14).

MISLEADING CONDUCT

34 This issue requires some consideration of ss.4(2) and 52 of the Trade Practices Act 1974 (Cth). Those provisions are in the following terms:
4(2) In this Act:
(a) a reference to engaging in conduct shall be read as a reference to doing or refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of, a covenant;
(b) a reference to conduct, when that expression is used as a noun otherwise than as mentioned in paragraph (a), shall be read as a reference to the doing of or the refusing to do any act, including the making of, or the giving effect to a provision of, a contract or arrangement, the arriving at, or the giving effect to a provision of, an understanding or the requiring of the giving of, or the giving of, a covenant;
(c) a reference to refusing to do an act includes a reference to:
(i) refraining (otherwise than inadvertently) from doing that act; or
(ii) making it known that that act will not be done; and

(d) a reference to a person offering to do an act, or to do an act on a particular condition, includes a reference to the person making it known that the person will accept applications, offers or proposals for the person to do that act or to do that act on that condition, as the case may be.

52(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.

(2) Nothing in the succeeding provisions of this Division shall be taken as limiting by implication the generality of subsection (1).

35 The primary judge set out the relevant findings of the referee in relation to this matter, as follows:

Having dealt with all other matters raised, I now turn to the principal issue concerning s.52 of the Trade Practices Act and clause 23 of the contract. In s.15.3 of the report, the referee deals with what he calls, for convenience, "misrepresentation". The primary facts, as stated in Abigroup's submissions to the referee, appeared to him to be undisputed. As recited in the report, they include the following:

"5. Until April 2000 Abigroup was unaware that the Superintendent had been appointed as Peninsula's agent "in all matters in relation to the design and construction of the project", pursuant to the Undisclosed Agency Agreement (see para. 15 of Abbott 3). There is no issue between the parties that Peninsula did not reveal to Abigroup the Undisclosed Agency Agreement, prior to contract.

6. Similarly, Abigroup does not dispute that it was aware prior to entering into the Contract, that Peninsula and the Superintendent were related entities and had common directors.

7. Mr Abbott readily agreed that before the parties entered into the Contract, he had made enquiries about the structure of the companies including the identity of Peninsula, the Superintendent and other related entitles (T710.23 to T711.34).

8. Mr Abbott went on to say that he discussed "quite extensively" the structure of the companies to the point that there was a running joke that Peninsula were having more trouble getting approved by Abigroup than Abigroup were of them (T711.36 to 47).

9. Mr Abbott explained that there was a meeting convened within Abigroup between Mr Brecht, Mr Hendry and Mr Abbott in respect of the structure of the companies and that it was "touch and go" as to whether Abigroup would proceed (T856.7 to T857.18)."

At the relevant time, Mr Brecht was the chief executive of Abigroup and Mr Abbott was a senior manager with responsibility for all Abigroup's building projects in New South Wales. The reference in item 9 to "the structure of the companies" is a reference to information in the possession of Abigroup about directorship and other corporate links between Peninsula and the superintendent, The East Asia Property Group Australia Pty Ltd ("East Asia").

The referee then referred to the following evidence of Mr Abbott:

"15. Thus unknown to me and Abigroup until April this year [i.e., 2000], EAPG had been appointed Peninsula's agent "in all matters relating to the design and construction" of the Peninsula Balmain, including in relation to the provision of the services set out in clause 5.1, which includes services of the nature of EAPG's functions as Superintendent under the Contract. Nor have I found anything in the Agreement which requires EAPG to perform those functions in accordance with the standards set out in clause 23 of the Contract.

16. Had I known of the existence of the Agreement prior to execution of the contract, I would not have recommended to Peter Brecht that Abigroup enter into the Contract, and Abigroup would not have done so.

17. Had I known of the Agreement, I would have sought one or more of the following changes:

(a) appointment of an independent third party as the Superintendent, such as a quantity surveyor or some other project management company;

(b) if EAPG was to remain as the Superintendent, appointment of an independent third party to perform the Superintendent's certification functions under the Contract such as assessment of variations, delays and progress certificates;

(c) amendments to the Agreement which would have allowed EAPG to perform its functions under the Contract in accordance with clause 23 of the Contract.

Failing agreement to one or more of these matters, I would not have recommended that Abigroup enter into the Contract and it would not have done so."

The referee also referred to the evidence of Mr Brecht:

"In determining whether to enter into the Contract, I relied upon the recommendation of Mr Abbott that Abigroup should do so. If he had recommended that Abigroup should not do so then Abigroup would not have entered into the Contract.

The referee then made two crucial findings:

"Consequently I find as a fact that, had the existence of this particular agency agreement been disclosed prior to contract, Abigroup would either not have entered into the contract or would have done so only after it had been amended on some mutually agreed basis.

Further, I find that not to disclose the existence of this agency agreement was misleading and deceptive, though not necessarily intentionally."

As to the impact of what he considered to be the superintendent's undisclosed partisanship, the referee made these observations:

"It is difficult, though, to say what the effect on the ultimate outcome would have been if the contract had proceeded on the basis of a truly independent third person as Superintendent. Abigroup would have received better consideration of, and earlier payment for, some of its variation claims. However the evidence of Mr Walker, as noted previously, is that it was able to fund the project without that (though undoubtedly less comfortably).

It would also have received some relief on time, though not enough to get it off the hook."

Related to this is the issue of breach of clause 23 of the contract. That clause is as follows:
"The Principal shall ensure that at all times there is a Superintendent and that in the exercise of the functions of the Superintendent under the Contract, the Superintendent-
(a) acts honestly and fairly;
(b) acts within the time prescribed under the Contract or where no time is prescribed, within a reasonable time; and
(c) arrives at a reasonable measure or value of work, quantities or time."

Abigroup contended that the superintendent was inhibited from discharging its functions as envisaged by this clause when it was also Peninsula's "agent for all matters relating to the design and construction of the project". Abigroup's submissions were summarised by the referee as follows:

"(a) Peninsula never intended to be bound by clause 23 of the Contract as it had engaged the Superintendent to act as its agent in respect of all matters concerning the design and construction of the Project. In effect, the Superintendent was standing in the shoes of Peninsula;

(b) At no time during the course of the Project, did any representative of either Peninsula or the Superintendent pause to consider their respective roles vis a vis Abigroup's Contract;

(c) It never occurred to Mr Clemesha to distinguish his role as development manager in respect of the marketing and sale of the apartments for Peninsula and his role as the Superintendent;

(d) Mr Clemesha had a personal interest in the project, and was thus never able to act independently and fairly;

(e) The Superintendent was unable to reasonably assess the variation claims as it was bound to ensure that Peninsula did not breach clause 3.3(b) of the Bill Facility Agreement;

(f) Mr Clemesha did not assess the variation claims as and when they came to him for assessment, nor did he assess them reasonably or fairly;

(g) Peninsula failed to ensure that the Superintendent arrived at a reasonable measure of time in respect of the delays caused by Peninsula and the Superintendent;

(h) Peninsula had determined that no further money would be paid to Abigroup from early October 1999, and took steps to implement that decision including steps to progressively transfer offshore all proceeds from the sale of apartments; and

(i) Peninsula was from October 1999 onwards acting under a definitive resolve or decision against doing what the Contract required, namely, pay to the Abigroup all sums of money (including for variations) due or those sums which would become due under the Contract."

The referee's findings on these aspects may be quoted in full:
"As to (a), Peninsula, by entering into the Agency agreement with EAPG, effectively inhibited the Superintendent from discharging the obligations of Clause 23. Whether that amounts to repudiation is a matter of law. For my part, I would regard it as something which can be cured by an appropriate award of damages. While it is wrong, it is common for Superintendents to have some restriction placed on their freedom to act. Clearly it should be disclosed at the outset.

Points (f) and (g) were then a consequence of this.
As to (d), it is correct that Mr Clemesha had a personal interest in the project, through the purchase and re-sale of a unit for a profit. While that would certainly direct him to ensure that the venture was a success, I don't necessarily conclude that this would prevent him from acting independently and fairly vis a vis Abigroup.

I don't think the other points are made our [sic] conclusively by the evidence."

36 The primary juge noted that the relief concerning the referee's report sought by Abigroup and Peninsula was that outlined in Pt.72 r.1(a) of the Supreme Court rules, which says that the court may "adopt, vary or reject the report in whole or in part". The primary judge then set out a list of relevant considerations, taken from the judgment of Hunter J in ***Walter Construction Group Limited v. Walker Corporation Limited*** (2001) 47 ATR 48, as follows:

1. The hearing of a reference, should not be equated with a hearing at first instance in this Court. So much may be extracted from the fact that a referee may be appointed by reason of his or her technical expertise (not necessarily in legal matters) and from the provisions of Part 72 rule 8.

2. It is untenable to construe the power of the Court under Part 72 rule 13 as falling within the umbrella of a proposition that all litigants are entitled to have a judge decide all issues of fact and law that arise in any litigation. The procedure that Part 72 rule 13 establishes is not that of an appeal from a referee to a judge. The concept of "a re-hearing" which is itself ambiguous, at best provides an imperfect analogy.

3. Part 72 rule 13 does not require a judge to reconsider and determine afresh all issues, whether of fact or law which a party desires to contest before the judge. It would be a radical departure from the history of the rules to treat them as giving a dissatisfied party an automatic right to a hearing de novo. What is involved in an

application under Part 72 rule 13 is not an appeal, whether by way of a hearing de novo, or a more limited re-hearing.

4. In so far as the subject matter of dissatisfaction with a referee's report is a question of law, or the application of legal standards to established facts, then a proper exercise of discretion would require a judge to consider and determine the matter afresh.

5. If the referee's report reveals some error of principle, some absence or excess of jurisdiction, or some patent misapprehension of the evidence, that would ordinarily be a reason for rejecting it. So also would perversity or manifest unreasonableness.

6. In the case of findings of fact by the referee, where there is evidence to support such findings and the court is satisfied that those issues have been carefully considered by the referee it will not normally engage in a re-examination of the referee's findings.

37 The primary judge then stated the question for determination in relation to the misleading conduct allegation as follows: *The question in relation to the matters concerning s.52 and clause 23 is whether there are grounds on which it is open to the Court to depart from the findings of the referee and, if so, whether it should do so. As to the referee's findings of fact, it has not been suggested that the position is otherwise than as contemplated by the sixth of the principles I have extracted from the judgment of Hunter J in Walter Construction Group. I therefore accept those findings of fact. In particular, I accept the crucial finding that had Abigroup been aware of the agency, it would "not have entered into the contract or would have done so only after it had been amended on some mutually agreed basis". The only possibility I believe the Court may pursue, consistently with the fourth and fifth items on that list, is the possibility that characterisation of the conduct of Peninsula as misleading and deceptive and as entailing breach of contract was unwarranted.*

The primary judge reached the following conclusion on the matter: *Against this background, it is understandable that Mr Abbott of Abigroup (or any other reasonable person in his place) should have taken the view that a superintendent which was the agent of the principal in all matters concerning the project stood on quite a different commercial plane from one which was not such an agent. The undisclosed agency should therefore be regarded as a material consideration in the decision to accept a contract naming the agent as superintendent. By failing to make that material disclosure in the particular context, Peninsula led Abigroup into an erroneous understanding about a central feature of what was to become the contract between them. Peninsula's conduct was therefore misleading or deceptive and the referee's finding in that respect was fully justified.*

38 Having regard to that conclusion, the primary judge did not need to consider whether the circumstances of the existence and non-disclosure of the project management agreement meant that Peninsula was in breach of cl.23 of the building contract.

Submissions

39 Mr. Douglas QC for Peninsula submitted that the primary judge was in error in concluding that "the relationship between proprietor and architect or Superintendent ... is not of its intrinsic nature one of principal and agent". He submitted that in fact it is in the nature of the role of superintendent that the superintendent be agent for the principal; and he referred to Keating on Building Contracts, 6th Ed., 1995, ***Sutcliffe v. Thackrah*** [1974] AC 727, ***London Borough of Merton v. Stanley Hugh Leach Limited*** (1985) 32 BLR 68, ***South Australian Railways Commissioner v. Egan*** (1973) 130 CLR 506, and ***Perini Corporation v. Commonwealth of Australia [***1969] 2 NSWR 530. Furthermore, in so far as the project management agreement required East Asia to act in the interests of Peninsula, this was not inconsistent with East Asia acting honestly and impartially as superintendent, because for Peninsula to require East Asia to do otherwise would put Peninsula in breach of its building contract: cf. ***Hospital Products Limited v. United States Surgical Corporation*** (1984) 156 CLR 41 at 97.

40 Furthermore, Mr. Douglas submitted, if and in so far as there were any conflict between East Asia's obligation to act professionally as administrator of the building contract and its acting as agent for Peninsula, the former would prevail, because the project management agreement required East Asia to do the former but merely authorised it to act as agent.

41 Mr. Douglas also submitted that there had been no finding that the non-disclosure of the project management agreement was intentional; and that, in the absence of a finding of intentional non-disclosure, there was no basis for a finding of misleading and deceptive conduct: Semrani v. Manoun [2001] NSWCA 337 at [62]; cf. ***McWilliams Wines Pty. Limited v. L.S. Booth Wine Transport Pty. Limited (***1992) 25 NSWLR 723 at 729-30.

42 Mr. Walker QC for Abigroup submitted that, in so far as authorities suggested that a superintendent acted as a proprietor's agent in all functions exercised under a building contract, the word "agent" is used very widely and loosely, and does not distinguish between those functions in respect of which the superintendent acts as the proprietor's agent in such a way as to bind the proprietor, and those functions in which the superintendent acts in a certifying function and is subject to impartiality requirements. On a correct reading of the authorities, in exercising the latter functions, a superintendent is not acting as the proprietor's agent in the strict sense: see Perini at 536, ***Dixon v. South Australian Railways Commissioner*** (1923) 34 CLR 71, and London Borough of Merton at 79. Even if this Court should take the view that, on its true construction, the project management agreement did not require East Asia to act as Peninsula's agent when it carried out certifying functions, that was a matter of legal interpretation on which minds could differ, and the true test was the impact of the agreement on commercial people, as to which there was undisputed evidence from Abigroup which was accepted by the referee and the primary judge.

43 Mr. Walker referred to the finding by the referee that Peninsula, by entering into the agreement, "effectively inhibited the Superintendent from discharging the obligations of cl.23"; and that in consequence the Superintendent "did not assess the variation claims as and when they came to him for assessment, nor did he assess them reasonably or fairly"; and "Peninsula failed to ensure that the Superintendent arrived at a reasonable measure of time in respect of the delays caused by Peninsula and the Superintendent".

44 Mr. Walker submitted that the argument that it was in the interests of the proprietor that the superintendent exercise sturdy independence, because otherwise the proprietor would be in breach of contract, overlooked the reality that, particularly in grey areas, the superintendent could, without provable breach, act to the advantage of the owner and the disadvantage of the builder.

45 Turning to the interpretation of the project management agreement, Mr. Walker submitted that little weight could be given to the requirement that East Asia act professionally, because that was not a term apt to apply to corporations. Even if it was correct to say that the obligation to act professionally as superintendent prevailed over an authorisation to act as agent, nevertheless the authority to act as agent which was given and accepted under the agreement was extremely wide, and was not limited even by words such as "as and when you are pleased to do so". There was no suggestion that anyone read the grant of authority as excepting the certifying function, and there was no suggestion that the project management agreement was varied by entry into the building contract. Accordingly, Mr. Walker submitted, the referee was clearly correct, and the primary judge was correct, in finding that this undisclosed agreement did affect the reasonable assessment of risks involved in entering into the building contract and acceptance of East Asia as Superintendent.

46 Mr. Walker submitted that this was not a case of Peninsula refusing to do an act, but rather one of Peninsula doing an act, that is entering into the building contract without disclosing the project management agreement, thereby representing that the nominated Superintendent was clear of any inhibition from acting impartially other than being a related company. Accordingly, the requirement that the withholding of information be intentional, suggested in Semrani, had no application. In any event, the requirement in s.4(a) of the Trade Practices Act that, for something to amount to "refusing" there had to be a "refraining (otherwise than inadvertently)" meant merely that the person in question must know the relevant material and its non-disclosure must not be a mistake. In this case, there was no suggestion that the non-disclosure was a mistake, so the inference is readily drawn that Peninsula refrained, otherwise than inadvertently, from disclosing the material.

Decision

47 The referee was entitled to accept evidence from senior management of Abigroup that, if they had known of the project management agreement, they would have sought one or more of three specified changes, and that failing Peninsula's agreement to one or more of these matters, they would not have recommended that Abigroup enter into the building contract and it would not have done so; and the primary judge was correct to accept this finding.

48 However, the referee's finding that not to disclose the existence of this "*agency agreement*" was "misleading and deceptive, though not necessarily intentionally" is in a different position. It can be said that this is also a question of fact, even if it amounts to a finding that the conduct in question falls within s.52 of the Trade Practices Act: cf. ***Ambulance Service of NSW v. Daniel*** [2000] NSWCA 116 at [47]-[52] and cases there cited. However, this finding was plainly based on a view as to the true legal effect of the project management agreement. With reference to this agreement, the referee said this: *Whatever the actual effect might be, I would be in no doubt that a further obligation to be Peninsula's agent in all matters in relation to the design and construction of the project would tilt the balance to some extent in Peninsula's favour*.

49 The primary judge took a similar view, to the effect that the project management agreement meant that East Asia was Peninsula's agent in all matters in relation to the design and construction of the project.

50 The authorities referred to by Mr. Douglas and Mr. Walker are not altogether clear as to whether a person in the position of a superintendent of a building contract is the owner's agent in exercising all the functions of the superintendent. However, in my opinion the better view (supported by Perini, Dixon, Egan and London Borough of Merton, and not refuted by Sutcliffe) is that the superintendent is the owner's agent in all matters only in a very loose sense, and that, when exercising certifying functions in respect of which the superintendent must act honestly and impartially, the superintendent is not acting as the owner's agent, in the strict legal sense. In my opinion, this is confirmed by the consideration that the issue of a certificate by the superintendent does not bind the owner to any extent beyond what is prescribed by the building contract itself, so that the owner can challenge such certificates. If the superintendent was acting as the owner's agent in the strict sense, the issue of the certificate would be an act done by the owner through its agent, which the owner could not then challenge.

51 In my opinion, it is an erroneous construction of the project management agreement to treat it as *requiring* East Asia to act as Peninsula's agent, in the strict sense, in all matters in relation to the design and construction of the project, including in relation to the certification function under the building contract. The project management agreement *authorises* East Asia to act as Peninsula's agent, but it *requires* East Asia to act in a professional manner in various functions, including the function of administering the building contract and in the certification role under that contract (clauses 2.5 and 5.1.16). To the extent that this requirement is inconsistent with East Asia acting as Peninsula's agent, in the strict sense, it prohibits East Asia from doing so. There is nothing in the authorisation of East Asia to act as agent which affects this prohibition.

52 There is some force in Mr. Walker's submission that this is just one judge's view, contrary to the view taken by the only commercial people to have given an opinion on the matter, including the referee, as well as that of the primary judge; and that even if my view were correct as a matter of fine legal interpretation, what was important was the effect of this undisclosed agreement on commercial people.

53 However, I do not think this submission should prevail.

54 In my opinion, for conduct to be misleading or deceptive, it must be such as is apt to mislead or deceive in some non-trivial respect; so that to make out a case under s.52, Abigroup needed to show that the non-disclosure of the project management agreement was apt to do just that. It was clear from the building contract itself that the Superintendent was to be engaged and paid by Peninsula, and was to act in some respects as Peninsula's agent; and the question was whether the undisclosed agency agreement relevantly changed this position. If my construction of the project management agreement is correct, the respect in which non-disclosure was apt to mislead or deceive could only be that there was an undisclosed agreement the true effect of which had no relevant impact on East Asia's exercise of its role as Superintendent, but which could be read by commercial people as having such impact.

55 No such case was suggested on the pleading. Furthermore, suppose that Peninsula had expressly represented to Abigroup that its agreement with East Asia required East Asia to perform various services in connection with the project for Peninsula for reward, including supervision of the building contract, but did not impinge on East Asia's obligation to act honestly and impartially in the discharge of its functions as superintendent. Accepting as I do that this is the true effect of the agreement, I do not believe that such an express representation could possibly be misleading or deceptive, even if commercial people might wrongly come to a different view. The present situation, where no express representation was made, is in my opinion a fortiori. Accordingly, in my opinion the referee's finding as to misleading conduct is vitiated by an error of law, and should be set aside.

56 My approach discloses a further problem for Abigroup, which links with the next topic, namely causation of loss. The referee accepted Abigroup's evidence that, if it had known of the agreement, it would have sought one or more of three modifications to the arrangement (identified as (a), (b) and (c) in par.17 of Mr. Abbott's evidence set out above), and if Peninsula did not agree to one or more of them, would not have gone ahead at all. However, the referee did not make any finding as between these alternatives. Officers of Peninsula were called, and they did not give evidence one way or the other as to whether they would have acceded to any of the three modifications which Abigroup said it would have sought, and they were not cross-examined on this matter. In those circumstances, Mr. Walker submitted that the primary judge was correct to infer that Peninsula would not have acceded to any of the modifications and that there would have been no building contract.

57 In my opinion, although this inference was clearly available in relation to the first two of the alternatives, (a) and (b), it was not available in relation to the third, (c). If as I believe the true effect of the project management agreement was in accordance with the third modification, there is every reason to believe that Peninsula would have agreed to modification (c), to the extent of making the true position clearer. The onus was on Abigroup to prove causation, and although the evidentiary onus can shift and although I am prepared to say it did shift in relation to the first two alternatives, I do not think it shifted in relation to the third. To put this another way, I do not think that Abigroup showed any basis for drawing an inference that Peninsula and East Asia would not have agreed specifically that the arrangement between them not impinge on East Asia's obligation to exercise its functions as Superintendent honestly and impartially, when this was already the true effect of the agreement between them.

58 In my opinion, there is also a difficulty faced by Abigroup arising from the referee's failure to find that the non-disclosure was intentional. I accept Mr. Douglas' submission that, in so far as what is alleged to be misleading or deceptive conduct arises from Peninsula's refraining from disclosing the project management agreement, Abigroup needs a finding that this refraining was not inadvertent. Mr. Walker submitted that it was sufficient that Peninsula knew of the project management agreement, acted intentionally in negotiating, and did not disclose the agreement in circumstances where this was not due to mistake. However, in my opinion the requirement in s.4(2)(c) that a refraining be otherwise than inadvertent requires that there be actual advertence to the question of whether something should be done or not and the formation of an intention that it not be done. I think this is in accordance with the decision in Semrani.

59 Mr. Walker relied on the alternative submission that Peninsula's misleading and deceptive conduct was the entry into the building contract without making the disclosure, and this was a "doing" and not a mere "refraining". However, there was no finding by the referee that the positive conduct was itself misleading or deceptive, or any identification of how it was misleading and deceptive. In my opinion, if Abigroup wished to rely on the positive conduct as being misleading, it would have been necessary to allege and prove what representation was conveyed by the positive conduct. For example, Abigroup could have alleged and sought to prove that the positive conduct conveyed that, apart from the relationship between the two companies constituted by their common directors and overlapping ownership, there was nothing inhibiting East Asia from performing its duties as superintendent honestly and impartially. Abigroup gave no evidence as to what it understood to have been conveyed or represented by the positive conduct, but only gave evidence that if some disclosure had been made, it would have acted differently. That evidence, in my opinion, was appropriate to a case of "refraining", but not to a case of "doing".

60 It follows from my above reasons that in my opinion also, there was no breach by Peninsula of cl.23 by reason of the project management agreement.

61 In so far as the referee found that the Superintendent did not assess variation claims reasonably or fairly, that is not a breach of contract for which Peninsula could be liable. In so far as the referee found that Peninsula failed to ensure that the Superintendent arrived at a reasonable measure of time in respect of delays caused by Peninsula and the Superintendent, this would be a breach of cl.23 by Peninsula. However, the only damages that might flow from these matters were identified by the referee as "most likely to lie in an award of interest for the late and wrong decisions on variations". That seems to relate to the matter in respect of which there was no breach by Peninsula itself, and there does not seem to be any support in the referee's report for damages flowing from the breach by Peninsula: Peninsula's breach affected only the question of extensions of time, to which I will come.

MEASURE OF DAMAGES

62 Having regard to my decision that there was no misleading and deceptive conduct, there is no question of damages under ss.82 and 87 of the Trade Practices Act. There is also no question of damages for any repudiation of contract by reason of breach of cl.23; and I have already dealt with the question of damages for the more limited breach of cl.23 which the referee found. However, I should briefly indicate my views on the submissions that have been made.

63 Mr. Douglas submitted that, even if misleading and deceptive conduct had been shown, Abigroup merely proved that one of a number of alternatives would have ensued, one of which would not have involved any damages at all, because it was not proved that Peninsula and East Asia would not have agreed to vary their relationship to make it clear that East Asia would not be inhibited from acting honestly and impartially as superintendent. Next, Mr. Douglas submitted that the only loss suffered by Abigroup by reason of entry into the contract was due to its own breaches of the contract, in particular of the time limits under the contract, as found by the referee; and accordingly, Peninsula was not liable for damages for that loss: see ***Marks v. GIO Australia Holdings Limited*** (1998) 196 CLR 494 at [18]-[24] and [43]-[55]; ***Leda Holdings Pty. Limited v. Oraka Pty. Limited*** (1998) ATPR 41,601 at 40,517. The evidence was sufficient to disentangle the consequences of any misleading conduct and the consequences of Abigroup's own breach: ***Henville v. Walker*** (2001) 75 ALJR 1410 at [147]-[148], [166]; ***Akron Securities v. Iliffe*** (1997) 41 NSWLR 353 at 364-7. Mr. Douglas further submitted that it was quite wrong to assess damages on a quantum meruit basis, particularly where Abigroup did not seek rescission of the building contract.

64 Finally, in relation to Abigroup's Notice of Contention, placing reliance on a repudiatory breach of cl.23, Mr. Douglas submitted that leave should be granted to re-argue Renard Constructions (ME) Pty. Limited v. Minister for Public Works (1992) 26 NSWLR 234, with a view to establishing that, in cases of termination of such contracts for breach, the contract price did provide a ceiling on what could be awarded by way of quantum meruit.

65 Mr. Walker submitted that the primary judge was not shown to have been in error in disregarding the possibilities that a different contract might have been entered into, if Peninsula had agreed, and treating the matter on the basis that, but for the misleading conduct, there would have been no contract. At worst, the matter should be dealt with along the lines suggested by Malec v. J.C. Hutton Pty. Limited (1990) 169 CLR 638, and damages awarded on the basis of the court's assessment of the probabilities of the different alternatives. Mr. Walker submitted that it was appropriate to award damages by comparing Abigroup's actual position with the position it would have been in if it had not entered into any contract; and the quantum meruit approach was an appropriate way of doing this, since the profit component in the quantum meruit can be taken as prima facie equating with the value of the lost opportunity to make profits by allocating its resources elsewhere. On that approach, there was no need to separately assess losses caused to Abigroup by its own breaches of contract, because that would be already taken account of in the quantum meruit, and there would be no entitlement in Peninsula to damages against Abigroup for Abigroup's breaches of contract, because, but for Peninsula's misleading conduct, there would not have been any contract.

66 In my opinion, the onus was squarely on Abigroup to prove some loss, before a Malec approach could be applied; and in circumstances where Abigroup merely established four alternatives, one of which would, on my findings, not have resulted in loss at all, this threshold is not passed. However, if I were wrong in that view, I think a Malec approach would have been appropriate. On that approach, it would be necessary to assess the probabilities of no contract being entered into as well as those of some different contracts being entered into, and to award damages based on these probabilities.

67 Dealing with the circumstance of no contract being entered into, I would not have found error in the referee's approach, confirmed by the primary judge, in assessing damages with reference to a quantum meruit assessment of the work performed by Abigroup. In my opinion, it is not unreasonable to take the profit component in the quantum meruit as roughly equivalent to the value of the opportunity lost to Abigroup to direct its resources elsewhere. If that is the correct approach, then in my opinion Mr. Walker's submission that this should not be reduced by reason of Abigroup's breaches, except to the extent that those breaches have already been taken into account in the quantum meruit, is well founded. However, on the Malec approach, only a proportion of this loss would be awarded. The loss resulting from an alternative contract would probably be very small indeed, and would be more than offset by the liabilities that Abigroup would in any event have had under such an alternative contract.

68 Even if I had considered Peninsula to be in breach of cl.23 by reason of the existence and non-disclosure of the project management agreement, I would not have disagreed with the referee's view that this was not a fundamental breach of contract. Even if I had taken the view that it was such a breach, I would not have been minded to grant leave in this case to re-argue Renard.

EXTENSIONS OF TIME

69 As mentioned earlier, the Superintendent extended the date for practical completion to 26 April 1999, and no other extension was either sought by Abigroup or granted prior to 1 December 1999 when the contract was terminated. However, the referee found that Peninsula was entitled to liquidated damages only for the period 5 June 1999 to 1 December 1999: that is, the referee found that Peninsula was entitled to liquidated damages as if the date for practical completion had been extended to 5 June 1999.

70 This finding was made, despite it being common ground that no claim had been made by Abigroup for such extension in accordance with the procedure set out in cl.35 of the contract; and despite the referee's finding that it was mandatory to follow that procedure and that any right to an extension of time was lost if the procedure was not followed. The referee referred to the cases ***Jennings Construction Limited v. Q.H. & M. Birt*** (1986) 8 NSWLR 18, ***Wormald Engineering Pty. Limited v. Resources Conservations Co. International*** (1988) 8 BCL 158, **Opat Decorating Service Pty. Limited v. Hansen Yuncken (SA) Pty. Limited** (1994) 11 BCL 360, ***Turner Corporation (Receiver & Manager Appointed) v. Austotel Pty. Limited*** (1994) 13 BCL 378, ***Turner Corporation (In Provisional Liquidation) v. Co-Ordinated Industries Pty. Limited*** (1994) 11 BCL 202, and ***Australian Development Corporation Pty. Limited v. White Constructions (ACT) Pty. Limited*** (1996) 12 BCL 317.

71 However, the referee found that, by reason of the penultimate paragraph of cl.35(5), it was still open to the Superintendent to grant an extension of time, even if the builder had not followed the cl.35 procedure. In doing so, he referred to the following passages from D. Jones, Building & Construction Claims and Disputes, section 4.3.5.1: *In circumstances where the superintendent is empowered to grant an extension of time even when the contractor has not applied for it, must the superintendent exercise this right fairly? ... The answer to this question under AS2124 is an explicit yes. "The principal shall ensure that at all times ... the superintendent ... act honestly and fairly". It may be arguable, then, that the principal will be in breach of contract to the contractor if the superintendent does not exercise its right to unilaterally extend time in the contractor's favour.*

72 The referee expressed the view that, of the five extensions contended for before him by Abigroup, four were variations that could be classed as acts of prevention by Peninsula, and one was a "neutral delay"; and that the Superintendent should have granted extensions for the former, and should have granted an extension for the latter since it was reasonable for it to do so. The referee continued: *Using the power which I believe I have to open up and review the decisions (including non-decisions) of the Superintendent, I therefore find that EOTs should be granted for all the delays listed at the head of this section, and for the times involved.*

73 Although it was not necessary for him to do so, the referee also considered whether Peninsula was estopped by its conduct from contending that the extension of time claims were time-barred. The referee reviewed the factual circumstances, and concluded as follows: *My conclusion is that the requirements of the contract as to timely notification were "on hold" for most and probably all of the period that Abigroup was on site.*

74 The primary judge confirmed both of these conclusions.

Submissions

75 Mr. Rudge SC for Peninsula submitted that the referee was correct to find that cl.35 was mandatory, and that if it was not complied with, Abigroup could not rely on the so-called "prevention principle" to resist Peninsula's claim for liquidated damages for late completion. Mr. Rudge relied on the two Turner cases referred to above, and on an article Wallace "Prevention and Liquidated Damages: A Theory Too Far?" (2002) 18 Building & Construction Law, 82-88.

76 However, Mr. Rudge submitted that the referee was in error in treating Abigroup as entitled extensions of time on the basis of the Superintendent's power to grant extensions, notwithstanding that cl.35 had not been complied with. Mr. Rudge submitted that this power was for the benefit only of the owner, it no longer existed after termination of the contract, there was no occasion to exercise it when no claim for extensions had been made to the Superintendent, prior to termination or even afterwards, and accordingly the primary juge was in error in confirming the referee's findings.

77 Mr. Rudge further submitted that there was no basis for finding an estoppel. Abigroup's pleading claimed only that time requirements were "on hold" in respect to applications for variation; and in any event, the reasons given by the referee did not support there being either a representation by Peninsula or a common assumption by Peninsula and Abigroup that time limits would not be relied on, or that any non-compliance by Abigroup with time requirements was in reliance on any such representation or assumption: cf. China Ocean Shipping Co. Limited v. P.S. Chellaram Co. Limited (1990) 28 NSWLR 354 at 366-8. Peninsula sought to support this submission by reference to Abigroup's own evidence on this matter, which had been before the referee but rejected by the primary judge. In order to do this, Peninsula applied to add a further ground of appeal, alleging error in the primary judge in rejecting this evidence; but this application was rejected during the hearing, because of its lateness, the inadequacy of supporting argument, and consequent prejudice to Abigroup.

Decision

78 I accept that, in the absence of the Superintendent's power to extend time even if a claim had not been made within time, Abigroup would be precluded from the benefit of an extension of time and liable for liquidated damages, even if delay had been caused by variations required by Peninsula and thus within the so-called "prevention principle". I think this does follow from the two Turner cases and the article by Mr. Wallace referred to by Mr. Rudge.

79 In my opinion, no error is shown regarding the primary judge's acceptance of the referee's conclusion based on the Superintendent's power. In my opinion, this power is one capable of being exercised in the interests both of the owner and the builder, and in my opinion the Superintendent is obliged to act honestly and impartially in deciding whether to exercise this power. Of course, if a timely claim has not been made, and the ground on which an extension is claimed is one which is difficult to decide because of the time that has elapsed since the time when the claim should have been made, that may be a ground on which the Superintendent can fairly refuse the extension; but there is no suggestion that that is the case here.

80 In my opinion also, the power to extend time, including the power to do so even if no claim has been made within time, does not automatically come to an end with the termination of the contract for the builder's breach. Clause 35.6, providing for liquidated damages, expressly operates after the contract has been terminated under cl.44; and in order for it to so operate there must be a date for practical completion on which the clause can operate after termination of the contract. If an application had been made within time before termination and not yet determined by the Superintendent at the time of termination, it is plain in my opinion that the Superintendent would have power to determine that claim after termination. If a claim had been made before termination but outside the time provided by cl.35, and the Superintendent had not made a decision in exercise of the Superintendent's power to extend time notwithstanding non-compliance, in my opinion the Superintendent could still do so after termination. In those circumstances, I do not think the Superintendent's power is lost on termination, even if the claim for exercise of the power to extend notwithstanding non-compliance had not been made until after termination.

81 For those reasons, it was in my opinion open to the referee to do what he considered the Superintendent should have done in response to the claims made to the referee; and it was open to the referee to conclude that the Superintendent, acting fairly, would have granted the extensions which the referee found to be justified. This view may have some further support from the referee's finding that Peninsula was itself in breach of cl.23 in failing to ensure that the Superintendent arrive at a reasonable measure of time in respect of delays caused by Peninsula and the Superintendent.

82 It is not necessary to determine the estoppel question, on this point. However, there is in my opinion force in Peninsula's submissions that the referee's reasons showed that he did not find all the facts which were necessary at law to ground an estoppel, and that the primary judge was in error in so far as he accepted the finding of estoppel.

VARIATION AND DELAY COSTS

83 So far as relevant to this appeal, the referee found that Abigroup was entitled to remuneration associated with six variations. These were:

1. VPR5 (linen cupboards) $11,250.00
2. VPR6 (sliding doors) $13,590.00
3. VPR11 (drain) $19,502.00
4. VPR25 (garbage enclosure) $11,884.00
5. VPR51R (removal of slab topping) $126,000.00
6. VPR53 (cutting into slab to install pipes) $67,419.00

The referee also held that Abigroup was entitled to delay costs arising out of the last two of those variations.

84 It is common ground that, in the case of the first four of the variations, cl.40.2 applied; and Peninsula's submission was that Abigroup had not complied with the requirements of cl.40.2. In respect of the last two of the variations, Peninsula's submission was that the Superintendent had not directed Abigroup to perform them under cl.40.1, and that, in order to be entitled to remuneration for such variations and to associated delay costs, Abigroup had to prove compliance with the requirements of cl.46 and had not done so.

85 In addition, Peninsula submitted that the amount Abigroup could recover in delay costs was limited to a daily rate set out in the contract.

86 The referee allowed the first four variations, but did not explicitly deal with Peninsula's argument that Abigroup had not complied with cl.40.2. However, he did find in relation to VPR11 that the proposed variation was notified on 8 July 1998 and that Abigroup submitted a price for it on 4 August 1998 (Red 253).

87 In relation to VPR51R, the referee found that the Superintendent had required removal of the topping. In relation to VPR53, the referee found that the work was additional to contract requirements, and was performed between June 1998 and March 1999 under the supervision of the Superintendent's consulting engineer TTW as something essential to give the relevant piping the designed fall. The claim for this variation was submitted on 26 March 1999, which the referee found (Red 215) to be *"within a reasonable time"*.

88 The referee found that Abigroup was entitled to associated delay costs.

89 The referee's findings on all these matters were confirmed by the primary judge. In response to a submission that the delay costs awarded by the referee were excessive, because they were allowed at a rate far in excess of the figure of $7,890.00 per day stated on the tender form, the primary judge referred to cl.36 of the general conditions, stating that it contained an explicit requirement that the principal pay *"such extra costs as are necessarily incurred by the Contractor by reason of the delay"*. He noted that that was in a contractual context where, by virtue of par.3 of the formal instrument of agreement, the general conditions were expressed to prevail over the tender documents in the event of a discrepancy or inconsistency. The primary judge considered there was an inconsistency, that cl.36 prevailed, and that accordingly the limit in the tender document had no application.

Submissions

90 For Peninsula, it was submitted that "upon receipt" in cl.40.2 meant "immediately after receipt" or *"within a reasonable time after receipt"*: ***Amco Wrangler Limited v. Sukkar*** (1985) 1 NSWLR 577 at 582, ***Koon Wing Lau v. Calwell*** (1948) 80 CLR 533 at 573-4, ***Donovan v. City of Sale*** [1979] VR 461 at 470. It was submitted that Abigroup had not complied, on that interpretation; and that compliance with notification times was important: ***Jennings v. Birt, Wormald Engineering Pty. Limited v. Resources Conservations Co. International*** (1988) 8 BCL 158. The referee made no determination of this matter, and the primary judge was in error in confirming the referee's allowance of variations affected by cl.40.2. In relation to the other two variations, there was no finding by the referee that they were directed by the superintendent, so as to bring them within cl.40.1. Accordingly, it was necessary to comply with the time directions in cl.46; and the referee was in error in concluding that cl.46 did not apply.

91 Finally, it was submitted for Peninsula that in so far as the referee found that time conditions were "on hold", that was erroneous for the reasons given earlier.

Decision

92 I accept that the time requirements of cl.40.2 were not directly addressed by the referee, as they should have been. However, the referee did find that a price was promptly submitted in relation to VPR11.

93 As regards the others, I note that Peninsula made no submission that a price was not submitted at some time or that no direction to go ahead was given. In those circumstances, even if failure to submit advice concerning the construction program and a price within a reasonable time amounted to a breach of cl.40.2, that would not in my opinion disentitle the builder to payment for the variation, so long as a price was submitted at some time and a direction to go ahead given.

94 For that reason, I do not think Peninsula has made good any basis to find either that the referee was wrong or that the primary judge was wrong in relation to these four variations.

95 As regards VPR51R, in my opinion the referee's finding that there was an "instruction" to carry out this variation is sufficient to establish a "direction" within cl.40.1.

96 As regards VPR53, very extensive work was performed by Abigroup over nine months in consultation with the Superintendent's engineering consultant and to the knowledge of the Superintendent, which was in fact in excess of what was required by the original contract, and on the referee's finding, essential to have the plumbing working satisfactorily.

97 In my opinion, in order to entitle Abigroup to payment for this work as a variation under the contract, compliance with cl.40 was required, to the extent that there must either have been a direction from the Superintendent or written approval from the Superintendent. It seems clear that there was no written approval. Accordingly, one question that arises is whether what happened amounted to a "direction" by the Superintendent. (I note that cl.23 requires Abigroup to comply with directions of the Superintendent, and defines "direction" to include "agreement", "approval" and "permission" among others; but this probably does not affect the construction of "direction" in cl.40.) If it did not, there would still be a question whether the events I have mentioned gave rise to an agreement outside the contract or an estoppel or claim in respect of unjust enrichment which would entitle Abigroup to payment for this work.

98 Even if no "direction" had been given, it seems to me that in circumstances where what Abigroup was doing over nine months was done in consultation with the engineering consultant and to the knowledge of the Superintendent (which would in my opinion be attributed to Peninsula), Peninsula could not possibly claim damages on the basis that this work was a breach of cl.40; so to that extent at least, in my opinion, some estoppel would have operated.

99 There was no clear decision either by the referee or by the primary judge as to whether a direction was given, or whether Abigroup had some entitlement to payment outside the contract. On the other hand, there is no clear indication on the material as to precisely what submissions were made to the referee and to the primary judge. I do not think that Peninsula has made good any basis to find that the primary judge was wrong and/or that the referee was wrong in relation to VPR53. And if Abigroup's entitlement was either under cl.40 or outside the contract, then in my opinion cl.46 had no application.

100 In relation to the quantification of delay costs, on my reading of the contract material, cl.36 in the general conditions of contract (referred to by the primary judge) was displaced by cl.36 set out earlier in this judgment (see Blue 74 and 115), which is not inconsistent with the limit placed on delay costs by the tender document. That

point does not appear to have been picked up in submissions, and it is possible that I am mistaken in this impression. However, on my reading of the material, the primary judge was wrong in his decision, and I can see no basis for displacing the limit provided by the tender. However, having regard to the circumstance that this matter was not dealt with in submissions, I would reserve leave to Abigroup to make further submissions on this after delivery of the judgment.

WATER DAMAGE

101 As mentioned earlier, the referee deducted from the completion costs awarded to Peninsula the sum of $998,271.00, being costs incurred between 16 January 2000 and 31 March 2000, because some unidentified part of these costs related to the costs of fixing water damage caused by a broken water pipe in a third floor apartment.

102 The basis on which the referee did this was that he took it that insurance covered the full restoration of areas affected by the flooding to the standard they had attained by 15 January 2000, that such work should not be to the account of Abigroup (Red 374), and that Peninsula failed to prove what part of the total spent after 16 January 2000 was part of the reasonable cost of completing the works (Red 387), that is, its true cost of the finishing work unaffected by the flooding (Red 414).

103 Before the primary judge, Peninsula contended that the referee did not make a finding on Peninsula's contention that Abigroup was responsible for the burst pipe. The primary judge rejected that contention.

Submissions

104 Mr. Rudge SC for Peninsula submitted that there was a plain error by the referee in holding that the circumstance that the water damage was covered by Peninsula's insurance meant that Peninsula could not include the cost of rectifying water damage in its costs of completion claimed against Abigroup, without determining Peninsula's contention that Abigroup was responsible for the burst pipe.

105 Mr. Faulkner for Abigroup submitted that Peninsula failed here because it did not discharge its onus of proof.

Decision

106 In my opinion it was an error for the referee to hold that the circumstance that the water damage was covered by Peninsula's insurance meant, without more, that Peninsula could not include the cost of rectifying water damage in its costs of completion claimed against Abigroup; and in my opinion, if the burst pipe was due to a breach of contract by Abigroup, then there was no need for Peninsula to differentiate the costs of completion unaffected by the flooding. The referee should have decided the question whether or not the burst pipe was due to Abigroup's breach of contract. If the answer was yes, then the referee's reason for disallowing Peninsula's claim for expense incurred in the period 16 January 2000 to 31 March 2000 would disappear; if the answer was no, then the reason would stand.

107 The matter should be remitted to the referee to make the appropriate finding.

CONCLUSION

108 For those reasons, in my opinion the following orders should be made:

1. Appeal allowed.
2. Orders below set aside.
3. Report of Mr. McDougall dated 19 February 2001, together with the supplementary report dated 27 February 2001, be adopted, subject to the following matters:
   (a) Disallowance of variation VPR32.
   (b) Abigroup's delay costs to be calculated at $7,890.00 per day.
   (c) The referee's disallowance of $998,271.00 being Peninsula's costs incurred between 16 January 2000 and 31 March 2000 set aside.
   (d) Finding of misleading conduct and breach of cl.23 by Peninsula set aside.
4. Matter remitted to referee to determine question of Peninsula's costs incurred between 16 January 2000 and 31 March 2000 in accordance with these reasons, and following that determination, remitted to the Equity Division for entry of judgment (including judgment for costs of the proceedings and before the referee) in accordance with these orders and the referee's determination of that question.
5. Respondent to pay appellant's costs of the appeal, and to have a suitors' fund certificate if otherwise entitled.
6. Leave to Abigroup to apply, by furnishing written submissions within 14 days, for re-consideration of Order 3(b) and/or Order 5, in which case Peninsula is to respond by written submissions within a further 7 days.

Mr. F.M. Douglas QC with Mr. M.G. Rudge SC and Mr. M. Christie for appellant instructed by
Mr. B.W. Walker with Mr. I. Faulkner for respondent instructed by Deacons Lawyers Clayton Utz Lawyers