Supreme Court of Victoria, Court of Appeal before Maxwell P, Kellam JA and Whelan AJA. 22nd November 2007

MAXWELL P, KELLAM JA:

1 These proceedings (appeal and cross-appeal) raise two sets of issues. The first concerns whether the building contract was terminated by the acceptance of a repudiation, as the learned primary judge found. The second – and rather more extensive – set of issues concerns the trial judge's assessment of the amount payable by the appellant owners ("the Principal") to the respondent builder ("Kane Constructions") on a quantum meruit. Those issues will only fall for determination if the appeal by the Principal against the repudiation finding fails.

2 Argument on the repudiation issues occupied a full day of hearing. Towards the end of the day, the Court proposed to the parties a rather unusual course, as follows. The further hearing of the appeal would be adjourned while the Court considered its decision on the repudiation issue. The Court would then announce its decision and publish its reasons. If, in the light of that decision, the quantum meruit issues were still live, they would be referred to mediation. This course seemed appropriate in view of the range and complexity of the issues which would need to be debated concerning the amount payable on a quantum meruit. Both parties to the appeal readily agreed to this proposal, evidently sharing the Court's view that lengthy and expensive argument over multiple quantum issues should be avoided if possible.

3 As will appear, we have concluded that the Principal's attack on the repudiation finding fails. The quantum meruit issues therefore remain live. We will, accordingly, refer all remaining issues in the appeal, and the cross-appeal, to mediation. If the mediation is unsuccessful, the further hearing of the appeal and cross-appeal will take place on a date to be fixed.

4 It is important to state clearly that, in announcing our decision on the first issue and publishing these reasons, the Court is not providing an advisory opinion in aid of future negotiations. We are deciding, finally, the first part of the appeal. That matter is hereafter removed from contention. That was the course which we proposed, and to which the parties agreed.

5 We have not had the advantage of full argument on the matter, but we think that the course which we have mentioned can be effectuated by ordering that there be a determination, separately from the determination of the other issues in the appeal and the cross-appeal, of the question whether the learned trial judge erred in concluding that the building contract was terminated by the respondent's acceptance of a repudiation by the appellants. That question being answered in the negative, all remaining issues can then be the subject of the referral and ancillary orders to which we adverted at 3 above.

6 We have had the considerable advantage of reading in draft the reasons for judgment of Whelan AJA. We agree with his Honour's conclusions on the repudiation issues and, subject to what follows, we do so for the reasons which his Honour gives.

Adopting an incorrect interpretation of the contract

7 An issue which arose at trial, and again on the appeal, concerned the significance of the adoption by the alleged repudiator of an incorrect interpretation of the contract. Of what significance is it if the repudiatory party acts in accordance with a bona fide belief as to the correctness of its interpretation?

8 This is an important topic. As a practical commercial matter, contracting parties need to know what will – and will not – count as repudiatory conduct. As this case illustrates, such judgments typically have to be made in circumstances of commercial and financial pressure. The applicable principles need, therefore, to be stated as simply and clearly as possible.

9 In our view, the objective test of repudiation, as stated by Brennan J in ***Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd*** ("Laurinda"),[1] leaves no room for consideration of whether the party in breach – the alleged repudiator – held the honest belief that its action was justified by the contract. Axiomatically, the repudiator's state of mind is irrelevant. What matters is the character of the repudiator's conduct.

10 In the present case, the appellants argued that their conduct in cashing the bank guarantees did not justify the drawing of an inference of repudiation: "*As the trial judge found, the Owners were purporting to assert contractual rights, but were relying on an incorrect interpretation of the contract. ... In seeking recourse to the guarantees, the Owners were seeking to secure costs to which, on their interpretation of the contract, they were entitled. Viewed in the proper context, <u>where the Owners were purporting to act pursuant to the contract, it cannot clearly be inferred they were repudiating their obligations pursuant to it</u>.*"[2]

We reject this argument. As Whelan AJA says: "*Even if the Principal's subjective view was, on the basis of legal advice perhaps, that it had some entitlement to call up the bank guarantees without notice, the issue is what message would that action have conveyed to Kane Constructions on 6 October 2000.*"[3]

11 That the touchstone is conduct, not state of mind, emerges clearly from the authorities dealing with erroneous interpretation. In ***Federal Commerce & Navigation Co Limited v Molena Alpha Inc (The Nanfri) ("Molena Alpha")***,[4] the House of Lords held that shipowners had repudiated a charter party. Lord Wilberforce said: "*If a party's conduct is such as to amount to a threatened repudiatory breach, his subjective desire to maintain the contract cannot prevent*

[1] [1989] HCA 23; (1989) 166 CLR 623.
[2] Written submission [26] (emphasis added).
[3] See below [140], [146].
[4] [1979] AC 757.

the other party from drawing the consequences of his actions. The two cases relied on by the [buyers] ... would only be relevant here if the owners' action had been confined to asserting their own view – possibly erroneous – as to the effect of the contract. They went, in fact, far beyond this when they threatened a breach of the contract with serious consequences."[5]

12 One of the cases referred to in this passage was ***Sweet & Maxwell Ltd v Universal Services Ltd*** ("Sweet & Maxwell"),[6] in which the English Court of Appeal held that it was not repudiation for a party merely to assert an erroneous interpretation of the contract. Pearson LJ said: "*A party should not too readily be found to have refused to perform the agreement by contentious observations in the course of discussions or arguments as to the provisions to be inserted in the lease. In the letter ... the defendants' solicitors were stating their view as to the effect of the agreement, and said they were willing to perform it, and they were not refusing to perform it according to its true construction, whatever that might be. In my view, there was no repudiation.*"[7]

13 In ***Woodar Investment Development Ltd v Wimpey Construction UK Ltd***,[8] the relevant conduct consisted of:

- on one side of the contract, express reliance on a particular term;
- on the other side, an intention to seek judicial determination of the validity of a notice purportedly given under the contract; and
- "an assumption ... that both sides would abide by the decision of the court."

Consistently with what he had said in ***Molena Alpha***, Lord Wilberforce said this was "*quite insufficient to support the case for repudiation*".[9]

14 In **DTR Nominees Pty Ltd v Mona Homes Pty Ltd ("DTR Nominees")**,[10] the High Court said: "*No doubt there are cases in which a party, by insisting on an incorrect interpretation of a contract, evinces an intention that he will not perform the contract according to its terms. But there are other cases in which a party, though asserting a wrong view of a contract because he believes it to be correct, is willing to perform the contract according to its tenor. He may be willing to recognise his heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. In either event an intention to repudiate the contract could not be attributed to him.*"[11]

15 The Court cited the passage quoted above at 12 from the judgment of Pearson LJ in Sweet & Maxwell, and concluded as follows:

In this case the appellant acted on its view of the contract without realising that the respondents were insisting upon a different view until such time as they purported to rescind. It was not a case in which any attempt was made to persuade the appellant of the error of its ways or indeed to give it any opportunity to reconsider its position in the light of an assertion of the correct interpretation. There is therefore no basis on which one can infer that the appellant was persisting in its interpretation willy nilly in the face of a clear enunciation of the true agreement.

...

*... [O]n the evidence this Court would not be justified in finding that the appellant acted otherwise than in accordance with a bona fide belief as to the correctness of the interpretation which it sought to place upon the contract. Consequently it is a case of a bona fide dispute as to the true construction of a contract expressed in terms which are by no means clear (see Asprey JA in **Satellite Estate Pty Ltd v Jaquet**). In these circumstances the Court is not justified in drawing an inference that the appellant intended not to perform the contract according to its terms or that it repudiated the contract.*[12]

What mattered was not the (*bona fide*) belief of the alleged repudiator but the character of its conduct: rather than "*persisting willy nilly*", the repudiator was engaging in genuine disputation with the other parties about the true construction of the contract. The inference of repudiation could not reasonably be drawn.

16 In the same way, it is immaterial whether the alleged repudiator acts in accordance with legal advice. In ***Vaswani v Italian Motors (Sales and Service) Ltd***,[13] the Privy Council quoted with approval what had been said by Lord Denning MR in ***Molena Alpha***, as follows: "*I have yet to learn that a party who breaks a contract can excuse himself by saying that he did it on the advice of his lawyers: or that he was under an honest misapprehension ... I would go by the principle ... that if the party's [conduct] – objectively considered in its impact on the other party – is such as to evince an intention no longer to be bound by his contractual obligations, then it is open to the other party to accept his repudiation and treat the contract as discharged from that time onwards*" .[14]

17 The distinctions drawn in the cases may be summarised as follows:

1. For party A merely to assert, or argue for, a wrong interpretation of the contract will usually not be enough to justify party B drawing an inference of repudiation. The reason for this is that party A may be –

[5] Ibid 780.
[6] [1964] 2 QB 699.
[7] Ibid 734.
[8] [1980] WLR 277.
[9] Ibid 282.
[10] [1978] HCA 12; (1978) 138 CLR 423.
[11] Ibid 432-3 (Stephen, Mason and Jacobs JJ).
[12] Ibid 432 (emphasis added) (citation omitted).
[13] [1996] 1 WLR 270.
[14] Ibid 277 citing ***Federal Commerce & Navigation Co Ltd v Molena Alpha Inc (The Nanfi)*** [1978] QB 927, 979.

willing to perform the contract according to its tenor. He may be willing to recognise his heresy once the true doctrine is enunciated or he may be willing to accept an authoritative exposition of the correct interpretation. In either event an intention to repudiate the contract could not be attributed to him.[15]

Thus the inference of repudiation should not readily be drawn where, for example –

(a) party A makes "contentious observations in the course of discussions or arguments";[16] or

(b) party A's conduct amounts to engaging in "a bona fide dispute as to the true construction of a contract expressed in terms which are by no means clear".[17]

2. The inference of repudiation can more readily be drawn when the interpretation relied on by party A is clearly or obviously untenable and party A –

(a) acts (or threatens to act)[18] unilaterally on the basis of the interpretation; or

(b) persists in the interpretation in the face of communications from party B pointing out the error.[19]

18 For the reasons given by Whelan AJA, the present case falls clearly into the second category. In enforcing the guarantees, the Principal acted unilaterally. This action was "*obviously untenable*" under the contract, as their counsel properly conceded in argument. In relation to the deduction of liquidated damages, the Principal "*persisted willy nilly*", in the face of cogent counterargument, in maintaining its untenable position.[20] On both counts the builder was well justified in drawing the inference of repudiation.

WHELAN, AJA:

19 By a notice of appeal dated 21 February 2006 the appellants have appealed against orders made on 7 February 2006 in a proceeding brought by the respondent ("Kane Constructions") against the appellants and a company named Stacks Properties Pty Ltd. Kane Constructions has also appealed against those orders. The respective appeals rely on a number of grounds. On 21 August 2007 this Court heard argument in relation to one of the grounds relied upon by the appellants and, with the consent of all parties, indicated that we would consider that ground before continuing with the balance of this appeal and with the appeal by Kane Constructions.

20 Kane Constructions was engaged pursuant to a contract dated 20 August 1999 to carry out building works at 158–172 Oxford Street, Collingwood. The two appellants and Stacks Properties Pty Ltd were the "Principal" as defined under that contract. I will refer to them together as the Principal. Disputes arose and whilst the works were incomplete, Kane Constructions sued the Principal and relevantly alleged that the Principal had repudiated the contract, that the contract had been terminated upon Kane Constructions' acceptance of that repudiation, and that Kane Constructions was entitled to recover on a quantum meruit. The Principal denied the contract had been terminated. The Principal alleged that the contract was still on foot and that the parties' rights and obligations were to be determined accordingly. The Principal counterclaimed for sums allegedly due under the contract.

21 The trial of the proceeding occupied 37 sitting days, commencing on 21 August 2003 and concluding on 31 October 2003. Reasons for judgment were delivered on 30 June 2005.

22 The trial judge found, amongst other things:

(a) that the contract had been terminated by Kane Constructions' acceptance of the Principal's repudiation of it; and

(b) that Kane Constructions was entitled to elect to recover from the Principal on a *quantum meruit*.

No orders were made at that time. Eventually orders were made on 7 February 2006. There was significant dispute after the delivery of the 30 June 2005 reasons, concerning, amongst other things, the proper calculation of the *quantum meruit*.

23 The issues now sought to be agitated in this appeal are:

(a) whether the trial judge erred in finding that the contract was terminated by Kane Constructions' acceptance of the Principal's repudiation: ground 1; and,

(b) whether the trial judged erred in the assessment of the *quantum meruit* claim: ground 3.

24 The only issues raised by Kane Constructions' appeal concern the proper calculation of the quantum meruit.

25 Given that the issues raised concerning the quantum meruit are entirely dependent upon the conclusion concerning termination, it was suggested by the Court at the hearing on 21 August 2007 that argument should be confined in the first instance to the ground of this appeal concerning the termination issue (ground 1 of this appeal), that the Court should consider that ground, and that the Court would then address the further disposition of the two appeals. The parties consented to, and indeed embraced, that suggestion.

Relevant contractual provisions

26 The contract between the parties incorporates the Australian Standard General Conditions of Contract AS 2124-1992.

[15] ***DTR Nominees*** [1978] HCA 12; (1978) 138 CLR 423, 432 (Stephen, Mason and Jacobs JJ).

[16] ***Sweet & Maxwell*** [1964] 2 QB 699, 734 (Pearson LJ) cited in ***DTR Nominees*** [1978] HCA 12; (1978) 138 CLR 423, 432 (Stephen, Mason and Jacobs JJ).

[17] ***DTR Nominees*** [1978] HCA 12; (1978) 138 CLR 423, 432 (Stephen, Mason and Jacobs JJ).

[18] ***Molena Alpha*** [1979] AC 757, 780 (Lord Wilberforce).

[19] ***Summers v Commonwealth*** *[1918] HCA 33;* (1918) 25 CLR 144, 152 (Isaacs J), applying ***Morris v Baron & Co*** *[1997] UKHL 17;* [1918] AC 1, 41 (Lord Parmoor); ***DTR Nominees*** [1978] HCA 12; (1978) 138 CLR 423, 432 (Stephen, Mason and Jacobs JJ); ***Progressive Mailing House Pty Ltd v Tabali Pty Ltd*** *[1985] HCA 14;* (1985) 157 CLR 17, 37 (Mason J); ***Satellite Estate Pty Ltd v Jaquet*** [1968] 2 NSWR 340, 357 (Asprey JA).

[20] See below [129]-[141], [150].

27 As indicated previously, the two appellants and Stacks Properties Pty Ltd are defined as "the Principal" under the contract. Kane Constructions is defined as the "Contractor". The contract contains the following relevant provisions.

Retention Moneys

28 Pursuant to clause 42.3 the Principal is entitled to deduct from money otherwise due to the Contractor amounts described as "retention moneys". Under clause 5.6 the Contractor is entitled to provide, in lieu of retention moneys, security in certain designated forms, which include a bank guarantee or bank guarantees. The item of the Annexure to the contract which is referable to clause 42.3 provides that two bank guarantees of 2.5% each (a reference to 2.5% of the contract sum) are to be held by the Principal.

29 Clause 5.1 provides that retention moneys are for the purpose of ensuring the due and proper performance of the contract.

30 Recourse to the retention moneys is dealt with in clause 5.5. It relevantly provides as follows:

A party may have recourse to retention moneys ... where -

(a) the party has become entitled to exercise a right under the Contract in respect of the retention moneys ... and

(b) the party has given the other party notice in writing for the period stated in the Annexure, or if no period is stated, five days of the party's intention to have recourse to the retention moneys ... and

(c) the period stated in the Annexure or if no period is stated, five days has or have elapsed since the notice was given.

The period stated in the Annexure is the period of five days.

31 Clause 42.11 provides:

Where, within the time provided by the Contract, a party fails to pay the other party an amount due and payable under the Contract, the other party may, subject to Clause 5.5, have recourse to retention moneys ...

The Superintendent

32 Pursuant to clause 23 of the contract, the Principal is required to ensure that at all times there is a Superintendent and to ensure that in the exercise of his functions the Superintendent acts honestly and fairly, acts in a timely manner, and arrives at a reasonable measure of value of work, quantities or time. Amongst other things, the Superintendent has the responsibility of dealing with applications for extension of time and has the responsibility of dealing with progress claims and certifying amounts for payment.

Time for Performance

33 Pursuant to clause 35.2, the Contractor is required to execute the work by the defined "*Date for Practical Completion*". The Date for Practical Completion under the contract is 10 December 1999. Provision is made for extensions of time in clause 35.5. This involves application by the Contractor to the Superintendent and a determination by the Superintendent of a reasonable extension if appropriate. Under clause 35.6, if the Contractor fails to reach practical completion by the Date for Practical Completion the Contractor is indebted to the Principal for liquidated damages at the rate of $1,100.00 per day.

Certificates and Payments

34 Clause 42.1 deals with progress claims and payment certificates. Under its provisions the Contractor is to deliver on the 28th day of each month to the Superintendent claims for payment "supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require".

35 Within 14 days of receipt of a claim for payment the Superintendent is to issue to the Principal and to the Contractor a payment certificate "*stating the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the Principal*". The Superintendent is required to set out the calculations including amounts due from the Principal to the Contractor and from the Contractor to the Principal. Clause 42.1 then provides:

Subject to the provisions of the Contract, within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the Certificate as due to the Contractor or to the Principal as the case may be, or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim. A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.

Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided by clause 42.8.

36 Clause 42.8 concerns the final certificate. Amongst other things, that clause provides for release to the Contractor of remaining retention moneys if the final certificate certifies a balance owing by the Principal to the Contractor.

37 Clause 42.1 imposes upon the Superintendent the task of assessing the respective amounts due from and to the Contractor and the Principal and then certifying the amount to be paid by the Contractor or by the Principal, as the case may be.

38 Provision is made for the setting off of money due from the Contractor to the Principal "otherwise than under the contract" in clause 42.10. But under the terms of clause 42.1 the obligation to pay on a certificate is unqualified. The amount paid must be "not less than the amount shown in the Certificate".

39 Certificates under clause 42.1 are only a provisional assessment of liability because the position might be effectively altered by subsequent payment certificates and because the right of the parties to dispute matters under clause 47 is preserved.

Dispute resolution

40 Clause 47 contains provisions for dispute resolution. A procedure is set out involving a notice of dispute, a written response, a decision by the Superintendent, procedures to explore resolution, and ultimately litigation at the Victorian Civil and Administrative Tribunal (misdescribed in the Annexure as "VCAD").

Default

41 Clause 44.1 of the contract provides as follows:

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.

42 Clauses 44.2, 44.3, and 44.4 deal with action which the Principal might take in response to breach by the Contractor. Those clauses relevantly provide as follows:

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 33.1;

(b) failing to proceed with due expedition and without delay, in breach of Clause 33.1;

...

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 execute 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 the notice under Clause 44.2 the Contractor fails to show reasonable cause why the Principal should not execute 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.

The provisions of Clause 44.6 are not presently relevant.

43 In relation to default by the Principal similar provisions to those contained in clauses 44.2, 44.3 and 44.4 are contained in clauses 44.7, 44.8, and 44.9.

44 Clause 44.7 relevantly provides:

If the Principal commits a substantial breach of contract and the Contractor considers that damages may not be an adequate remedy, the Contractor may give the Principal a written notice to show cause.

Substantial breaches include but are not limited to —

(a) failing to make a payment, in breach of Clause 42.1 ...

45 Clause 44.8 contains similar requirements in relation to the contents of the show cause notice to those contained in clause 44.3, including a requirement in sub-clause (b) that the notice "specify the alleged substantial breach".

46 Clause 44.9 relevantly provides: "*If by the time specified in a notice under Clause 44.7 the Principal fails to show reasonable cause why the Contractor should not exercise a right referred to in Clause 44.9, the Contractor may by notice in writing to the Principal suspend the whole or any part of the work under the Contract.*"

Relevant Facts

47 Kane Constructions took possession of the site on 31 May 1999, prior to execution of the contract on 20 August 1999. As at July 2000 the works were incomplete. There were complaints by both parties about the performance of the other. There were complaints by Kane Constructions about the Principal's interference in the building works and the Superintendent's failure to approve variations and extensions of time. There were complaints by the Principal about Kane Constructions' failure to progress the works in a timely manner and about the quality of the works carried out.

48 As a result of these unresolved disputes, Kane Constructions commenced proceedings in the Victorian Civil and Administrative Tribunal, with the points of claim being filed on or about 4 July 2000.

49 Prior to 1 August 2000, Kane Constructions made 13 progress claims pursuant to the contract. The Principal paid the claims as certified by the Superintendent.

50 On 1 August 2000, Kane Constructions submitted progress claim 14 seeking the sum of $1,216,546.64 for works performed to 31 July 2000.

51 The Superintendent requested further information concerning progress claim 14. The provision of that information was completed on 21 August 2000.

52 On 23 August 2000, the Superintendent issued payment certificate 14 in the sum of $340,562.00 in response to Kane Constructions' progress claim 14. Kane Constructions provided to the Principal a tax invoice for $374,618.00, being the sum certified plus GST.

53 The Principal did not pay the amount of payment certificate 14. Instead, on 28 August 2000, the Principal paid Kane Constructions the sum of $132,618.20. The Principal calculated that sum by deducting $220,000 for liquidated damages from the amount certified in payment certificate 14 and then adding GST. The Principal set out this calculation in a covering letter to Kane Constructions.

54 On 1 September 2000, Kane Constructions submitted progress claim 15 to the Superintendent in the sum of $1,572,304.91.

55 On 8 September 2000, Kane Constructions issued to the Principal a notice expressed to be given pursuant to clause 44 of the contract.

56 The notice set out the matters required to be set out by sub-clauses 44.8(a),(c),(d), and (e) of the contract. In relation to the requirement in clause 44.8(b) that the notice specify "*the alleged substantial breach*", the notice stated: "*The Principals have committed a substantial breach of contract in that, in breach of Clause 42.1 of the General Conditions of Contract, they have failed to make payment to the Contractor in the sum of $1,216,546.64 being the amount of the Contractor's progress claim No. 14 dated 1 August 2000 and have made payment in the sum of $132,618.20 only.*"

57 The Principal responded to Kane Constructions' notice by a letter dated 11 September 2000. The letter stated:

The Principal's payment of $132,618.00 for Progress Claim No 14 is the correct sum under clause 42.1, and clause 35.6 of the AS2124 contract agreement...Liquidated Damages were deducted under clause 35.6 because Kane Construction failed to achieve Practical Completion by 13th January 2000. The date that the Superintendent had granted extensions of time for Practical Completion.

58 By a letter dated 13 September 2000, Kane Constructions replied to the Principal's letter of 11 September 2000. In this letter Kane Constructions maintained the "*allegation that the principals have committed a breach of contract*" in that "*[t]he Superintendent failed to issue a payment certificate in response to [Kane Constructions'] claim dated 1 August 2000 within 14 days of the claim*", and "*[i]n the events the obligation of the principals became on 16 August 2000 an obligation to pay the full amount of the progress claim on 29 August 2000*". The letter went on to also assert that "*[t]he principals are not entitled to deduct liquidated damages from the amount otherwise payable to this company under clause 42.1*".

59 On the following day, 14 September 2000, the Superintendent issued payment certificate 15 in the sum of $220,800 in response to Kane Constructions' progress claim 15. The Principal did not pay any sum on payment certificate 15.

60 By a letter dated 15 September 2000, the Principal wrote to Kane Constructions in response to Kane Constructions' letter of 13 September 2000. This letter referred to the sequence of events concerning the provision of additional information in relation to progress claim 14. The letter stated:

We maintain the principal has not committed a breach of contract and that The superintendent did issue a payment certificate after all the information was supplied for an accurate assessment of Kane Constructions claim.

61 The letter asserted that the Principal had "made the payment for Claim No 14". It did not address Kane Constructions' assertion that the Principal was not entitled to deduct liquidated damages from amounts payable under clause 42.1.

62 On 18 September 2000, Kane Constructions issued to the Principal a document entitled "CONTRACTOR'S NOTICE UNDER CLAUSE 44.9 OF THE GENERAL CONDITIONS OF CONTRACT SUSPENDING THE WHOLE OF THE WORK UNDER THE CONTRACT". It referred to the giving of the show cause notice under clause 44.7, asserted that there had been a failure to show reasonable cause, and gave notice of suspension of the whole of the work.

63 On 21 September 2000, the Principal issued to Kane Constructions a document entitled: "PRINCIPAL'S NOTICE TO SHOW CAUSE". The document was expressed to be given under clause 44 of the contract and asserted a substantial breach in that Kane Constructions had wrongfully suspended the work and had failed to proceed with due expedition and without delay. It required Kane Constructions to show cause in writing why the Principal should not exercise the right conferred in clause 44.4 of the contract either to take the whole or part of the works remaining to be completed under the contract out of the hands of Kane Constructions or to terminate the contract.

64 By letter dated 28 September 2000, Kane Constructions responded to the Principal's notice. Kane Constructions asserted that the works had been validly suspended under the contract and denied any failure to proceed with due expedition. This response by Kane Constructions articulated alternative allegations of breach by the Principal. The first was the alleged failure to pay the amount of progress claim 14 in the sum of $1,216,546.64. The second was expressed in these terms: "*Further and in the alternative the Principals are in breach of clause 42.1 of the General Conditions of Contract in purporting to make an impermissible deduction of liquidated damages of $220,000 as described in the Principal's letter of 28 August 2000.*"

65 Immediately following the passage quoted the letter stated: "*We are willing immediately to lift the suspension if the Principals remedy their breach.*"

The letter concluded: "*In conclusion the Contractor has acted in accordance with the rights granted to it by the Contract in the circumstances. It remains willing to perform its contractual obligations but requests that the Principals observe their payment obligations.*"

66 On the same day, Kane Constructions submitted progress claim 16 in the sum of $1,545,618.91.

67 Between 29 September and 2 October 2000, Kane Constructions removed all of its plant, equipment and materials, with the exception of one site shed, from the site.

68 On 2 October 2000, the Principal issued Kane Constructions with a notice, expressed to be under clause 44.4 of the contract, taking the work out of Kane Construction's hands.

69 Also on 2 October 2000, the Principal's then solicitor wrote to the solicitors for Kane Constructions about the removal of plant and equipment from the site by Kane Constructions asserting that this conduct constituted repudiatory conduct, as to which it was said that the Principal reserved their rights.

70 By a letter dated 5 October 2000 sent by facsimile transmission to the Principal's then solicitor, Kane Constructions' solicitors responded to the Principal's notice of 2 October 2000. This letter maintained that Kane Constructions had properly suspended the work. It maintained that the obligation to pay the full amount of progress claim 14 had "crystallised" on 15 August 2000 when the Superintendent failed by that date to issue a certificate, stating that that was the effect of clause 42.1 in the circumstances. It then continued:

In any event, your client failed to pay by 29 August the amount of $340,562.00 certified by the Superintendent on 24 August, asserting an entitlement to deduct liquidated damages of $220,000.00. It was not open to your clients to make that deduction as all the relevant authorities make clear: See ***Blue Chip Pty Ltd v Contract Constructions Group Pty Ltd*** *(1996) 13 BCL 31;* ***Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd*** *(1997) 14 BCL 215.*

71 The letter stated that the plant and equipment had been removed because the majority of it was no longer required and because of the risk of theft or damage. The letter stated that the Principal's conduct was repudiatory and that the solicitors' instructions were that Kane Constructions would accept that repudiation unless by 12 noon on Friday 6 October 2000 the Principal:

1. Confirms in writing that its undated notice received by our client on 2 October 2000 is withdrawn;
2. Acknowledges in writing our client's entitlement to an extension of time in respect of the period from 18 September 2000 to 6 October 2000; and
3. Remedies its default by paying to our client the balance owing in respect of our client's progress claim No. 14 dated 1 August 2000.
4. Pays progress payment certificate No. 15 dated 14 September 2000.

72 On 6 October 2000 the Principal called up Kane Constructions' bank guarantees. It did so without giving notice under clause 5.5 of the contract.

73 Later that day Kane Constructions' solicitors sent a letter by facsimile transmission to the Principal's then solicitor. The letter read as follows:

"*We refer to our facsimile dated 5 October 2000 to which we have had no response.*

Moreover, earlier today your clients, in clear breach of the contract, had recourse to the securities provided by our client pursuant to the contract. That conduct further evidences your clients' intention not to be further bound by the contract.

Your clients' conduct, in all circumstances, is repudiatory. Our client has instructed us to accept that repudiation on its behalf which we hereby do."

74 It was at that point, according to the case put on behalf of Kane Constructions and accepted by the trial judge, that the contract was terminated. The issue now to be resolved is whether that conclusion is correct.

75 The evidence in the trial canvassed many factual matters not referred to above. The trial judge's treatment of the facts was detailed and extensive. The factual matters I have set out are the relevant ones for the purposes of deciding the ground of appeal under consideration.

The parties' competing contentions as to their contractual rights and obligations

76 As has been seen, Kane Constructions and the Principal each adopted and acted upon positions as to their respective contractual rights and obligations which the other party contended was wrong.

77 The two issues of relevant contention were:

(a) Kane Constructions' contention that because the Supervisor had not issued a payment certificate in response to progress claim 14 within 14 days of receipt of the claim, the Principal was obliged under clause 42.1 to pay progress claim 14 in full.

(b) The Principal's contention that they were entitled to deduct liquidated damages allegedly due under clause 35.6 from payment certificate 14 issued by the Superintendent under clause 42.1.

It is necessary to review the relevant authorities on the issues in contention between the parties and to then consider their conduct by reference to the contract and those authorities.

Review of the authorities on the contentious contractual issues

78 A convenient starting point is the decision of the House of Lords in ***Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd***.[21] That case concerned a deduction made by a head contractor from a certified payment to a sub-contractor of an amount claimed to be due for unliquidated damages for delay and defective work. The House of Lords held that the matter was to be determined as an issue of construction of the contract. Lord Diplock observed that one starts with the presumption that each party is entitled to all remedies for breach of contract as would arise by operation of law, including set off. He went on to say that this presumption could be rebutted by unequivocal words or clear implication whereby the parties express their agreement that the remedy shall not be available.[22] The particular sub-contract in question did not exclude set off; indeed, its express terms were to the contrary, and judgment on a preliminary issue in favour of the sub-contractor was reversed.

79 In the Victorian Supreme Court in ***L U Simon Builders Pty Ltd v H D Fowles & Ors ("L U Simon")*** [23] a builder sought summary judgment from a proprietor on the amount due on progress certificates under a building contract. The proprietor claimed to be entitled to set off liquidated and other damages claims. Relying upon the decision in **Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd**, and several subsequent decisions to the same effect, Smith J held that parties could exclude a right of set off which might otherwise exist. He found that in this contract they had done so. The features of the contract which he relied upon in reaching this conclusion were the role of the architect as assessor, valuer and certifier; the availability of arbitration as to the certifier's decision; the obligation to pay progress certificates without provision for dispute and which he accordingly characterised as "absolute"; and other terms including the builder's right to terminate for non-payment, the builder's obligation to proceed with work whilst arbitration was pending, and the scheme for dealing with defects, security and the final certificate. As the matter was a summons for final judgment, Smith J had to be persuaded not just that the builder's construction was correct but that there was no real question to be tried. He held that there was no real question to be tried. His conclusion was that the parties had provided for "a comprehensive scheme for the certification of payments and the adjustments of liabilities between them"[24] under which payments are certificated, disputes go to arbitration, adjustments can be made in later certificates, performance by both parties continues, and there is an accounting in the final certificate. In these circumstances it was held to be clear that it would be contrary to the agreement between the parties to allow the proprietor to set off as it claimed to be entitled to do.

80 In ***Re Concrete Constructions Group Pty Ltd ("Re Concrete Constructions")***[25] the Queensland Court of Appeal considered the same form of contract, AS 2124-1992, as was used by Kane Constructions and the Principal here. The issue in that case was the same as one of the contentious issues between the parties here, namely whether a proprietor can deduct liquidated damages allegedly due under clause 35.6 from a payment certificate issued by the Superintendent under clause 42.1. The proprietor there argued that the entitlement to set off was preserved by the introductory words of the paragraph of clause 42.1 which I have quoted above: "*Subject to the provisions of the Contract*", and by the terms of clause 35.6. The argument was that clause 35.6 conferred on the principal expressly, or if not then impliedly, a right to deduct liquidated damages.

81 The Queensland Court of Appeal rejected the proprietor's argument. Fitzgerald P said: "*What is certified is intended to be paid*".[26] McPherson JA and Helman J addressed the argument in favour of an implied term in some detail. They referred to the provisional nature of a payment certificate under clause 42.1. The proprietor had sought to call in aid clause 42.10 where a right of set off for money due "*otherwise than under the contract*" is expressly preserved, but McPherson JA and Helman J considered that this clause fortified the conclusion that there could be no set off of matters arising under the contract which the Supervisor could take into account when certifying under clause 42.1. They held that the suggested implied term was not necessary and "*would be directly opposed to the express provision in the fourth paragraph of cl. 42.1 requiring the principal to pay the contractor 'an amount not less than the amount shown in the Certificate as due to the Contractor'*."[27]

[21] [1974] AC 689.
[22] [1974] AC 689, 718, 723
[23] [1992] 2 VR 189.
[24] [1992] 2 VR 189, 194.
[25] [1997] 1 Qd R 6 also reported at (1996) 13 BCL 31 as ***Blue Chip Pty Limited v Concrete Construction Group Pty Limited***.
[26] [1997] 1 Qd R 6, 8.
[27] [1997] 1 Qd R 6, 13.

82 The decision of the Queensland Court of Appeal in ***Re Concrete Constructions*** was handed down on 2 April 1996. It has been cited, followed and applied in numerous cases since then.[28]

83 In ***Algons Engineering Pty Limited v Abigroup Contractors Pty Limited ("Algons Engineering")***[29] Rolfe J in the New South Wales Supreme Court had before him a summons for final judgment in which the plaintiff, a sub-contractor, sought judgment against the defendant contractor under a progress claim where no payment certificate had been issued. The contractor claimed an entitlement to set off liquidated damages for delay and damages for sub-standard workmanship. The form of contract in that case was AS 2545-1993. The relevant terms of that contract, with the exception of some inconsequential variations because it was a sub-contract and some different time periods, were the same as those in the contract between Kane Constructions and the Principal here.

84 Rolfe J referred to a number of prior authorities including **L U Simon** and ***Re Concrete Constructions***. He set out the relevant part of Clause 42.1 in full and referred to clauses 42.10, 5, 23, 35.6, 42.2, 42.6, 42.7, 42.8, 42.9, 42.10, 44.7 and 47. By essentially the same process of reasoning as had been employed in L U Simon and in Re Concrete Constructions, he found that the defendant contractor was not entitled to deduct liquidated damages or any other alleged debt (not falling within clause 42.10) from a progress claim (there having been no payment certificate in that case).

85 It is not necessary to set Rolfe J's contractual analysis out in full as, on the appeal before us, the Principal's submissions accepted that the deduction of liquidated damages was in breach of the contract.[30] It is important to observe, however, that Rolfe J found, like Smith J had found in ***L.U. Simon***, not just that the claimant's construction was correct but that the contention that there was an entitlement to deduct liquidated damages was not arguable and did not give rise to any real issue or question to be tried.[31]

86 The judgment in **Algons Engineering** was delivered on 1 August 1997.

87 At the very time when the disputes between Kane Constructions and the Principal were coming to a head, Byrne J in the Victorian Supreme Court heard and delivered judgment on a summary judgment application in ***Minson Nacap Pty Ltd v Aquatec-Maxcon Pty Ltd ("Minson-Nacap")***.[32] The application was heard on 22 September 2000 and judgment was delivered on 5 October 2000.

88 ***Minson-Nacap*** concerned the form of contract AS 4303-1995. Clause 42.1 under that contract is for all relevant purposes the same as clause 42.1 of the contract here.

89 In **Minson-Nacap** the head contractor claimed to be entitled to deduct sums for defective work from amounts due under clause 42.1. Byrne J dismissed this claim very shortly. He referred to ***Re Concrete Constructions and to Algons Engineering***, and indicated that in the circumstances he would not burden the judgment with further authority. He said that he adopted the approach that had been adopted in those cases. He found that there was no arguable defence raised by the contention of an entitlement to deduct. His Honour emphasised in this specific context the importance of judicial decisions on standard clauses. He observed that small changes could alter the construction adopted and then said: "*Happily this is not the case here. Clause 42.1 of the Australian Standard contracts has, for relevant purposes been very stable for many years.*"[33]

90 **Minson Nacap** raised two further issues. One concerned the effect of contractual termination, which is not relevant here. The other was the issue of the consequence of a failure to issue a certificate within the time specified in clause 42.1.

91 In ***Minson Nacap*** the head contractor argued that the sub-contractor had failed to comply with what was said to be the obligation in clause 42.1 to support its progress claim by evidence. As I read Byrne J's judgment he rejected this defence on the facts. Byrne J found that although the relevant items on the claim in question were "one line" claims, they were repetitions of earlier claims which had been made and, in Byrne J's view, it was not necessary on every occasion when they were repeated that they be documented in full.[34] This aspect of Byrne J's decision was reversed on appeal, or, perhaps more correctly, as a result of developments after Byrne J's decision the Court of Appeal reached a different conclusion. I deal with the decision on appeal below.

92 In ***Daysea Pty Ltd v Watpac Australia Pty Ltd ("Daysea")***[35] the Queensland Court of Appeal had before it an appeal from a District Court order setting aside summary judgment obtained by a builder in the Queensland

[28] ***620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 2)*** [2006] VSC 491; ***JM Kelly (Project Builders) Pty Ltd v Toga Development No 31 Pty Ltd*** [2006] QSC 365; ***Main Roads Construction Pty Ltd v Samary Enterprises Pty Ltd*** [2005] VSC 388; ***Beckhaus Civil Pty Ltd v Brewarrina Shire Council (No 2)*** [2004] NSWSC 1160; ***Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd*** *[2004] VSCA 18;* (2004) 8 VR 16; ***Bartier v Kounza Investments Pty Ltd*** [2003] QSC 390; ***Brewarrina Shire Council v Beckhaus Civil Pty Ltd*** *[2003] NSWCA 4;* (2003) 56 NSWLR 576; ***Queensland University of Technology v Project Constructions (Aust) Pty Ltd (in liq)*** [2002] QCA 224; [2003] 1 Qd R 259; ***Daysea Pty Ltd v Watpac Australia Pty Ltd*** [2001] QCA 049; ***Dalefield Pty Ltd v Pro-Civil Pty Ltd*** [2000] QSC 424; ***Minson Nacap Pty Ltd v Aquatec-Maxcon Pty Ltd*** [2000] VSC 402; ***Planet Build (NSW) Pty Ltd v Lassgol Pty Ltd*** [2000] NSWSC 788; ***McMaster Pty Ltd v Redcliffe City Council*** [2000] QSC 092; ***Bayside Civil & Drainage Pty Ltd v Marinestar Holdings Pty Ltd*** [2000] WASC 78; ***Devaugh Pty Ltd v Lamac Developments Pty Ltd*** [1999] WASCA 280; ***Bayside Civil & Drainage Pty Ltd v Marinestar Holdings Pty Ltd*** [1999] WASC 245; *Lamac Developments Pty Ltd v Devaugh Pty Ltd* [1999] WASC 76; ***Hansen Yuncken v Southern Group Caterers*** (1998) 196 LSJS 480; ***Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd*** (1998) 14 BCL 215.

[29] (1998) 14 BCL 215.

[30] Appellants' Outline of Submissions dated 1 August 2007, [12], [21].

[31] (1998) 14 BCL 215, 230.

[32] [2000] VSC 402.

[33] [2000] VSC 402, [19].

[34] [2000] VSC 402, [17]–[18].

[35] [2001] QCA 49.

Building Tribunal. Again, a clause relevantly identical to clause 42.1 was in the contract. In Daysea a claim had been made and a progress certificate had been issued, but it was issued outside the required 14 day period. The Court of Appeal upheld the Building Tribunal's decision that this was the same as if there had been no certificate at all and that the owner's obligation was to pay the progress claim in full.

93 In ***Zauner Construction Pty Ltd v No 2 Pitt Street Pty Ltd***[36] Byrne J referred to the analysis in Daysea and said he agreed with it and would follow it.[37]

94 In October 2002 Macready AsJ in the Construction List of the New South Wales Supreme Court decided a summary judgment application in ***Beckhaus Civil Pty Ltd v Council of the Shire of Brewarrina ("Beckhaus")***.[38] The contract there was AS 2124-1992, the same as here. A number of issues were raised. One was that the contractor contended that it was entitled to payment in full of a progress claim because the payment certificate had been issued out of time. The superintendent had been of the view that the information supplied was insufficient. The issue was whether the superintendent was obliged to assess the claim as best he could on whatever information he had, or whether the provision of satisfactory information was a condition precedent to the superintendent's obligation to assess. Macready AsJ held the superintendent was obliged to assess on what he had.

95 The matter then went to the New South Wales Court of Appeal (***Brewarrina Shire Council v Beckhaus Civil Pty Ltd ("Brewarrina")***)[39] where this conclusion was rejected. Ipp JA, with whom Mason P agreed, held that the obligation on the superintendent to issue a certificate was subject to a condition precedent that the contractor support the claim with evidence. Young CJ dissented on this issue. He disagreed with the conclusion that the provision of supporting information was a condition precedent to the obligation to issue a payment certificate, emphasising the provisional nature of such certificates[40] and the general approach to clause 42.1 taken in ***Re Concrete Constructions, Daysea and Algons Engineering***.[41]

96 As indicated, Byrne J's decision in Minson-Nacap was appealed to this Court (***Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd ("Aquatec-Maxcon")***).[42] This Court held that, given the decision of the New South Wales Court of Appeal in Brewarrina, there was a triable issue as to whether the required information was provided and whether its provision was a condition precedent.

97 I do not read the joint judgment of Winneke P, Buchanan and Eames JJA in ***Aquatec-Maxcon*** as finally concluding that the construction adopted by Bryne J was wrong. Whilst they did say ... "*we can see no reason why we should not accept the majority decision in* ***Brewarrina*** *as accurately construing the relevant provision of cl 42.1*", they qualified that statement with the introductory words: "*For the purposes of this appeal*".[43] It must be remembered that the application was for summary **judgment, and the relevant enquiry was whether there was a triable issue. They then went on to say: "***It may well be that the proper construction of the provision will be conditional upon the resolution of the factual dispute in respect of the information required by and given to the superintendent. In this case, there has — as yet — been no such resolution.*" [44]

98 The trial judge here concluded that the Principal was not bound to pay the full amount of progress claim 14 even though no payment certificate had been issued within the specified 14 days. In this respect the trial judge relied upon ***Brewarrina*** and ***Aquatec-Maxcon***.[45] There was no challenge to this conclusion before us on this appeal.

99 The trial judge here concluded that the Principal was not entitled to deduct liquidated damages from the amount paid on payment certificate 14.[46] Again, there was no challenge to this conclusion before us.

100 This review of what seem to me to be the significant authorities on the contentious contractual issues reveals an important matter. It is this. As at September/October 2000 there was no tenable contractual basis upon which it could be maintained that a principal could deduct from a certificate under clause 42.1 of AS 2124-1992 an alleged entitlement to liquidated damages under clause 35.6. It had been settled by the relevant authorities for some years before then that that could not be done. By contrast, as at September/October 2000 the proposition that a failure to issue a payment certificate within the specified 14 days meant that the claim was payable in full was tenable and represented what was, for a time, subsequently held to be the correct view. The trial judge said that prior to **Brewarrina** "established law" stated that late certification meant the claim was payable in full.[47] That position arguably changed when ***Brewarrina*** was decided by the New South Wales Court of Appeal in February 2003 and **Aquatec-Maxcon** was decided by this Court in March 2004. The trial judge characterised these two decisions as constituting an "*apparent change in the law*".[48]

[36] [2001] VSC 154.
[37] [2001] VSC 154, [17].
[38] [2002] NSWSC 960.
[39] [2003] NSWCA 4; (2003) 56 NSWLR 576.
[40] [2003] NSWCA 4; (2003) 56 NSWLR 576, [72], [79].
[41] [2003] NSWCA 4; (2003) 56 NSWLR 576, [70].
[42] [2004] VSCA 18; (2004) 8 VR 16.
[43] [2004] VSCA 18; (2004) 8 VR 16, 29.
[44] [2004] VSCA 18; (2004) 8 VR 16, [29]–[30].
[45] ***Kane Constructions Pty Ltd v Sopov*** [2005] VSC 237, [765]–[772].
[46] ***Kane Constructions Pty Ltd v Sopov*** [2005] VSC 237, [773]–[777].
[47] ***Kane Constructions Pty Ltd v Sopov*** [2005] VSC 237, [770].
[48] ***Kane Constructions Pty Ltd v Sopov*** [2005] VSC 237, [771].

Other relevant authorities on the contract

101 Two other authorities concerning building contracts need to be referred to before addressing the specific issue of repudiation and in that context analysing the parties' conduct in September and October 2000.

102 The first is **Rejan Constructions Pty Ltd v Manningham Medical Centre Pty Ltd ("Rejan Constructions")**.[49] This was another decision of Byrne J.

103 Counsel for Kane Constructions were concerned to emphasise on the hearing of this appeal the important role which clause 5, governing recourse to retention moneys, plays in the scheme of relationships created by the contract. They adopted in that respect the observations made by Byrne J in ***Rejan Construction***s. Byrne J said:[50]

The drafters of the 1992 version of the Standards Australia contract and of the building contract presently under consideration have demonstrated a great care that the grantor of the security, the Contractor, should not be disadvantaged by inappropriate action against the security by a party in dispute. The evident reason for this is that the maintenance of the security is in effect no disadvantage to either disputant; it simply means that there is a secure fund available to satisfy the Principal's claim when, in due course, it is shown to be well founded. The exercise by the Principal of rights under cl. 5.6 in the case where no money is later found to be owed to it risks imposing a grave disadvantage upon the Contractor.

104 Those observations seem to me to be well founded and to apply with equal cogency to retention moneys, or securities held in lieu of retention, as they do to other security. Recourse to both is regulated by clause 5.

105 The second authority to which reference needs to be made is ***FPM Constructions Pty Ltd v Council of the City of Blue Mountains ("FPM Constructions"),***[51] a decision of the New South Wales Court of Appeal.

106 The contract in that case contained provisions as to notices which were relevantly the same as those contained in clause 44 of the contract between Kane Constructions and the Principal here.

107 One of the issues considered by the New South Wales Court of Appeal in that case was the significance of the reference in the applicable notice provisions to "*the alleged substantial breach*", and how the position is to be analysed if the response reveals that there is no breach. Does that mean that the notice itself is invalid, or does it simply mean that cause has been shown?

108 Basten JA, with whom Beazley JA agreed, suggested that there may not need to be a breach in fact before a notice could be validly issued. Basten JA said:[52] "*Arguably, if the contractor demonstrates to the satisfaction of the principal that no such breach has taken place, the result should be that the power to terminate the contract is not engaged, rather than that the notice is invalid. Accordingly, the better construction may be that a principal is entitled to issue the notice if it is satisfied, in good faith, that there has been a substantial breach by the contractor and a notice in those circumstances will be valid.*"

109 The third judge, Giles JA, described the existence of a substantial breach in fact as a "pre-condition" to the giving of a notice.[53] Giles JA also observed that if a notice asserted obligations which on a proper construction were not owed, "it may be that the notice was valid but cause could readily be shown."[54]

110 Basten JA also referred with approval to authorities indicating that what the show cause notice needs to do is to direct the other party's mind to "what was said to be amiss".[55]

111 For present purposes the relevant matter which emerges from FPM Constructions is not the final determination of the question whether an incorrectly specified breach results in an invalid notice or a notice as to which the recipient will be readily able to show cause, because in this case nobody contends that termination occurred under the contract. The analysis of the notice provisions in FPM Constructions does assist, however, in accurately characterising what was conveyed to the recipient by the notices served under clause 44 by each of Kane Constructions and the Principal. I will return to this in the specific context of the notices given by the parties here.

Authorities on repudiation

112 Before analysing the parties' conduct between 1 August 2000 and 6 October 2000, it is important to be clear about what is the relevant issue. The Principal's submissions,[56] and Kane Constructions' submissions[57] both adopted the analysis of the relevant principle by Brennan J (as he then was) in **Laurinda Pty Ltd v Capalaba Park Shopping Centre ("Laurinda")**.[58] He said: "*Repudiation is not ascertained by an enquiry into the subjective state of mind of the party in default; it is to be found in the conduct, whether verbal or other, of the party in default which conveys to the other party the defaulting party's inability to perform the contract or promise or his intention not to perform it or to fulfil it only in a manner substantially inconsistent with his obligations and not in any other way.*" [59]

[49] [2002] VSC 579.
[50] [2002] VSC 579, [40].
[51] [2005] NSWCA 340.
[52] [2005] NSWCA 340, [164].
[53] [2005] NSWCA 340, [58].
[54] [2005] NSWCA 340, [62].
[55] [2005] NSWCA 340, [148] – [149].
[56] Appellant's Outline of Submissions dated 1 August 2000, [20].
[57] Submissions of Kane on the Principals' Appeal (undated), [25].
[58] [1989] HCA 23; (1989) 166 CLR 623, 647–8.
[59] [1989] HCA 23; (1989) 166 CLR 623, 647.

113 Kane Constructions also particularly relied upon Fullagar J's statement of the principle in ***Carr v JA Berriman Pty Ltd***[60] where he said, in relation to the conduct of a building owner under a building contract who was alleged to have repudiated:[61] "*A reasonable man could hardly draw any other inference than that the building owner does not intend to take the contract seriously, that he is prepared to carry out his part of the contract only if and when it suits him.*"

114 The trial judge also referred to Laurinda (although the trial judge referred to the relevant passage in the judgment of Deane and Dawson JJ) and to numerous other authorities and texts to the same effect.[62]

115 These principles were not controversial before us. The controversial issue was not the content of the relevant principles but rather their application to the facts here.

116 Whilst the validity or otherwise of the various notices and the existence or non-existence of breaches of contract are obviously relevant to a characterisation of each of the parties' conduct, the ultimate issue is not whether the notices were valid or not, or whether particular breaches occurred or not. The issue is, to adopt the formulation in the Principal's submissions,[63] whether a reasonable person in the shoes of Kane Constructions would clearly infer that the Principal would not be bound by the contract or would fulfil it only in a manner substantially inconsistent with their obligations and in no other way.

117 Whilst primary attention is to be focused on the conduct of the Principal, Kane Constructions' conduct is relevant as well. This is because the Principal also submits that even if the Principal's conduct was repudiatory, Kane Constructions was disentitled from terminating because its own breaches were so serious as to have given the Principal the right to terminate itself, or because Kane Constructions' own wrongful conduct caused the conduct by the Principal upon which Kane Constructions relied to terminate.[64]

Analysis of the parties' conduct

118 I return then to the conduct of the parties between 1 August 2000 and 6 October 2000.

119 On 1 August 2000 Kane Constructions submitted progress claim 14 under clause 42.1. The Superintendent did not issue a payment certificate within the required 14 days. The Superintendent did request further information, and the provision of that information was not completed until 21 August 2000.

120 At that time it was, at the least, a justifiable position to maintain that in those circumstances an obligation to pay progress claim 14 in full had arisen. Such an approach was consistent with the approach Byrne J was to take shortly thereafter (on 5 October 2000) in Minson-Nacap, was consistent with the approach which was to be taken by the New South Wales Court of Appeal in Daysea, and was consistent with the approach which was to be taken by Macready AsJ in Beckhaus, and with Young CJ's dissent in Brewarrina. It could not be concluded that the adoption of this position by Kane Constructions conveyed a message that Kane Constructions did not intend to perform the contract.

121 On 23 August 2000 the Superintendent issued payment certificate 14. On 28 August 2000 the Principal short paid payment certificate 14 by $220,000 claiming to be entitled to deduct that sum for liquidated damages under clause 35.6. It never resiled from this position.

122 The Principal's position was inconsistent with the judgment of the Victorian Supreme Court in L U Simon, contrary to the judgment of the Queensland Court of Appeal in Re Concrete Constructions, and contrary to the judgment of the New South Wales Supreme Court in ***Algons Engineering. L U Simon*** was decided in December 1991. ***Re Concrete Constructions*** was decided in April 1996. ***Algons Engineering*** was decided in August 1997. It was not contended on the appeal before us that any of those decisions are incorrect, indeed the Principal's submissions stated or assumed that they were correct.[65] At the time the Principal took the position which it did those authorities had stood for some years. At that very time Byrne J in ***Minson-Nacap*** was able to find on a summons for final judgment that deductions could not be made by a principal from amounts due under clause 42.1 by reference to those authorities without further consideration.

123 At the trial (but not on appeal) the Principal did put arguments as to why the Principal was not liable to pay either progress claim 14 or payment certificate 14. It was argued that progress claim 14 was lodged late (i.e. after the 28th day of the month). It was argued that the obligations under clause 42.1 had been varied when GST was introduced. There was an argument as to estoppel in relation to the assessment procedure and arguments were put under the Domestic Buildings Contracts Act 1995. The trial judge rejected all of these arguments. For present purposes these arguments are irrelevant. The issue is what was conveyed to Kane Constructions by the position the Principal adopted at the time. What was conveyed was that the Principal was determined to insist upon a right to deduct a substantial sum for liquidated damages under clause 35.6 from amounts due under clause 42.1. That position was untenable. As the trial judge observed the authorities on this point were clear[66] and long standing.[67]

[60] [1953] HCA 31; (1953) 89 CLR 327.
[61] [1953] HCA 31; (1953) 89 CLR 327, 351.
[62] ***Kane Constructions Pty Ltd v Sopov*** [2005] VSC 237, [792]–[796].
[63] Appellants' Outline of Submissions dated 1 August 2007, [20].
[64] Appellants' Outline of Submissions dated 1 August 2004, [27]–[30].
[65] Appellants' Outline of Submissions dated 1 August 2007, [12], [21].
[66] ***Kane Constructions Pty Ltd v Sopov*** [2005] VSC 237, [776].
[67] ***Kane Constructions Pty Ltd v Sopov*** [2005] VSC 237, [754].

124 On 8 September 2000 Kane Constructions issued to the Principal its notice under clause 44. The *"alleged substantial breach"* set out in that notice was the failure to pay progress claim 14 in full.

125 The Principal's submissions on this appeal were very largely premised on the proposition that this notice was "invalid" because the trial judge found that the relevant obligation was not an obligation to pay progress claim 14 in full. Given the issue before us, it is not necessary to decide whether the notice was "valid" or not, but if the construction considered to be the better one in FPM Constructions were adopted this notice was not invalid even if the trial judge's conclusion is accepted. The breach specified was the "alleged" breach. The notice did direct the Principal to what was "*said to be amiss*". Further, there was a justifiable basis for that assertion. The issue of whether cause might then be shown is a separate issue.

126 I do not accept the Principal's submission that this notice was "invalid". For the purposes of this appeal, there being no challenge to the trial judge's finding that the obligation at the relevant time was not an obligation to pay progress claim 14 in full, I accept that the alleged specified breach was not a breach in fact. At the risk of being repetitious, it was, however, the alleged breach. If it were necessary to rule on the validity of the notice, which in my view it is not, I would adopt the construction of clause 42.1 suggested to be the "better" one by Basten JA in FPM Constructions and find that it was valid.

127 The Principal's first response to Kane Constructions' notice under clause 44 by its letter of 11 September 2000 maintained the position that the Principal was entitled to deduct liquidated damages from the payment certificate.

128 Kane Constructions' response to the Principal's letter of 11 September 2000 by its letter of 13 September 2000 identified the distinction between the issue of whether the obligation was to pay progress claim 14 and the issue of whether there was an entitlement to deduct liquidated damages from amounts payable under clause 42.1. The Principal's response to this letter, by its letter of 15 September 2000, justifiably pointed to the sequence of events in relation to the provision of information so as to meet the allegation that the obligation was to pay progress claim 14 in full, but ignored the separate issue as to whether there was an entitlement to deduct liquidated damages from payment certificate 14.

129 In my view it is not necessary to determine whether the Principal in fact failed to show reasonable cause or not. The important point is that the Principal maintained its untenable position in relation to its deduction. If it were necessary to rule upon whether the Principal had shown reasonable cause, my conclusion would be that it had not. The reason is that its responses confirmed its refusal to comply with clause 42.1. Insofar as Kane Constructions was insisting upon the payment in full of progress claim 14, it did show reasonable cause by its letters of 11 September 2000 and 15 September 2000, but it also insisted upon its right to deduct, which meant it would not resile from an untenable position concerning its obligations under clause 42.1.

130 Payment certificate 15 was issued on 14 September 2000. I do not consider that actions taken or not taken in relation to it are significant. This is because the Principal's show cause notice of 21 September 2000 and its notice taking the works out of Kane Constructions' hands had the effect of suspending and then removing the obligation to pay, assuming for these purposes the validity of those notices. In these circumstances, it could not be said that the Principal was conveying a message that it would not comply with the contract by the non-payment of payment certificate 15.

131 Kane Constructions' notice suspending the work under clause 44.9 dated 18 September 2000 was a step taken by Kane Constructions which was a justifiable exercise of a contractual right, whether upon analysis the notice was valid or not. A notice had been given under clause 44.7 which had contained all of the required particulars, including the "alleged" substantial breach. The Principal had, assuming the correctness of the trial judge's conclusion on this point, shown reasonable cause as to why the Principal was not obliged to pay the full amount of progress claim 14, but the Principal was at that time still in breach of its obligations under clause 42.1 on any view. As the Principal's own submissions before us conceded, the deduction insisted upon was "plainly" unauthorised by the contract.[68] Further, the Principal had confirmed that it intended to persist in this unjustifiable position and that it had no intention of remedying what the Principal now concedes to have been a clear breach. In those circumstances Kane Constructions' suspension of the work cannot be characterised as conveying a message that Kane Constructions would not comply with the contract. That conclusion in my view is sufficient for present purposes. If it were necessary to determine whether the suspension were valid, in my view, given the Principal's refusal to resile from its unjustifiable deduction, I would find the Principal had failed to show reasonable cause and the suspension was valid.

132 The Principal's notice to Kane Constructions to show cause under clause 44 dated 21 September 2000 does not relevantly advance the analysis. The Principal relied upon the alleged wrongful suspension of the work and upon the alleged failure to proceed with due expedition and without delay. Save to the extent that there is in this notice an implicit adherence to the untenable proposition that the Principal was entitled to deduct liquidated damages from the payment certificate, this notice does not convey an intention on the Principal's part not to perform the contract.

133 Kane Constructions' letter of 28 September 2000 is important. The letter is Kane Constructions' response to the Principal's notice to show cause. In the context of addressing the allegation of wrongful suspension, Kane

[68] Appellants' Outline of Submissions dated 1 August 2007, [21].

Constructions makes it clear in this letter that it analyses the existing position in relation to clause 42.1 in a way which raises two issues. The first is whether the obligation is to pay progress claim 14 in full. The second is the entitlement to deduct liquidated damages.

134 The statement that Kane Constructions will immediately lift the suspension if the "Principals remedy their breach" in a context in which Kane Constructions has expressed that breach as involving alternative propositions, namely, non-payment of progress claim 14 and/or the wrongful deduction of liquidated damages, is significant. In my view this letter was a clear invitation to the Principal to re-address the breach which it is clear was in existence at that time, namely the Principal's deduction of the liquidated damages. The letter concludes by emphasising Kane Constructions' remaining willingness to perform its contractual obligations.

135 Kane Constructions removed equipment over 29 September to 2 October 2000. The trial judge accepted Kane Constructions' evidence as to the reasons for this removal.[69] The trial judge accepted that the reasons for removal were security and to prevent the Principal using plant and equipment they were not entitled to use, and the trial judge also accepted the evidence that the site could have been reinstated within a day if the suspension had been lifted.

136 The Principal's notice of 2 October 2000 under clause 44.4 taking the work out of Kane Constructions' hands is significant, but only for this reason. It conveys the message that, notwithstanding the terms of Kane Constructions' letter of 28 September 2000, the Principal maintained their position that they would not remedy the breach of contract which was committed by deducting the liquidated damages.

137 Kane Constructions' solicitors' letter of 5 October 2000 is, it seems to me, essentially a re-statement of the position put in the letter of 28 September 2000. Amongst other things, this letter referred the Principal's solicitor at that time to two of the relevant authorities which ought to have revealed that the deduction of liquidated damages was unjustifiable.

138 As counsel for the Principal emphasised, Kane Constructions was at this stage asserting that the Principal's conduct was repudiatory, and was threatening to accept that repudiation the next day. It is not necessary to determine whether that allegation could have been sustained. This is because the Principal acted first. It called up the guarantees without notice on 6 October 2000.

139 Counsel for the Principal agreed in oral submissions before us that the breach of contract by the Principal in calling up the bank guarantees as it did was "obvious".

140 Before the trial judge the Principal submitted that it called up the guarantees relying upon what was characterised as an "incorrect interpretation" as a result of the fact that the guarantees themselves were unconditional in their terms and did not require notice to be given.[70] The trial judge also referred to evidence given by Mr Sopov to the effect that the guarantees had been called up on legal advice.[71] In my view the conduct of the Principal on 6 October 2000 cannot be properly characterised as conduct taken in reliance on an "incorrect interpretation" of the contract between the Principal and Kane Constructions. Such a characterisation can only be made if one ignores the provisions of clause 5. Even if the Principal's subjective view was, on the basis of legal advice perhaps, that it had some entitlement to call up the bank guarantees without notice, the issue is what message would that action have conveyed to Kane Constructions on 6 October 2000.

141 As at 6 October 2000 the position was that the Principal had committed an unjustifiable breach at the end of August 2000, which it refused to remedy or resile from notwithstanding clear invitations to do so, including one invitation which included reference to relevant authorities. Whilst that breach persisted the Principal committed a second "obvious" breach by calling up the bank guarantees without notice. The Principal ignored the provisions of clause 5 which, as Byrne J observed in Rejan Constructions, had been demonstrably drafted so as to protect the contractor from risks potentially imposing grave disadvantage upon it.

Trial judge's conclusion on repudiation

142 The trial judge's relevant conclusion is to be found in this passage of the judgment: "*I find that the conduct of the defendants was repudiatory and the plaintiff was entitled to terminate the contract on two grounds: firstly, on the basis that the deduction of liquidated damages was wrongful; and secondly, on the basis that the defendants were not entitled to cash in the bank guarantees provided by the builder as they did on 6 October 2000.*"

Both these actions constituted significant breaches of the contract on the part of the defendants and evinced the principal's intention to no longer be bound to the contract.[72]

Principal's submissions on repudiation

143 The Principal's submissions summarised the errors said to have been made by the trial judge in reaching the conclusion set out above as follows:

(a) Each relevant finding made by the trial judge that led to the conclusion that the contract had been terminated proceeded from an erroneous construction of Kane Constructions' show cause notice and the parties' obligations in relation to it. Properly construed, the show cause notice was invalid as were all steps taken by Kane Constructions pursuant to it.

[69] ***Kane Constructions Pty Ltd v Sopov*** [2005] VSC 237, [818]–[820].
[70] ***Kane Constructions Pty Ltd v Sopov*** [2005] VSC 237, [797].
[71] ***Kane Constructions Pty Ltd v Sopov*** [2005] VSC 237, [798].
[72] ***Kane Constructions Pty Ltd v Sopov*** [2005] VSC 237, [808] - [809].

(b) The trial judge failed properly to address whether the Principal's conduct was repudiatory and instead erroneously assumed that a "substantial breach of contract" (as defined) amounted to repudiation and the trial judge impermissibly relied upon findings about Mr Sopov's uncommunicated subjective intentions to find the Principal had repudiated their obligations. The trial judge should have held that the Principal's conduct was not repudiatory.

(c) Alternatively to (a) and (b), even if the Principal's conduct was repudiatory, the actions taken by Kane Constructions pursuant to its invalid show cause notice (giving a notice of suspension of works, suspending works and later abandoning the site) disentitled it from terminating the contract.[73]

144 **The Principal's counsel developed these submissions as follows:**

- The trial judge's finding that progress claim 14 was not payable in full disposed of the only alleged breach stated in Kane Constructions' show cause notice.[74]
- The invalid show cause notice led to an invalid notice of suspension and then to the removal of equipment and suspension of work in breach of the contract by Kane Constructions.[75]
- The calling up of the guarantees by the Principal should be seen as a response to Kane Constructions' unlawful suspension of work and abandonment of the site.[76]
- None of this is to deny that the Principal was in substantial breach of the contract by deducting liquidated damages.[77]
- On 6 October 2000 both parties were in breach of the contract and each were acting on erroneous views of it.[78]
- Two errors pervade the trial judge's finding that the Principal did repudiate. The first is an assumption that a substantial breach amounts to repudiation. The second is the reliance upon the evidence as to Mr Sopov's subjective intentions.[79]
- The trial judge never addressed the question whether a reasonable person in the shoes of Kane Constructions would infer that the Principal would not be bound by the contract or would fulfil it only in a manner substantially inconsistent with their obligations.[80]
- Whilst the deduction of liquidated damages was plainly unauthorised an intention not to be bound cannot be inferred from it in circumstances where the project was running late and the payment which was not made was a payment of "what is no more than a provisional assessment of amounts due".[81]
- The Principal's continued failure to resile from the deduction of liquidated damages has to be seen in the light of Kane Constructions' unlawful conduct in suspending the work and its constant demands that progress claim 14 be paid in full.[82]
- Likewise, in relation to the calling up of the guarantees the trial judge wrongfully equated breach with repudiation and relied upon findings as to Mr Sopov's subjective intentions.[83]
- The trial judge correctly found that the Principal acted on an "incorrect interpretation" of the contract in calling up the guarantees, but that conduct ought to have been found not to be repudiatory in the context of Kane Constructions' abandonment of the site pursuant to its invalid notices.[84]
- The relevant legal principle in relation to Kane Constructions being disentitled from terminating is that a terminating party, which is in breach itself, is precluded from terminating if its breach is so serious as to entitle the other party to terminate or if its conduct caused the event upon which it relies to terminate. Both conditions are made out here.[85]
- The insistence upon the payment in full of progress claim 14 and the abandonment of the site was repudiation by Kane Constructions.[86]
- Further, Kane Constructions' refusal to perform the contract led the Principal to conclude "erroneously" that they were entitled to call up the guarantees.[87]

Conclusions on this ground of appeal

145 I do not accept the foundation proposition for much of the submissions made by the Principal on the appeal. The foundation proposition is that, because the Principal's obligation was found by the trial judge to be an obligation to pay payment certificate 14 and not progress claim 14, Kane Constructions' show cause notice was "invalid". I have previously given my reasons for this conclusion.

73 Appellants' Outline of Submissions dated 1 August 2007, [1].
74 Appellants' Outline of Submissions dated 1 August 2007, [7].
75 Appellants' Outline of Submissions dated 1 August 2007, [10].
76 Appellants' Outline of Submissions dated 1 August 2007, [11].
77 Appellants' Outline of Submissions dated 1 August 2007, [12].
78 Appellants' Outline of Submissions dated 1 August 2007, [13].
79 Appellants' Outline of Submissions dated 1 August 2007, [15] – [17].
80 Appellants' Outline of Submissions dated 1 August 2007, [20].
81 Appellants' Outline of Submissions dated 1 August 2007, [23].
82 Appellants' Outline of Submissions dated 1 August 2007, [24].
83 Appellants' Outline of Submissions dated 1 August 2007, [25].
84 Appellants' Outline of Submissions dated 1 August 2007, [26].
85 Appellants' Outline of Submissions dated 1 August 2007, [28].
86 Appellants' Outline of Submissions dated 1 August 2007, [29].
87 Appellants' Outline of Submissions dated 1 August 2007, [30].

146 More fundamentally, however, as counsel for Kane Constructions stressed on the hearing of the appeal, the validity of the various notices and the actions taken under them is not the determinative issue. No party contended before the trial judge, and no party contends now, that the contract was terminated pursuant to its terms. The Principal contends the contract was not terminated at all. Kane Constructions contends the contract was terminated by acceptance of the Principal's repudiation. The relevant issue is whether the Principal did repudiate the contract. The relevant enquiry is whether the conduct of the Principal was such as to convey to Kane Constructions that the Principal did not intend to perform the contract or would perform it only in a manner substantially inconsistent with their obligations and not in any other way.

147 I do not accept that Kane Constructions' show cause notice was invalid, but even if it were, that would not alter the position that the Principal, in relation to the two matters identified by the trial judge, by adopting positions and taking actions which could not be justified under the terms of the contract, did convey their determination to proceed in a manner which was in contravention of the contract.

148 It is true, as was submitted by counsel for the Principal on the appeal, that as at 6 October 2000, on one view, both parties were maintaining positions inconsistent with the contract properly construed. But there is a very significant difference between the two parties' respective positions. Kane Constructions was maintaining a position which could be justified under the terms of the contract. The Principal was not. The Principal's conduct in failing to pay payment certificate 14 in full and in calling up the bank guarantees could not be justified under the terms of the contract. In the circumstances such conduct must convey to the other party an intention not to perform the contract or to perform it only in a manner substantially inconsistent with the Principal's obligations.

149 As to the submission that the trial judge erroneously equated a defined "substantial breach of contract" within the meaning of clause 44.7 with repudiatory conduct. I do not accept that the trial judge did proceed in that way. In my view it is clear from the conclusion I have earlier quoted that the trial judge was aware of the relevant issue and reached a finding in relation to it. In any event, in my view the trial judge's conclusion was correct

150 It is true that the trial judge in the reasons devoted some attention to the subjective intentions of Mr Sopov. I do not accept that the judge's conclusion was relevantly tainted by that analysis of the evidence. The trial judge's detailed analysis of Mr Sopov's evidence in the reasons comes after the conclusion which I have quoted. The trial judge referred to this issue expressly as an "additional matter". In any event, even if the trial judge did erroneously take into account evidence as to Mr Sopov's subjective intentions, the conclusion reached on repudiation was fully justified.

151 In relation to the deduction of liquidated damages, the Principal's submissions before us conceded that that deduction was "unauthorised". The submissions made on behalf of the Principal accepted the correctness of the decision in Re Concrete Constructions.[88] The criticism made of the trial judge in relation to this aspect of the matter is that this breach was not sufficient in itself to justify a finding of repudiation. I am not persuaded that that is so. The Principal took an unjustifiable position. It was pointed out to them. They refused to resile. It was pointed out again, this time with the citation of authority. Still, the Principal refused to resile. The more important point is, however, that this conduct does not stand alone. Having ignored clause 42.1, the Principal proceeded to ignore another important provision of the contract, clause 5. The Principal was ignoring the contract; it was not proceeding on the basis of a justifiable interpretation of it, whereas Kane Constructions was.

152 As to the submission Kane Constructions was disentitled from terminating, I am not persuaded that Kane Constructions was in breach as at 6 October 2000, but even if it was, I do not consider that Kane Constructions' conduct ever amounted to repudiation. Kane Constructions never conveyed that it did not intend to comply with the contract. The position which it adopted, even if now held to be wrong, was justifiable under the provisions of the contract. Kane Constructions' position was a position a number of judges would subsequently adopt as the correct one, prior to the decisions in Brewarrina and Aquatec-Maxcon.

153 Further, I do not accept that Kane Constructions conveyed that it would only perform its obligations if the Principal paid the full amount of progress claim 14. That is not my interpretation of the letter of 28 September 2000 or the solicitor's letter of 5 October 2000. But even if that were the correct interpretation, that would then be a circumstance where a party was relying upon a justifiable but incorrect interpretation of the contract. It would not be a circumstance where a party was adopting a course which simply could not be justified by the provisions of the contract, as was the position adopted by the Principal. I do not accept that Kane Constructions itself conveyed that it was unwilling to perform the contract on its proper interpretation.

154 As to the submission that Kane Constructions' refusal to perform "led" the Principal to issue the show cause notice and to take the work out of Kane Constructions' hands, and also "led" the Principal, erroneously, to the conclusion that they were entitled to cash the bank guarantees, I do not accept that Kane Constructions caused the Principal to ignore clause 5. It was not suggested that Kane Constructions caused the Principal to deduct the liquidated damages.

155 In my opinion the conclusion of the trial judge that the contract was terminated as a result of Kane Constructions' acceptance of the Principal's repudiation was correct.

For the Appellants/ Cross-Respondents Mr E M B Derham QC with Mr C P Young instructed by Pilley McKellar
For the Respondent/ Cross-Appellant Mr G J Digby QC with Mr M J Stirling instructed by Deacons

[88] Appellants' Outline of Submissions dated 1 August 2007, [21].