JUDGMENT : Master Macready. Equity Division. T&C List. Supreme Court New South Wales. 7th December 2004

1 I gave judgment in this matter on 16 September 2004 and have now heard argument on a small number of outstanding matters that arose from that judgment. In that judgment I found that the plaintiff was entitled to a verdict on its claim and that although there had been substantial performance of the contract the defendant was entitled to succeed on its cross-claim in respect of rectification of a small number of defects. The parties have now agreed that the amount owing on the cross-claim is the sum of $40,000.00 inclusive of GST.

2 I also found that the plaintiff did not achieve practical completion under the contract and this has led to a debate as to whether in these circumstances the defendant is entitled to liquidated damages under the contract. The amount of the plaintiff's claim apart from this matter is said to be the sum of $809,236.54. There also needs to be decided questions about variation 21 and interest.

Liquidated damages

3 The defendant submitted that any entitlement to liquidated damages under the contract would automatically follow my finding that practical completion was not achieved.

4 The primary submission of the defendant was that the sum of $1,822,000.00 was payable by way of liquidated damages from 18 March 2002 to the date of judgment on 16 September 2004. If liquidated damages were not to include the period when the plaintiff suspended the works on 22 May 2002 until the date of a payment by the defendant to the plaintiff of the $702,678.45, which was made on 18 November 2002 (180 days @ $2,000.00 = $360,000.00), the amount of liquidated damages under the contract to the date of judgment is said to be the sum of $1,462,000.00.

5 On the plaintiff's own case the defendant submits that liquidated damages must be payable from at least 18 March 2002 to 22 August 2003 – the date on which the defendant submits that the plaintiff asserted that the contract remained on foot. This is a total of $1,044,000.00. If liquidated damages are likewise deducted for the period of suspension as set out above, the amount due is said to be $684,000.00.

6 The suspension of the works by the plaintiff on 22 May 2002 was as a result of the defendant failing to pay the amount claimed in a progress certificate which was also expressed as a progress claim under the **Building and Construction Industry Security of Payment Act** 1999 (NSW). The date of 22 August 2003 is a reference to a letter from the plaintiffs to the defendant's solicitors, which dealt with testing on the levies in August 2003. In dealing with the proposed testing a number of points were made by the plaintiff's solicitors including:

> *"6. In relation to works site safety plans, the contract will be working in accordance with the plans already submitted under the contract, and in accordance with the contract. In this regard we note the contract has not been terminated between the parties and is still in existence."*

7 I will return to these matters when discussing the plaintiff's response to the defendant's submissions.

8 The plaintiff raised the following matters in respect of the claim that liquidated damages applied.

- Issue not pleaded nor agitated in proceedings
- Contract not on foot
- Liquidated damages generally
- Failure by Superintendent to exercise discretion to extent time for Practical Completion
- Uncertainty regarding Commencement and Completion Dates
- Liquidated Damages are not payable for an indefinite period
- Indemnity under **Building and Construction Industry Security of Payment Act**
- Rate of Liquidated Damages must apply to a Separable Portion
- Liquidated Damages not certified by Superintendent

9 I will deal with each of these matters in turn.

Issue not pleaded nor agitated in proceedings

10 It is clear that there was no claim for liquidated damages pleaded by the defendant in either its defence or cross-claim. The plaintiff submitted that there is a whole range of issues critical to the determination of the entitlement of the defendant to liquidated damages which had not been ventilated in the hearing as there was no such pleaded claim. The various matters referred to by the plaintiff in its submissions were as follows:

(a) whether the contract between the Plaintiff and Defendant was on foot at the date of judgment (16 September 2004);

(b) if the contract was on foot at the date of judgment, the construction of the contract and specifically Clause 35.6 of the General Conditions of Contract, including:

(i) whether the contract contained one or two Separable Portions;

(ii) the commencement date(s) for the Separable Portion(s);

(iii) the completion date(s) for the Separable Portion(s);

(iv) the liquidated damages rate for the Separable Portion(s);

(c) if the contract was not on foot at the date of judgment, the manner in which further performance of the parties under the contract was discharged; and

(d) if the contract was not on foot at the date of judgment, whether the Defendant has any right to deduct liquidated damages from the monies otherwise owing to the Plaintiff by the Defendant, and if so, to what extent.

11 At the last hearing before me the defendant made an oral application to amend it's pleading in order to allow it to raise this claim. I will firstly deal with the other matters raised by the plaintiff to see whether any purpose would be served in granting leave to amend.

Contract not on foot

12 The plaintiff's submission was that the contract was discharged by implied agreement through the parties' mutual abandonment of the contract in or about early 2002. It referred to ***DTR Nominees Pty Limited v Mona Homes Pty Limited*** (1978) 138 CLR 423. The High Court in that case on page 434 referred to the principle in these terms: *"But there can be no doubt that by 5th December 1974, when these proceedings were commenced, neither party, whatever may have been their reasons, regarded the contract as still being on foot. Neither party intended that the contract should be further performed. In these circumstances the parties must be regarded as having so conducted themselves as to abandon or abrogate the contract."*

13 The plaintiff also made reference to the following principle in relation to the discharge of the contract referred to in **Keating on Building Contracts** (6th Edition.) at p255: *"If the contract is brought to an end by determination or otherwise, then prima facie all future obligations cease and no claim can be made for liquidated damages accruing after determination."*

14 This submission, which goes to the final date for any claim for liquidated damages illustrates the difficulty, that arises with the plaintiff's submissions on this point. Any abandonment of the contract in the sense referred to in ***DTR Nominees*** means the contract is rescinded *ab initio*. This would normally not allow claims for damages for breach or claims relying upon the contract.

15 As a matter of general principle, when a contract is found to have been abandoned, the parties are relieved of their obligations *ab initio*. As stated by Kirby P (as his Honour then was) in ***CIC Insurance Limited v Bankstown Football Club Limited*** (1995) 8 ANZ Ins Cases 61-232 at 75-558: *"As a matter of legal doctrine, where a contract is held to have been 'abandoned' it is ordinarily abandoned **ab initio**. To the contrary, where a contract has been performed in part and rights and obligations have accrued from it, any abandonment of future performance of the contract is ordinarily the concern of the doctrine of repudiation ... However, the exact operation of the doctrine of abandonment in this respect remains unclear; one can postulate that ordinarily abandonment operates **ab initio** but at the same time one cannot exclude the possibility of abandonment in **futuro**: see, for example, **Australian Stratacore Holdings Ltd (in Liq) v Sanwa Australia Securities Ltd** (Court of Appeal, unreported, 27 May 1994). "*

16 With the greatest of respect to his Honour, however, it is not readily apparent how the decision in ***Australian Stratacore Holdings*** is authority for the proposition that abandonment may effect anything other than an *ab initio* abandonment of all contractual obligations. In that case the contract under consideration concerned an agreement for the underwriting of a public share issue which was purportedly rescinded by both parties in the face of what was perceived, erroneously in the event, as repudiatory breaches. With the parties failing to attempt performance for some months following the last such purported rescission, Bryson J held at first instance that the contract had been abandoned and, accordingly, dismissed both the principal claim and cross-claim. An appeal to the Court of Appeal was dismissed, with Priestly JA (with whom Handley JA agreed) stating (BC9402553 at 19): *"From his view that the parties had abandoned the Underwriting Agreement Bryson J drew the natural enough conclusion that neither was entitled to a remedy for breach of it and on the appellant's claim gave judgment for the respondent with costs and on the respondent's cross claim gave judgment for the appellant with costs."*

17 Similarly in ***DTR Nominees***, upon the finding that the contract had been abandoned Stephens, Mason and Jacobs JJ ordered (at 434) the return of the deposit paid on exchange without remitting the matter to the court below for further consideration.

18 The test of whether abandonment has occurred was recently stated by Ryan J, sitting in the Full Court of the Federal Court of Australia, ***Wallera Pty Ltd v CGM Investments Pty Ltd*** [2003] FCAFC 279 at [2]; Kiefel J at [40] to be that of: *"Whether there has been an abandonment by both parties of a contract formerly subsisting between them turns on whether the acts and omissions of each party, viewed objectively in the light of the circumstances of the contract, give rise to an inference that the parties to the contract have agreed to discharge it."*

19 As intimated by Ryan J, it is only the objectively expressed intentions of the parties with which the court is concerned, such an approach being consistent with the High Court's recent emphatic restatement of the objectivity principle as it applies to questions of formation: ***Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd*** [2004] HCA 52 at [40], per Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ. As stated by Jerrard JA (with whom Williams and Phillippides JJA agreed) in ***Marminta Pty Ltd v French*** [2003] QCA 541 at [22], "the question whether a contract has been so abandoned does not require one to examine whether the party actually had then intention of abandoning the agreement; only whether their [sic] conduct, when objectively viewed, manifested that intention." This is in marked contrast to the position in England.

20 The strictness of the test of whether the parties have conducted themselves in such a manner as to evince a mutual intention to abandon the contract will vary in accordance with the circumstances.

21 Abandonment will be more readily inferred when there has been some definite act of the parties that tends to manifest such an intention, for instance *"where one or more of the parties have ineffectively attempted to bring the agreement to an end and both behave as if it were ended"*: ***Wallera Pty Ltd v CGM Investments Pty Ltd*** at [40], per Kiefel J. Such was the case in ***DTR Nominees***, where both parties expressly attempted to rescind; equally in ***Summers***,

the intention to abandon was found in the plaintiff's continued adherence to an erroneous construction of the contract and the defendant's purported (albeit ineffective) acceptance of such conduct as constituting a repudiation.

22 On the assumption that a party will be reluctant to walk away from work done or monies paid, abandonment will be less readily inferred when the contract under consideration is only partially executed; and *a fortiori* this will be the case when the obligations remaining to be performed are wholly for the benefit of one party. Thus in ***Fitzgerald v Masters*** (1956) 95 CLR 420, a half-interest in a farming property was sold on terms that required the payment of the purchase price over a number of years, during which time the vendor and purchaser were to work the land as partners. However in 1932 the purchaser left the property and ceased payments, no further steps were taken in relation to the contract until 1948 and the action was not commenced until 1953. Nonetheless, the Court (Dixon CJ, McTiernan, Webb, Fullagar and Taylor JJ) held that the contract had not been abandoned. Dixon CJ and Fullagar J stating (at 432) that: *"There can be no doubt that, where what has been called an 'inordinate' length of time has been allowed to elapse, during which neither party has attempted to perform, or called upon the other to perform, a contract made between them, it may be inferred that the contract has been abandoned. A good example is to be found in* ***Pearl Mill Co. Ltd. v. Ivy Tannery Co. Ltd.*** *(1919) KB 78 . See also* ***Mathews v. Mathews*** *(1941) SASR 250 at p. 255 and* ***G. W. Fisher Ltd. v. Eastwoods Ltd.*** *(1936) 1 All E.R. 421 at p. 426, per Branson J ... It is impossible, in our opinion, to infer a discharge of the contract in the present case. In each of the cases cited above the contract was an executory contract, under which neither party had acquired any proprietary right or interest. The position was simply that each party had promised to do something, and for a long period no act was done in performance of the contract, and no step was taken to require any act to be done in performance of the contract. Here the contract had been partly performed by the respondent. Before he left the property, he had paid more than half of the purchase price, and he had an equitable interest in the land. He had registered his contract. It is impossible to suppose, nor can the deceased have supposed, that he ever intended simply to allow the deceased to keep both the money and the land, and no suggestion that the money should be repaid to him was ever made."*

23 The circumstances surrounding this matter do not point to any abandonment of the contract in the sense used by the High Court.

24 The plaintiff had left the site by the end of April 2002 with all its equipment as a result of the disputes, which had then occurred. The defendant had purported to take work out of the plaintiff's hands in June 2002. It was in May 2002 that the plaintiff purported to suspend work for non-payment in respect of progress claim number 7. The original summons, which was filed on 14 June 2002, only sought a payment in respect of the outstanding progress claim. The defendant filed cross-claims seeking damages for breach of contract on 20 August 2002 and 22 October 2002. The time of filing of the amended summons was on 2 December 2002 in which the plaintiff sought final relief in respect of the contract.

25 The relief, which the plaintiff sought in its final summons, was for payment for work done under the contract. It did not sue on quantum meruit outside the contract and as part of its claim under the contract it sought a declaration that it had achieved practical completion. For its part the defendant in the cross-claim relevantly sued for damages for breach of contract and also for a total failure of consideration in respect of the contract. Such a claim for damages for breach was not dependent upon any determination of the contract and relied simply upon the contractual provisions relating to the plaintiff's performance of the contract.

26 It is notable that neither in the plaintiff's claim, the defendant's cross-claim, nor in any defence to either of these claims, is there any claim by any party that the contract has been determined or abandoned. There is no suggestion of any determination either pursuant to the contractual terms of clause 44 of the General conditions or at common law by way of repudiation.

27 In these circumstances in which both parties have evinced an intention to enforce the contract there can be no suggestion of any abandonment in the sense used by the High Court in **DTR Nominees**.

28 The problem with the whole of this area is that any determination of the contract by the parties was really not live as an issue in the proceedings before me. This is probably because each party's claim did not rely upon any determination of the contract and the defendant made no claim to liquidated damages. If it had done so the plaintiff would most probably have at least sought to advance some repudiation of the contract in order to found a claim that the contract had been determined and that the liquidated damages provision ceased to apply on and from that date.

Liquidated damages generally

29 This is a reference to the principle, which underpins the claim made in the next section. The prevention principle is summarised in **Hudson, Building and Engineering Contracts** (11th Edition) page 1157 in these terms:

"*(a) that acts of prevention by the owner, whether authorised by or breaches of the contract, will set time at large and invalidate any liquidated damages clause, in the absence of an applicable extension of time clause. Variations whether authorised under the original contract or subsequently agreed, will be regarded as acts of prevention (or of waiver) for this purpose;*

(b) that where the act of prevention or waiver goes to part of the delay but not of the whole, the entire liquidated damages clause will still be invalidated unless an applicable extension of time clause exists;

(c) that where there is an extension of time clause, this is regarded as being inserted for the benefit of the owner to the extent that it may operate to keep alive the liquidated damages clause in the event of delay due to waiver, prevention or breach by the owner or his agents. Where it does not cover acts of waiver, prevention or breach which

have in fact occurred, no decision by a certifier under the clause can bind the builder, or preserve the liquidated clause. .....

(e) but that where the extension of time clause sufficiently clearly covers the owner's waiver, prevention or breach, the liquidated damages clause will be unaffected and will apply"

30 It was submitted that the failure by the Superintendent to exercise his discretion to extend time following upon the suspension of works enlivened this principle.

Failure by Superintendent to exercise discretion to extent time for Practical Completion

31 On 27 May 2002, the plaintiff suspended work pursuant to section 27(1) of the **Building and Construction Industry Security of Payment Act,** due to the failure by the defendant to pay the plaintiff Progress Payment No 7. I have already held that the plaintiff was entitled to that progress claim and accordingly the plaintiff was entitled to suspend work. This suspension leads to a delay in completion of the work.

32 It was the submission of the plaintiff that as a consequence of such delay caused by the defendant**,** the Superintendent was obliged to exercise the discretion available to him under the second last paragraph of Clause 35.5 of the General Conditions of Contract to extend the time for Practical Completion notwithstanding that the plaintiff had not applied for an extension of time.

33 Clause 35.5 is in the following terms:

35.5 Extension of Time for Practical Completion

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

When it becomes evident to the Principal that anything which the Principal is obliged to do or provide under the Contract may be delayed, the Principal shall give notice to the Superintendent who shall notify the Contractor in writing of the extent of the likely delay.

If the Contractor is or will be delayed in reaching Practical Completion by a cause described in the next paragraph and within 28 days after the delay occurs the Contractor gives the Superintendent a written claim for an extension of time or Practical Completion setting out the facts on which the claim is based, the Contractor shall be entitled to an extension of time for Practical Completion.

The causes are -

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

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

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

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

With any claim for an extension of time for Practical Completion, or as soon as practicable thereafter, the Contractor shall give the Superintendent written notice of the number of days' extension claimed.

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

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

Notwithstanding that the Contractor is not entitled to an extension of time the Superintendent may at any time and from time to time before the issue of the Final Certificate by notice in writing to the Contractor extend the time for Practical Completion for any reason.

A delay by the Principal or the failure of the Superintendent to grant a reasonable extension of time or to grant an extension of time within 28 days shall not cause the Date for Practical Completion to be set at large but nothing in this paragraph shall prejudice any right of the Contractor to damages.

34 It is notable in the context of considering the prevention principle that this clause contains provision for an extension of time as a result of any default by the owner in two circumstances. The first is when the contractor within the time regime makes application and the second is the discretionary power in the Superintendent to extend time notwithstanding that no application has been made to him. There have been two recent Australian judgments considering other forms of contract in which it was decided that contractors who fail to comply with these notice requirements remain liable to liquidated damages while losing their right to extension of time for the acts in question. The cases are ***Turner Corporation Limited (in liq) v Co-ordinated Industries Pty Ltd*** (1994) 11 BCL 202 a decision of Rolfe J. and ***Turner Corporation Pty Limited (Receiver & Manager Appointed) v Austotel Pty Ltd*** (1994) 13 BCL 378 a decision of Cole J.

35 In ***Turner Corporation Pty Ltd (Receiver & Manager Appointed) v Austotel Pty Ltd*** at 384-5, Cole J (as his Honour then was) said: *"If the Builder, having a right to claim an extension of time, fails to do so, it cannot claim that the act of prevention which would have entitled it to an extension of time for Practical Completion resulted in its inability to complete by that time. A party to a contract cannot rely upon preventing conduct of the party when where it failed to exercise a contractual right which would have negated the effect of the preventing conduct."*

36 A later case being ***Gaymark Investments Pty Ltd v Walter Construction Group Ltd*** (1999) 16 BCL 449 suggests that there is still some room for the application of the prevention principle. The reasoning in that case is subject to extensive criticism in the literature by the current editor of Hudson. See **"Prevention and liquidated damages: A theory gone too far?"** (2000) 18 BCL 82 and "**Liquidated damages "down under": Prevention by whom?"** (2002) 7 Construction and Engineering Law (Issue 2, p 23). In any event it's reasoning is not applicable to the contractual provisions under consideration in these proceedings. This is because the lynchpin of the outcome in that case was that the parties had inserted special conditions which did not permit the superintendent to extend time notwithstanding the contractor's failure to comply with the notice requirements enabling it to be said that the contract 'failed to provide' for the situation there under consideration.

37 The final paragraph of clause 35.5 with which I am concerned obviously is an express provision to reinforce the fact that the prevention principle does not apply.

38 In ***Abigroup Contractors Pty Ltd v Peninsula Balmain Pty Ltd*** (2002) 18 BCL 322; [2002] NSWCA 270 the Court of Appeal had to deal with the same clause 35.5 and a failure by the Superintendent to exercise his discretion to extend time under the penultimate paragraph of the clause.

39 The decision of the Court was given by Hodgson JA who expressed his conclusions in respect of this paragraph and the following terms:

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

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

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

by cl.35, and the Superintendent had not made a decision in exercise of the Superintendent's power to extend time notwithstanding non-compliance, in my opinion the Superintendent could still do so after termination. In those circumstances, I do not think the Superintendent's power is lost on termination, even if the claim for exercise of the power to extend notwithstanding non-compliance had not been made until after termination.

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

40 There is thus power to extend time even after a termination of the contract. I am not concerned with a situation where the parties have terminated the contract but instead with a situation where there has been no exercise by the Superintendent of the discretion given to him in the penultimate paragraph of the clause.

41 The reference to clause 23 of the contract in the reasons which I have quoted applies to the present case and the words in that clause are as follows: *"The principal shall ensure that at all times there is a Superintendent and that in the exercise of the functions of the Superintendent under the contract, the Superintendent-*
(a) acts honestly and fairly;
(b) acts within the time prescribed under the contract or where no time is prescribed, within a reasonable time; and
(c) arrives at a reasonable measure or value of work, quantities or time. "

42 In the present case clause 35.5 of the contract does not prescribe a time for the exercise of the discretion in the penultimate paragraph of the clause. Presumably the Superintendent could exercise his discretion to grant time while he still held that position prior to the issue of the final certificate. In this case no final certificate has issued.

43 Bearing in mind what I have now decided namely that the principal was in default from 27 May 2002 for failure to pay the progress claim any Superintendent being seized of these facts should have exercised his discretion to extend time until the amount of the certificate was paid. There was also an obligation on the principal to ensure that he did so act.

44 The Plaintiff in its submissions relied on the following extension of the prevention principle in relation to liquidated damages to the failure by the Superintendent to extend time which appears in Hudson, **Building and Engineering Contracts** (11th Edition.), p1184, para 10.080: *"Where there is a power to extend the time for delays caused by the building owner, and such delays have in fact taken place, but the power to extend the time has not been exercised, either at all or within the time expressly or impliedly limited by the contract, it follows (unless the builder has agreed to complete notwithstanding such delays) that the building owner has lost the benefit of the clause, as the contract time has in such case ceased to be applicable, there is no date from which penalties can run, and therefore no liquidated damages can be recovered".*

45 What the submissions of both parties failed to address was extensive qualification to this principle which was also referred to by Hudson at page 1189 in these terms: *"However, it is submitted that the earlier cases may have been at fault, and the later cases perhaps somewhat less so, in too easily putting forward or acquiescing in the notion that lateness in granting an extension of time (apart from being a breach of contract which will undoubtedly sound, if necessary, in damages, in much the same way as a contractor's failure to give notice or make his application for an extension of time)" should be treated in the same way as a case of prevention, or as a condition prece-dent, so having the effect of invalidating the liquidated damages clause altogether. There is no reason, either in legal principle or on consensual interpretative grounds, for so construing an express or implied obligation in a construction contract to grant an extension within a stipulated or a reasonable time, it is submitted. The strict view seems to have been first put forward, not unreasonably in a very different prevention context, by Prendergast C.J. in* ***Murdoch v. Lockie****, and in the very different judicial climate then obtaining in regard to liquidated damages clauses in general. As has been seen,* ***Murdoch v. Lockie*** *was rapidly adopted and applied by the New Zealand Court of Appeal in the* ***Anderson*** *case in 1900, and was stated as an effective rule of law in the fourth edition of this book in 1914, and in the sixth edition at page 359, which was followed by Burt J. in the* ***McMahon*** *case, supra. It can be seen that that view was rather more tentatively stated in the tenth edition.*

Given the quite different attitudes at the present day to liquidated damages provisions, and bearing in mind that producer pressures have meant that many liquidated damages clauses are effectively damage limitation clauses, and also having regard to the obvious advantages to contractors of deferred decisions on extension of time, thereby postponing any drain on their cashflow by way of deduction, there no longer seems any sufficient reason, it is submitted, for according the contractor any remedy other than a right to damages, if provable, in the event of an extension of time decision being unnecessarily or unreasonably delayed in breach of contract.

This is not to say that in principle a contract may not contain sufficiently express provisions designed, for whatever reason, to bring the right to liquidated damages to an end if not exercised by a certain time."

46 The reference to the ***McMahon*** case was a reference to ***MacMahon Constructions Pty Ltd v Crestwood Estates*** [1971] WAR 162 where the following was said: *"An 'extended time', should it exist, must be the product of the proper exercise of power appropriate to the circumstances to be found in the contract and by 'proper exercise' I mean that if, upon the proper construction of the power to extend, it should appear that the power must be exercised within a period of time either fixed or reasonable, then a purported exercise outside that time is ineffective and there then being no date*

from which the liquidated damages can run, the building owner loses the benefit of that provision. See Hudson, op cit., sixth edition page 359 and ***Miller v London County Council*** *(1934) ALL E R 657 at page 661 "*

47 The plaintiff's submissions also take no account of the decisions in the ***Turner*** cases and the outcome of the ***Peninsula Balmain*** case. There, in a finding not disturbed either by Barrett J at first instance or the Court of Appeal and in the context of a clause 35.5 identical to that in these proceedings, the referee held that on the facts the superintendent should have exercised his discretion to extend time notwithstanding the failure of the contractor to comply with the notice provisions of that clause. However the effect of this failure was not, as submitted by the plaintiff in these proceedings, that time was set at large pursuant to the prevention principle. Rather, the outcome was that the date from which the principal was entitled to liquidated damages was set back to the completion date determined by the referee to be that to which the superintendent should have extended time, with the principal's entitlement to such damages being otherwise unaffected by the superintendent's failure in fact to make that extension.

48 While it is not clear from the report as to whether the final paragraph of clause 35.5 was responsible for this conclusion, to ascribe such an operation to that clause is consistent with both its plain words and the policy reasons supporting a construction, which gives full effect to those plain words.

49 Additionally, to submit that the superintendent's failure to extend time notwithstanding the contractor's failure to comply with notice provisions results in the engagement of the prevention principle appears contrary to Hodgson JA's reasoning on appeal. Viz, if the result of the superintendent failing to exercise his power to extend time in such circumstances was that the principal was in breach of clause 23 (see [81]), then as a matter of logic and first principle the consequence of the superintendent's default is not that time is set at large but, rather, that the principal is liable in damages to the contractor for its breach.

50 Accordingly the prevention principle will not assist the plaintiff in resisting any claim for liquidated damages.

51 The plaintiff of course still has, as is pointed out above, and as is apparent from the final paragraph of the clause a right to recover damages. The amount of those damages has not been the subject of submissions before me and the entitlement to such damages may involve a matter of causation the question being whether the effective cause was its failure to apply for an extension.

52 In the absence of further evidence at this stage I would not find it possible to conclude that it is likely that the plaintiff's damages based upon the failures identified would be in an amount equal to or greater than the liquidated damages provision.

Uncertainty regarding Commencement and Completion Dates

53 The first submission of the plaintiff was that because of the failure to specify a date of commencement in respect of separable portion B there was no completion date which could be determined for separable portion B and thus there could be no claim for liquidated damages as the clause provides for them to operate from this contractual date.

54 The relevant contractual provisions on this aspect seemed to be as follows. Clause 35.6 of the General Conditions of Contract provides that the plaintiff will be indebted to the defendant for liquidated damages: *"at the rate stated in the Annexure for every day after the Date* ***for*** *Practical Completion to and including the Date* ***of*** *Practical Completion or the date the contract is terminated under Clause 44, whichever first occurs."* [emphasis added]

55 Annexure A to the Contract provides:
(a) the Date for Practical Completion of Separable Portion A is "*20 weeks after Date of Acceptance of Tender*"; and
(b) the Date for Practical Completion of Separable Portion B is "*10 weeks after commencement date for Separable Portion B*".

56 The "commencement date for Separable Portion B" was not specified in the contract. In the absence of either an agreed commencement date for Separable Portion B, or evidence of the actual date of commencement (which may be what the insertion means), there can be no specific date calculated as the Date for Practical Completion for Separable Portion B. The resolution of these issues would require further evidence, which is not presently available unless I gave leave for amendment, and allowed any necessary further evidence.

57 I turn to the next submission of the plaintiff which is that there is no date of practical completion for separable portion A or separable portion B. I have already determined that the plaintiff did not achieve practical completion under the contract due to its failure to undertake an adequate number of tests at the culverts.

58 As stated above, Clause 35.6 of the General Conditions of Contract provides that the plaintiff will be indebted to the defendant for liquidated damages: *"at the rate stated in the Annexure for every day after the Date* ***for*** *Practical Completion to and including the Date* ***of*** *Practical Completion or the date the contract is terminated under Clause 44, whichever first occurs."* [emphasis added]

59 There is no Date of Practical Completion for either Separable Portion A or Separable Portion B and neither party, under Clause 44 of the General Conditions of Contract, terminated the contract.

60 Accordingly, in the plaintiff's submission the liquidated damages clause is ineffective because neither of the events, which condition the entitlement to liquidated damages, has occurred. Probably there would be an implied term that any such liquidated damages would continue until the contract was determined at common law. However such a termination has not been pleaded or established and is not readily apparent on the facts.

61 It was submitted that it is established law that if the contractual dates for completion are not clear and enforceable, then any liquidated damages provisions are paralysed, because they are expressed to operate from this contractual date: ***Holme v Guppy*** [1838] 3 M&W 387; 105 ER 1195; ***Parle v Leistikow*** [1883] 4 LR (NSW) 84.

62 The plaintiff relies on the following summary of the relevant principles in Hudson, **Building and Engineering Contracts** (11th Edition.), p1147, para 10.024: *"Liquidated damages stipulated for at a rate for each day or week of delay in completing the works must begin to run from* ***some definite contract completion date****, whether specifically named in the contract or defined by reference to some event, such as an order to start work. It follows, therefore, that if the date in the contract has for some reason ceased to be the proper date for completion of the works, and no contractual provision exists for the substitution of a new date in the events which have happened, there is in such a case no date from which liquidated damages are to run and the right to liquidated damages will have been lost."*

63 These comments of course are only expressed to apply to the commencement date but there is no reason in principle why they should not apply to the concluding date. Presumably if the concluding date has not yet occurred the damages are still accruing and the right to their recovery has not yet arisen.

64 The plaintiff referred to the fact that the uncertainty surrounding the dates for Practical Completion and the dates of Practical Completion associated with the work under the contract was reflected in the defendant's proposed Orders, which purport to calculate liquidated damages from the date at which the plaintiff applied for Practical Completion (18 March 2002) until the Date of Judgment (16 September 2004). Clearly this is inappropriate.

65 Any resolution of these issues will in part depend upon the commencement date of separable portion B, which would require further evidence. If this were the only matter there would be no objection to allowing further evidence to clarify that point. It would be short and concerned with already existing facts. However it is not the only matter and there has not been identified in submissions any determination of the contract which would bring into play the liquidated damages clause.

Liquidated Damages are not payable for an indefinite period

66 This submission is based upon the two alternatives given by clause 44 of the General conditions in the event of default by the contractor, namely, either to terminate the contract or to take the work over and complete it itself. The defendant purported to exercise an entitlement under clause 44 on 6 June 2004 to remove work from the contractor. The submission went on to suggest that once the defendant purported to remove work from the contractor, the defendant was obliged to proceed with the work with due diligence and to have such work completed. In default of its failure to do so it was put that it cannot claim liquidated damages for what in effect is an indefinite period.

67 This argument raises a factual issue as to whether the defendant has proceeded with the work with due diligence, a matter which has not really been addressed in the evidence.

Indemnity under the Building and Construction Industry Security of Payment Act

68 This submission is a part answer to the claim for liquidated damages in that it applies after 27 May 2002. On 22 May 2002 the defendant served a notice of intention to suspend work upon the defendant pursuant to s 15(2)(b) of the **Building and Construction Industry Security of Payment Act**. Following upon the failure of the defendant to pay the monies claimed in progress claim number 7 on 27 May 2002 the plaintiff suspended work under the contract pursuant to s 27(1) of the Act. Section 27 (3) of the Act provides that the plaintiff is not liable to the defendant for any loss or damage suffered by the defendant following such a suspension.

69 I have in my judgment already decided that the plaintiff was entitled to payment of the relevant progress claim and accordingly under section 27 (3) of the Act the defendant is not entitled to liquidated damages on and from 27 May 2002.

70 There has been raised a question as to how long that suspension continued. This arises because the amount of Progress Claim No. 7 was paid to the plaintiff on 18 November 2002. The circumstances of the payment however require some elaboration. There was an appeal from the summary judgment, which I gave in this matter on 18 October 2002. That application for leave to appeal came before the Court of Appeal on 11 November 2002. The orders made on that occasion included the following:

"ORDER that the judgment and orders of Macready AJ made on 18 October 2002 be stayed pending the determination of the claimant's application for leave to appeal and (if leave is granted) the determination of the appeal if within seven days the opponent fails to provide a bank guarantee securing repayment of the amount of the said judgment together with interest at the rate applicable under s.95 of the Supreme Court Act 1970.

DIRECT that the form of the said bank guarantee shall be as agreed between the solicitors for the claimant and the opponent and in default of agreement as determined by the Registrar.

DIRECT that upon such guarantee being provided within the said period of seven days the claimant shall pay the amount of the said judgment to the opponent.

ORDER that the application for leave to appeal be listed for hearing together with the proposed appeal and the same argued together, with an estimate of one day being noted by the Court.

ORDER that the hearing of the application and appeal be expedited and listed for hearing on 19 November 2002."

71 The provision of a bank guarantee and the payment as required under the orders took place on 18 November 2002. The appeal was heard on 19 November 2002 and the Court of Appeal delivered its judgment on 17 February 2003. The provision of the bank guarantee was by the Commonwealth Bank who required the funds which

were paid to the plaintiff to be placed into a term deposit account as security for the bank guarantee. The plaintiff thus did not have access to the funds for use in its day-to-day operations. In addition the plaintiff had to pay various fees to the bank for the guarantee facility, which over the period up until 30 October 2004 totalled $21,735.36.

72 The relevant sections of the Act as in force at the relevant time are as follows:

"*15 Consequences of not paying claimant where no payment schedule*

(1) This section applies if the respondent:

(a) becomes liable to pay the claimed amount to the claimant under section 14 (4) as a consequence of having failed to provide a payment schedule to the claimant within the time allowed by that section, and

(b) fails to pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates.

(2) In those circumstances, the claimant:

(a) may recover the unpaid portion of the claimed amount from the respondent, as a debt due to the claimant, in any court of competent jurisdiction, and

(b) may serve notice on the respondent of the claimant's intention to suspend carrying out construction work (or to suspend supplying related goods and services) under the construction contract.

(3) A notice referred to in subsection (2) (b) must state that it is made under this Act.

(4) Judgment in favour of the claimant is not to be entered unless the court is satisfied of the existence of the circumstances referred to in subsection (1).

27 Claimant may suspend work

(1) A claimant may suspend the carrying out of construction work (or the supply of related goods and services) under a construction contract if at least 2 business days have passed since the claimant has caused notice of intention to do so to be given to the respondent under section 15, 16 or 25.

(2) The right conferred by subsection (1) exists only for so long as the respondent fails to comply with the requirements referred to in section 15 (1), 16 (1) or 25 (1), as the case may be.

(3) A claimant who suspends construction work (or the supply of related goods and services) in accordance with the right conferred by subsection (1) is not liable for any loss or damage suffered by the respondent, or by any person claiming through the respondent, as a consequence of the claimant not carrying out that work (or not supplying those goods and services) during the period of suspension."

73 The defendant submitted that when the amount was paid on 18 November that ended the period of suspension. The actual expression to which section 27(2) of the Act is referring is "fails to pay the whole or any part of the claimed amount".

74 The **Oxford English Dictionary** defines the verb 'pay' to mean: "To give (a person) what is due in discharge of a debt, or as a return for services done, or goods received, or in compensation for injury done; to remunerate, recompense." In turn, 'payment' is defined as "[t]he action, or an act, of paying." From this it can readily be concluded that the touchstone of the ordinary and natural meaning of the expressions 'to pay' and 'receives payment' in the present context is the act of a debtor transferring by way of satisfaction whatever is owed by him or her to a creditor. It therefore follows that the defendant's payment to the plaintiff of the judgment debt arising from the summary judgment of 18 October 2002 falls within this definition on the basis that it is not concerned with any restrictions on the right of the payee to apply the funds paid, but merely the act of payment in itself.

75 However, particularly with respect to a remedial statute such as this Act, the "*importance of interpreting legislation with the general purpose of the statute in mind rather than by simply relying on the literal meaning approach to statutory construction*" requires emphasis: ***Cole v Director-General of Department of Youth and Community Services and Anor*** (1986) 7 NSWLR 541 at 549, per McHugh JA. In the specific instance of the Act this general purpose could hardly be less unambiguous, expressed in s 3(1) to be: "*to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.*"

76 From this statement it is critical for present purposes to observe the emphasis on the creation of rights to the **recovery** of progress payments, in addition to rights vesting a mere **entitlement** to receive such payments.

77 The case law is replete with statements emphasising that the mischief to which the Act is directed, is the delay in contractors and subcontractors receiving milestone payments for work performed in an industry that, as expressed by Smart J in ***Abignano Ltd v Electricity Commission of New South Wales*** (1986) 3 BCL 290 at 297, has long been "notorious" for its extremely tight profit margins. Thus in ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140 at [96], Palmer J characterised the payment claim, payment schedule and adjudication mechanism as being one in which the respondent is obliged to "pay now, argue later", with the presumed need of claimants for security of cash flow taking precedence in the interim to any full and final determination of the rights of the parties (s 3(4)). Equally in ***Brodyn Pty Limited t/as Time Cost and Quality (ACN 001 998 830) v Philip Davenport & Ors*** [2003] NSWSC 1019 at [14], Einstein J observed that "[w]hat the legislature has effectively achieved is a fast track interim progress payment adjudication vehicle", going onto conclude (at [18]) that "the legislation was aimed at permitting contractors and subcontractors to obtain a prompt interim progress payment on account, pending final determination of all disputes."

78 It is with this general purpose in mind that the right to suspend construction work provided by ss 15 and 27 of the Act must be read. Specifically, it is evident that the right of suspension is intended to allow contractors, while shielded

from liability by virtue of s 27(3), to cease incurring additional expenses and liabilities during periods in which their cash flow has been interrupted by a failure on the part of the principal to pay progress payment claims made in accordance with the Act or the relevant contract. Indeed, this right of suspension pending payment takes on a special importance given that s 12 of the Act has abrogated the effect of 'pay when paid' provisions in applicable construction contracts, placing head contractors at additional risk when facing a recalcitrant principal.

79 Accordingly to apply the above-discussed ordinary meaning of 'pay' and 'payment' to circumstances wherein a claimant has been provided with a conditional payment the benefit of which the claimant is deprived pending the outcome of an appeal is contrary to:

(a) the purpose of the Act generally in its emphasis on the maintenance of cash flow regardless of the final rights and obligations of the parties to a construction contract;

(b) the purpose of the payment claim, payment schedule and adjudication mechanism specifically, being to ensure that monies owed as progress payments are **actually recoverable**; and

(c) the purpose of the right of suspension provided by ss 15 and 27, potentially depriving a claimant of **both** rights to the benefit of progress payments and to avoid the incurring of additional expenses and liabilities pending payment of the same.

80 Indeed the imperative of giving effect to the purpose of the statutory right of suspension when construing the Act was recently reinforced by the Court of Appeal in ***Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor*** [2004] NSWCA 394. In the context of a discussion concerning the availability of judicial review of the decisions of adjudicators, Hodgson JA (with whom Mason P and Giles JA agreed) said (at [51]) that: "*the scheme of the Act appears strongly against the availability of judicial review on the basis of non-jurisdictional error of law. The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: ss.3(4), 32. The procedure contemplates a minimum of opportunity for court involvement: ss.3(3), 25(4). The remedy provided by s.27 can only work if a claimant can be confident of the protection given by s.27(3): if the claimant faced the prospect that an adjudicator's determination could be set aside on any ground involving doubtful questions of law, as well as of fact, the risks involved in acting under s.27 would be prohibitive, and s.27 could operate as a trap.*"

81 By parity of reasoning, the remedy provided by s 27 of the Act is capable of achieving its full intended function only if the payment which terminates the claimant's right of suspension can be applied to defray expenses and liabilities incurred in carrying out the work to which the progress payment relates. To this end it bears repeating, as emphasised by Hodgson JA above, that progress payments made pursuant to the Act are interim payments; rather than operating as a discharge of a finally determined liability, their sole purpose is to ensure that contractors have sufficient cash on hand to continue work pursuant to the applicable contract. As this purpose was instrumental in the decision of the Court of Appeal in ***Brodyn*** to effectively deny the judicial review of adjudicators' determinations, so it must be in respect of the issue under consideration here.

82 Relevantly, s 33 of the **Interpretation Act** 1987 (NSW) compels the court, when construing a statutory provision, to prefer a construction "that would promote the purpose or object underlying the Act" over "a construction that would not promote that purpose or object." It has been held that this provision and its equivalents in other jurisdictions go further than merely declaring the purposive approach to statutory construction; rather, it permits the court to, first, identify whether a particular provision admits more than one possible meaning and, second, to prefer that alternative meaning if it is more consistent with the purpose of the enactment under consideration. As stated by Dawson J in ***Mills v Meeking*** (1990) 169 CLR 214 at 235 in the context of his Honour's discussion of the operation of s 35 of the **Interpretation of Legislation Act** 1984 (Vic): "*the literal rule of construction, whatever the qualifications with which it is expressed, must give way to a statutory injunction to prefer a construction which would promote the purpose of an Act to one which would not, especially where that purpose is set out in the Act. Section 35 of the Interpretation of Legislation Act must, I think, mean that the purposes stated in Pt 5 of the Road Safety Act are to be taken into account in construing the provisions of that Part, not only where those provisions on their face offer more than one construction, but also in determining whether more than one construction is open. The requirement that a court look to the purpose or object of the Act is thus more than an instruction to adopt the traditional mischief or purpose rule in preference to the literal rule of construction. The mischief or purpose rule required an ambiguity or inconsistency before a court could have regard to purpose:* ***Miller v The Commonwealth*** *(1904) 1 CLR 668, at p 674;* ***Wacal Developments Pty Ltd v Realty Developments Pty Ltd*** *(1978) 140 CLR 503, at p 513. The approach required by s 35 needs no ambiguity or inconsistency; it allows a court to consider the purposes of an Act in determining whether there is more than one possible construction. Reference to the purposes may reveal that the draftsman has inadvertently overlooked something which he would have dealt with had his attention been drawn to it and if it is possible as a matter of construction to repair the defect, then this must be done. However, if the literal meaning of a provision is to be modified by reference to the purposes of the Act, the modification must be precisely identifiable as that which is necessary to effectuate those purposes and it must be consistent with the wording otherwise adopted by the draftsman. Section 35 requires a court to construe an Act, not to rewrite it, in the light of its purposes.*"

83 Thus an analysis of both the general and specific purposes of the Act permits the court to identify an alternative construction to the ordinary meaning of 'pay' and 'payment.' That is that a claimant will not have 'received payment' pursuant to s 27(2), and that a respondent will still have failed 'to pay' pursuant to s 15(1)(b), in circumstances where the claimant is unable to obtain the benefit of that payment due to conditions, such as the provision of a secured bank guarantee, placed on its receipt. The adoption of such a construction does not constitute a 're-writing' of ss 15

and 27 as proscribed by the dictum of Dawson J above, but is rather a departure from the ordinary meaning of 'payment' in circumstances where the context and purpose of its use demands such a modification.

84 In my view there was not a payment, which caused the suspension, to cease on 18 November 2002. The suspension therefore continues down to the time of the hearing.

Rate of Liquidated Damages must apply to a Separable Portion

85 This submission referred to the defendant's attempt to calculate damages at an overall rate, rather than by applying the separate rates for completion of the severable portions of the contract. Plainly the contract provisions have to be complied with by calculating the amounts payable for each separable portion of the contract and this exercise raises the difficulties that I have referred to above.

Liquidated Damages not certified by Superintendent

86 This submission was to the effect that the defendant has no right to deduct liquidated damages from the monies otherwise payable to the plaintiff as the Superintendent did not deduct liquidated damages in a valid certificate issued under the contract. There was a certificate issued in respect of progress claim number 7 but that was not a valid certificate for the reasons, which I have given in my judgment in the plaintiff's summary judgment application.

87 The plaintiff relied upon the case of ***Blue Chip Pty Ltd v Concrete Constructions Group Pty Ltd*** (1996) 13 BCL 31. That was a decision of the full Court of the Supreme Court of Queensland which held that the correct construction of clause 42.1, which is in the same form as in the present case, when taken in its entirety, was that what is certified is intended to be paid. It held that it was not open to the principal to deduct liquidated damages before making progress payments in accordance with the Superintendent's certificate which omitted to certify such amounts of liquidated damages. A similar result was achieved in a number of other cases which dealt with this form of contract including ***Merritt Cairns Construction Pty Ltd v Wulguru Heights*** (1995) 13 BCL 37; 2 Qd R 521 and ***Algons Engineering Pty Ltd v Abigroup Pty Ltd*** (1998) 14 BCL 215.

88 There has been no certification by the Superintendent, which includes any deduction for liquidated damages. Accordingly this would seem to be an answer to the plaintiff's claim for payment of progress claim number 7. The principles, which the cases referred to, of course only, apply in respect of a claim in respect of a progress certificate. This does not mean that it finally determines the matter because a substantive judgment in proceedings or an award pursuant to the arbitration provisions or a later certificate can always, subject to questions of time and entitlement, deal with the claim for liquidated damages.

89 In the recent argument before me the plaintiff propounded short minutes, which only sought judgment in respect of the amount of $809,236.54. the defendant's minutes had a different sum. It is not clear to me whether it was claiming to be entitled to receive judgment for an amount claimed as damages for work done which was the alternative claim referred to in paragraph 5 of my principal judgment, or the amount of the progress claim. It is clear that the proceedings included a claim for a final resolution of the amount due under the contract by the time of the filing of the amended summons on 2 December 2003. Accordingly it would be appropriate in determining the matter to take account of a valid claim for liquidated damages.

90 In these circumstances the authorities referred to by the plaintiff will not, at this stage, prevent a consideration of the defendant's claim for liquidated damages by the Court if there is such a claim.

Should leave be given to allow a claim for liquidated damages?

91 Having regard to the conclusions to which I have come to on the claim under the Act there can presently be no liquidated damages for any period beyond 27 May 2002. The likely period of any such damages would be in the order of two months.

92 On the present state of the evidence there is no entitlement to liquidated damages because there has been no identification of any determination that brings into play the end date for the period of liquidated damages. The parties have not identified any matter in the present evidence that would be an end date and the likelihood is that any entitlement to liquidated damages will only arise following upon some other facts which lead to a termination of the contract after the present time.

93 If the contract is terminated after these proceedings a right to liquidated damages may arise and proceedings can be commenced for recovery of them. Although the Court is commanded by section 63 of the **Supreme Court Act** 1970 (NSW) to as far as possible, resolve all matters in controversy between the parties this should not extend to claims which have not presently arisen. In these circumstances I decline to give leave to plead any claim for liquidated damages.

94 I now turn to the other outstanding matters.

Variation 21

95 The detail of this claim is set out in paragraphs 89-90 of my judgment and I will not repeat it again in this judgment. I have now determined that:

(a) The Defendant is not entitled to succeed on its cross claim except in relation to two (2) small matters [Para 317 of the Reasons], namely:

(i) some surface treatment of the shrinkage cracks to the Doyle Street levee [paras 283 and 286 of the Reasons]; and

(ii) minor rectification of the levels in the Southern levee at chainages 5.54 and 9.843, and at the Charlton Road levee between chainages 55 and 60 [paras 273 and 274 of the Reasons]; and

(b) The Plaintiff did not achieve Practical Completion for the reason that the Plaintiff had not carried out the requisite number of earthworks tests at culvert locations.

96 The plaintiff submitted that the work to which I have just referred could properly be characterised as minor defects. In my view this is correct.

97 The submissions of the plaintiff were as follows:

1. Notwithstanding that the Plaintiff did not achieve Practical Completion, following the request made by the Plaintiff to the Superintendent on 18 March 2002 for Practical Completion to be granted:

(a) pursuant to clause 42.5 of Exhibit A the Superintendent was required to either grant Practical Completion or to issue reasons why Practical Completion would not be granted; and

(b) pursuant to clause 23 of Exhibit A, the Defendant was required to ensure that the Superintendent provided such reasons "within a reasonable time".

2. The Plaintiff requested Practical Completion from the Superintendent on 18 March 2002.

3. By letter dated 4 April 2002 the Plaintiff told the Defendant that it was holding its major earthmoving equipment on site pending the issue of the certificate of practical completion by the Superintendent [Tab 40 of Exhibit H]. There was no challenge to this proposition by the Defendant in these proceedings.

4. The Superintendent refused to issue a list of defects in the work to which the Plaintiff could have responded or made decisions to remove its major earthmoving equipment. The Defendant's attitude is summarized in items 9, 10 and 11 in the letter dated 1 May 2002 behind Tab 25 of the Affidavit of Brett Corven sworn 5 March 2004.

5. The Court has found that the only valid reason for the Defendant not granting practical completion was a lack of a sufficient number of test results for the installation of culverts.

6. The Plaintiff submits that:

(a) such reason in paragraph 5 above and that reason alone should have been notified to the Plaintiff in response to the Plaintiff's request for Practical Completion on 18 March 2004;

(b) the Defendant should have properly responded to the Plaintiff's request, within 14 days after receiving the Plaintiffs request on 18 March 2004, with reasons advising the Plaintiff of outstanding items required to be completed to achieve practical completion;

(c) had the Defendant properly responded to the Plaintiff's request, the Defendant could have made appropriate decisions to retain or demobilize its major earthmoving equipment from the site of the works at Brewarrina;

(d) the Defendant has substantially failed in its cross claim in these proceedings and hence there was no requirement for the Plaintiff to have kept its major earthmoving equipment on site;

(e) as determined by the Court in these proceedings there was no need for the Defendant to keep its major earthmoving plant on site after about 18 March 2004."

98 I agree with the plaintiff submissions and particularly note that the attitude of the defendant which is referred to in the submissions seems to be to refuse to address the list of minor defects because of its view that practical completion had not been reached. It is apparent from discussions, which took place on 3 April 2002 between the council and the plaintiff that the council was raising a large number of matters, which might require further work by the plaintiff. The matter escalated into the service of notices of dispute on about 24 April 2002 and accordingly it was probably reasonable for the plaintiff to keep its equipment on site until the time claimed namely 27 April 2002. In my view the plaintiff is entitled to this variation.

Interest

99 Pursuant to clause 42.9 of the general conditions the plaintiff is entitled to interest on overdue moneys at the rate specified in the Annexure, compounded at six monthly intervals. The rate of interest identified in the Annexure is "Commercial Bank Rates".

100 The plaintiff led evidence that the applicable "Commercial Bank Rate" is the overdraft rate of the plaintiff's bank, the Commonwealth Bank, namely:

(a) 8.95 % per annum to 31 October 2003;

(b) 9.45% per annum from 1 November 2003 to date.

101 Given the parties' agreement, it is appropriate to adopt these rates rather than the rates stated in Schedule J of the **Supreme Court Rules** 1970 (NSW).

102 The plaintiff submits that interest should be calculated from 10 May 2002 for the following reasons:

(a) The Plaintiff submitted its progress claim no. 7 to the Defendant on 26 April 2002.

(b) Pursuant to agreement between the parties, payment was due to the Plaintiff 14 days after receipt of the progress claim, namely 10 May 2002.

(c) In relation to variations not claimed by the Plaintiff in its progress claim no. 7 but approved by the Court in these proceedings, the Plaintiff incurred the expenditure attributable to those variations prior to 26 April 2002 and therefore interest should run after that date. For the purpose of calculating interest applicable to such variations the Plaintiff accepts 10 May 2002 as the due date for payment.

103 The plaintiff concedes that in any calculation of interest the defendant should be given credit for interest earned by the plaintiff on the sum of $702,678.45 paid by the defendant to the plaintiff on 18 November 2002 and placed in a term deposit by the plaintiff to secure the bank guarantee ordered by the Court of Appeal.

104 I agree with the plaintiff's submissions, on this aspect.

Costs

105 Not all matters concerning costs can be dealt with until the parties have the benefit of these reasons. There was however a submission that there should be no costs orders made in favour of the first and second cross-defendants because of the Court's finding that they had engaged in conduct in contravention of the **Trade Practices Act** 1974 (Cth). This was submitted against the background that the Court found damages were not proved and thus there would be no relief on the cross-claim.

106 A reference was made to **Oshlack v Richmond River Council** (1998) 193 CLR 72 where McHugh J said at page 97: *"The traditional exceptions to the usual order as to costs focus on the conduct of the successful party which disentitles it to the beneficial exercise of the discretion….*

'Misconduct' in this context means misconduct relating to the litigation, or the circumstances leading up to the litigation. Thus, the court may properly depart from the usual order as to costs when the successful party by its lax conduct effectively invites the litigation….."

107 In ***White Property Developments v Richmond Growth Pty Ltd and Ors*** (unreported, FCA, 23 March 1988) Madgwick J referred to the relevant conduct (at p. 4) and held (at p. 5): *"I am satisfied that a costs order departing from the usual is appropriate because of the conduct of the personal respondents…. The personal respondents procured Richmond Growth to behave in the way that it did. Their own conduct was similarly unlawful and/or reprehensible. It was misconduct of a kind apt to disentitle them from the usual costs order.*

I do not overlook that White Property failed on its own case, on the issue of reliance, as against the personal respondents and that, in that sense, White Property 'never had a case' against any of them. But each certainly invited action against him by his misconduct and, as indicated, there was, in the circumstances of this case, nothing unreasonable about testing whether such conduct might give rise to a cause of action".

108 This case is particularly appropriate as the case was, like the present case, concerned with a breach of the **Trade Practices Act**. It was said to be even more applicable in that the judge did not find reliance.

109 In ***TV Shopping Network Ltd v Scutt*** (1998) 43 IPR 451, Young Jas he was then, referred to this line of cases and summarised them in the following terms: *"Having considered the leading English cases and the Australian cases as noted in vol 40 of the 3rd ed of the Australian Digest in para [575], it seems to me that cases in this area fall into three categories; one, where the successful party has been guilty of misleading conduct; two, where an administrative authority has failed in its duty and led the unsuccessful party to make unwarranted assumptions; and three, where the conduct led to the belief that the cause of action existed.*

The case before Madgwick J was primarily in the first class, although I agree with Mr Christie it also partly comes within the third class. The present case is clearly within the third class.

It seems to me that the modern guideline is that the conduct in inviting the cause of action must really be the prime motive in bringing the litigation, and when, as here, there was ill feeling and suspicion which was fuelled by the computer incident and the lack of the first defendant's forthright cooperation, I do not think that the case quite gets as far as to justify me from depriving the successful first defendant of his costs. "

110 The **Trade Practices Act** claim, which is made in this case, I think, should really be considered in its overall context. The main dispute between the parties concerned the proper completion of the works, which was the subject of the contract. The **Trade Practices Act** claim had benefit to the defendant if it was successful on its cross-claims of personally providing a remedy against Mr Beckhaus. It arose out of against facts, which occurred at the commencement of the contract. This is in contrast to the substantial part of the litigation, which was the performance of the contract after its commencement.

111 In these circumstances I do not think that it would be appropriate to consider the misleading conduct as a prime reason for starting the litigation. The litigation was started because of concerns the council felt about the work that had been performed by the plaintiff under the contract. For these reasons it would not be appropriate to deprive the cross-defendants of their costs against the cross-claimant.

112 I direct the parties to bring in short minutes and argue any outstanding questions of costs.

M. Rudge SC & D. Robertson for plaintiff instructed by Dutton Lawyers
M. Christie & V. Culkoff for defendant instructed by Paul Ward-Harvey