Corbett Court P/L v Quasar Constructions (NSW) P/L [2008] Adj.L.R. 11/19

JUDGMENT : HAMMERSCHLAG J. Supreme Court New South Wales, Equity Div. T&C List. 19th November 2008

BACKGROUND

1 In about September 2003 the plaintiff (or "*CorCourt*" or "*the owner*" as the case may be) employed the defendant (or "*Quasar*" or "*the contractor*" as the case may be) to construct a shopping mall at Picton in the shire of Wollondilly for $11,275,000.

2 It did so under a contract in the form of the ABIC MW-1 2003 major works contract, with modifications *("the Contract")*.

3 The Contract includes general conditions (in alphabetically sequenced sections) and numbered special conditions. It provides that the latter take precedence.

4 The form used contains provisions for the appointment of an architect to perform administration and certification functions. The parties amended the form to define "*architect*" also to mean "*superintendent*". They designated the superintendent to be Corbett Constructions Pty Ltd and the superintendent's representative to be Mr John Corbett, a director of the plaintiff. The plaintiff and the superintendent were accordingly closely related and were both represented in their dealings with the defendant by Mr Corbett. This was a source of difficulty for the parties' relationship.

5 The development consisted of a Coles Supermarket and external and internal shops together with an underground car park servicing all components. The floor of the car park was to be, and now is, a concrete basement slab.

6 An Interim Occupation Certificate was issued by Wollondilly Shire Council ("the council") on 16 July 2004 for "*Coles supermarket & carpark*".

7 Coles commenced trading on 17 July 2004. The internal shops commenced trading on 4 August 2004 and the external tenancies on 24 October 2004.

8 A final Occupation Certificate for the building was issued only on 19 July 2005.

9 During the course of the Contract the defendant made sixteen progress claims on the plaintiff under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) ("the SOP Act"). Eleven claims were paid without adjudication. Five went to adjudication under that Act and were then paid. One of the adjudicated claims resulted in a judgment in favour of the defendant against the plaintiff in the District Court.

10 As at 23 May 2008 the plaintiff had paid the defendant $11,496,070.

11 Proceedings in this Court were commenced by the plaintiff in 2006 when it sought to reclaim a significant part of the monies earlier paid to the defendant and made a claim against the defendant for liquidated damages for delay. It challenged numerous variations for which the defendant had claimed and been paid. The defendant cross-claimed for additional amounts which it said were owed to it under the Contract.

12 On 13 April 2007 the whole of the proceedings were referred under Pt 20 r 20.14 of the *Uniform Civil Procedure Rules* 2005 (NSW) ("UCPR") to Mr G R Easton ("the referee") for inquiry and report.

13 The hearing before the referee was anticipated to take two weeks but took 36 hearing days. Over 2,700 pages of oral testimony were transcribed.

14 The referee conducted more than seven conclaves with experts retained by the parties, and directed the preparation of joint expert reports.

15 On 23 May 2008 the referee gave his report ("the report"). It runs to 210 paragraphs spanning 140 pages.

16 In par 8 of the report the referee made the following observation:

"*An unusual aspect of these proceedings is that while the matters in dispute are almost entirely routine building issues (which sensibly should have been resolved between the parties), it seems that every minor issue is still being litigated in the Reference proceedings. This situation has arisen apparently because of CorCourt's dissatisfaction with the outcomes of the five earlier adjudications under the SOP Act. Since Quasar is in the position of already having been paid (on an interim basis) for its claims, CorCourt is, in effect, the claimant seeking restitution by reversing all of Quasar's claims and mounting its own claims. Inevitably, resolution has become a difficult and costly process for which litigation is not well-suited. This is exemplified by the parties retaining no less than twelve experts to address the matters in dispute, at a cost which is likely to approach the total amount in issue.*"

17 The report can justifiably be described as thorough, analytical and (where appropriate) scientific. It concluded that $736,263.77 is owed by the defendant to the plaintiff.

THESE PROCEEDINGS

18 Now before the Court is a contest between the parties under UCPR Pt 20 r 20.24 in relation to the adoption of the report ("the adoption hearing").

19 Each party accepts that the report should be adopted but each contends for particular variations.

20 The parties have agreed that the amount determined by the referee is to be adjusted in favour of the defendant by $163,599 to take account of moneys which the referee took as having been paid to the defendant but which were in fact not paid.

21 In addition, the plaintiff did not contest that there should be an adjustment in favour of the defendant of $1,260 which the referee allowed for GST on liquidated damages found to be due to the plaintiff, incorrectly because GST is not payable.

22 During the adoption hearing the parties maintained the bellicose stance towards each other which the referee observed. The adoption hearing took three days with each party represented by senior and junior counsel. Neither party made any meaningful concession.

23 The material relied upon by the parties and placed before the Court in the adoption hearing was limited to the Contract, some brief extracts of the affidavit material and experts' reports relied on in the reference, extracts from the submissions made to the referee, a limited number of extracts from the transcript of oral evidence and a few miscellaneous documents.

THE VARIATIONS FOR WHICH THE PARTIES CONTEND

24 The plaintiff contends that the report should not be adopted in the following respects:

The slab damages claim

a the plaintiff brought, and the referee rejected, a claim for damages of $1,185,187 alleged to have been suffered as a result of the breach by the defendant of an alleged oral undertaking (collateral to the Contract) to provide independent certification in respect of an agreed modification to the specifications for the basement slab ("the slab damages claim");

b the plaintiff put that the slab damages claim should have succeeded and moves for a variation of the report so as to uphold it, but restricted to the amount of $243,103.

The liquidated damages claim

a the plaintiff claimed liquidated damages of $418,900 (alternatively $311,900) for alleged failure by the defendant to have the works reach practical completion by the contractual deadline of 9 June 2004 ("the liquidated damages claim");

b the plaintiff contended that whilst the Coles Supermarket and basement reached practical completion on 17 July 2004 the internal tenancies only reached practical completion on 4 August 2004 and the external tenancies only on 24 October 2004;

c the defendant contended that it was entitled to extensions of time to the dates for practical completion of each of the three components as a result of variations to the works required by the plaintiff;

d the referee determined that the whole of the works reached practical completion on 17 July 2004;

e the referee determined that the adjusted date for practical completion for the Coles Supermarket was 9 July 2004 and awarded damages at the contractual rate of $1,800 per day for seven days totalling $12,600;

f the referee found that the defendant was entitled to extensions of time beyond 17 July 2004 in respect of the internal tenancies and external tenancies and accordingly reported that no liquidated damages were payable in respect of those components;

g the plaintiff challenges the referee's findings on practical completion with respect to the internal tenancies and the external tenancies and puts that the referee should have found the dates for which it contends, and that the report should be varied to award it liquidated damages accordingly.

The delay claim

a the defendant brought a claim for "adjustment of time costs" to which it alleged it was entitled under the Contract ("the delay claim");

b the claim depended on a finding that the works had been delayed by variations required by the plaintiff;

c the plaintiff contended that the delay claim was barred because the defendant had failed to comply with formalities required by the Contract. It also challenged particular claims for extensions of time;

d the referee found that the plaintiff had waived compliance with the contractual formalities and upheld the delay claim. He determined that the defendant is entitled to such costs for 52.5 days at $6,200 per day (which rate was agreed between the parties). He found that the plaintiff is liable to pay to the defendant $325,500;

e the plaintiff challenges the referee's findings of waiver of the contractual formalities and his findings with respect to the delays occasioned by the plaintiff's variations. It puts that the delay claim should be dismissed.

25 Apart from the two adjustments already mentioned (one of which is agreed and the other not contested), the defendant contends that the report should be adopted save with respect to part of an amount awarded by the referee to the plaintiff representing preliminaries in respect of damages for defects. It asserts an amount (which transpires to be $13,466 – as appears below – out of $36,542) was wrongly awarded because there was no evidence that the actual cost of preliminaries would exceed $19,230 *("the defendant's challenge*").

26 During the adoption hearing the defendant sought leave to file a motion seeking an order that there be an allowance for interest in its favour for the period during which payment claims for variations and delay costs were unpaid, in the amount of $106,554.10. The plaintiff opposed leave and I refused it because by agreement between the parties interest was a question not dealt with by the referee on the basis that he would deal with it in a later report if the need arose. I will refer any question of interest which the parties have by agreement left over, to the referee for report should the need arise. I will, as I made clear to the parties, consider on delivery of this judgment, the entry of judgment for an amount on an interim basis.

27 Before dealing with the parties' respective contentions, it is necessary to set out the legal principles which apply to consideration by the Court of a referee's report and to its adoption, rejection or variation as the case may be.

THE LAW

28 Part 20 r 20.24 UCPR is in the following terms:

"*(1) If a report is made under rule 20.23, the court may on a matter of fact or law, or both, do any of the following:*

(a) it may adopt, vary or reject the report in whole or in part,

(b) it may require an explanation by way of report from the referee,

(c) it may, on any ground, remit for further consideration by the referee the whole or any part of the matter referred for a further report,

(d) it may decide any matter on the evidence taken before the referee, with or without additional evidence,

and must, in any event, give such judgment or make such order as the court thinks fit.

(2) Evidence additional to the evidence taken before the referee may not be adduced before the court except by leave of the court."

29 That rule is in the same terms as erstwhile *Supreme Court Rules* 1970 (NSW) Pt 72 r 72.13.

30 The Court has a discretion to exercise in adopting or rejecting a report. The principles which are to be applied in exercising that discretion were conveniently and cogently summarised by McDougall J in ***Chocolate Factory Apartments Pty Ltd v Westpoint Finance Pty Ltd and Ors*** [2005] NSWSC 784 (see ***Westpoint Management Ltd v Chocolate Factory Apartments Ltd; Chocolate Factory Apartments v Westpoint Finance & Ors*** [2007] NSWCA 253 in which an appeal to his Honour's ultimate conclusion partially succeeded but left his Honour's summary of the principles in tact).

31 His Honour said the following:

"*[6] The principles to be applied, in exercising the discretion conferred upon the Court by Pt 72 r 13 to adopt, vary or reject in whole or in part a report of a referee, are well established. There are a number of cases to which, customarily, reference is made. They include* ***Super Pty Ltd v SJP Formwork (Aust) Pty Ltd*** *(1992) 29 NSWLR 549; the unreported proceedings in that case before Giles J (19 May 1992: the relevant considerations referred to by his Honour are sufficiently extracted in the decision of the Court of Appeal);* ***Chloride Batteries Australia Ltd v Glendale Chemical Products Pty Ltd*** *(1988) 17 NSWLR 60;* ***White Constructions (NT) Pty Ltd v Commonwealth of Australia*** *(1990) 7 BCL 193; and* ***Foxman Holdings Pty Ltd v NMBE Pty Ltd*** *(1994) 38 NSWLR 615. As to the nature and content of the referee's obligation to give reasons, the relevant authorities include* ***Xuereb v Viola*** *(1989) 18 NSWLR 453 and* ***Hughes Bros Pty Ltd v Minister for Public Works*** *(Rolfe J, 17 August 1994, unreported; BC 9402885).*

[7] The relevant principles, distilled from those decisions, can be stated as follows:

(1) An application under Pt 72 r 13 is not an appeal either by way of hearing de novo or by way of rehearing.

(2) The discretion to adopt, vary or reject the report is to be exercised in a manner consistent with both the object and purpose of the rules and the wider setting in which they take their place. Subject to this, and to what is said in the next two sub paragraphs, it is undesirable to attempt closely to confine the manner in which the discretion is to be exercised.

(3) The purpose of Pt 72 is to provide, where the interests of justice so require, a form of partial resolution of disputes alternative to orthodox litigation, that purpose would be frustrated if the reference were to be treated as some kind of warm up for the real contest.

(4) In so far as the subject matter of dissatisfaction with a report is a question of law, or the application of legal standards to established facts, a proper exercise of discretion requires the judge to consider and determine that matter afresh.

(5) Where a report shows a thorough, analytical and scientific approach to the assessment of the subject matter of the reference, the Court would have a disposition towards acceptance of the report, for to do otherwise would be to negate both the purpose and the facility of referring complex technical issues to independent experts for enquiry and report.

(6) If the referee's report reveals some error of principle, absence or excessive jurisdiction, patent misapprehension of the evidence or perversity or manifest unreasonableness in fact finding, that would ordinarily be a reason for rejection. In this context, patent misapprehension of the evidence refers to a lack of understanding of the evidence as distinct from the according to particular aspects of it different weight; and perversity or manifest unreasonableness mean a conclusion that no reasonable tribunal of fact could have reached. The test denoted by these phrases is more stringent than "unsafe and unsatisfactory".

(7) Generally, the referee's findings of fact should not be re-agitated in the Court. The Court will not reconsider disputed questions of fact where there is factual material sufficient to entitle the referee to reach the conclusions he or she did, particularly where the disputed questions are in a technical area in which the referee enjoys an appropriate expertise. Thus, the Court will not ordinarily interfere with findings of fact by a referee where the referee has based his or her findings upon a choice between conflicting evidence.

(8) The purpose of Pt 72 would be frustrated if the Court were required to reconsider disputed questions of fact in circumstances where it is conceded that there was material on which the conclusions could be based.

(9) The Court is entitled to consider the futility and cost of re-litigating an issue determined by the referee where the parties have had ample opportunity to place before the referee such evidence and submissions as they desire.

(10) Even if it were shown that the Court might have reached a different conclusion in some respect from that of the referee, it would not be (in the absence of any of the matters referred to in sub par (6) above) a proper exercise of the discretion conferred by Pt 72 r 13 to allow matters agitated before the referee to be re-explored so as to lead to qualification or rejection of the report.

(11) Referees should give reasons for their opinion so as to enable the parties, the Court and the disinterested observer to know that the conclusion is not arbitrary, or influenced by improper considerations; but that it is the result of a process of logic and the application of a considered mind to the factual circumstances proved. The reasoning process must be sufficiently disclosed so that the Court can be satisfied that the conclusions are based upon such an intellectual exercise.

(12) The right to be heard does not involve the right to be heard twice.

(13) A question as to whether there was evidence on which the referee, without manifest unreasonableness, could have come to the decision to which he or she did come is not raised "by a mere suggestion of factual error such that, if it were made by a trial judge, an appeal judge would correct it". The real question is far more limited: "to the situation where it is seriously and reasonably contended that the referee has reached a decision which no reasonable tribunal of fact could have reached; that is, a decision that any reasonable referee would have known was against the evidence and weight of evidence".

(14) Where, although the referee's reasons on their face appear adequate, the party challenging the report contends that they are not adequate because there was very significant evidence against the referee's findings with which the referee did not at all deal, examination of the evidence may be undertaken to show that the reasons were in fact inadequate because they omitted any reference to significant evidence.

(15) Where the court decides that the reasons are flawed, either on their face or because they have been shown not to deal with important matters, the court has a choice. It may decline to adopt the report. Or it may itself look at the detail of the evidence to decide whether or not the expense of further proceedings before the referee (which would be the consequence of non adoption) is justified.

*[8] The twelfth point restates the aphorism of Mahoney JA in Super at 567. The thirteenth, fourteenth and fifteenth points are drawn (and include direct quotations) from the judgment of Hodgson CJ in Eq (with whom Priestley JA agreed and with whom, as to the relevant principles, Fitzgerald AJ also agreed) in **Franks & Anor v Berem Constructions Pty Ltd** (NSWCA 2 December 1998, unreported; BC 9806367). If I may say so with respect, I regard what his Honour said as giving content, on the facts of the particular case, to the operation of relevant principles rather than as stating any new principle."*

See also ***Bellevarde Constructions Pty Ltd v CPC Energy Pty Ltd*** [2008] NSWCA 228 at [46]-[48].

THE SALIENT PROVISIONS OF THE CONTRACT

32 It is necessary, to enable the referee's relevant findings and the challenges to them to be understood, to set out relevant provisions of the Contract.

33 Clause A8 of the Contract is in the following terms:

*"**Disputing architect's certificate, written decision or failure to act***

*8.1 If the contractor wishes to dispute a certificate, notice, written decision or written assessment issued by the architect, or to dispute the failure of the architect to issue something, the contractor must give the architect written notice under this clause within 20 *working days after:*

· receiving the certificate, notice, written decision or written assessment or

· becoming aware of the failure of the architect to issue something.

8.2 If the contractor fails to give a notice under subclause A8.1, the contractor will not be entitled to dispute the matter at all.

*8.3 The architect must assess a notice given under subclause A8.1 and give a written decision to the contractor and the owner within 10 *working days."*

34 Section H of the Contract deals with claims to adjust the Contract.

35 Clauses H.1 to H.4 are in the following terms:

*"**Time for making claim to adjust the contract***

*1.1 The contractor is entitled to make a *claim to adjust the contract only if the contractor:*

*· *promptly notifies the architect in writing of its intention to make a claim after receiving an instruction or, if no instruction is issued, *promptly notifies the architect after becoming aware of an event that will result in a claim and*

*· submits the detailed *claim to adjust the contract to the architect within a time agreed in writing between the contractor and the architect or, if no time is agreed, within 20 *working days after receiving an instruction or, if no instruction is issued, within 20 *working days after becoming aware of the event that has resulted in the claim and, for these purposes, an event is not a consequence of an instruction.*

*1.2 If the claim results from an instruction to proceed with a *variation, the requirements for submission of the claim are set out in clause J4.*

*1.3 If the claim results from an *urgent instruction, suspension of the *works or a delay in the progress of the *works, the contractor is not required to give the first notification required under subclause H1.1 but the detailed claim must be submitted within 20 *working days after the *urgent instruction is issued or the suspension ends or the delay ends.*

*1.4 If the claim results from discovery of *dangerous or contaminated material and subclause F8.4 applies, the contractor is required to *promptly notify the architect of its intention to make a claim, and submit the detailed claim within a time agreed in writing between the contractor and the architect, or if no time is agreed, within 20 *working days after completion of the necessary work under the written direction, official notice or order.*

Details required for claim

*2.1 A *claim to adjust the contract must contain the following details:*

*· identification of the architect's instruction, or a copy of the written direction, official notice or order in relation to *dangerous or contaminated material that caused the claim or, where none has been issued, details of the event and the basis for the claim*

*· a breakdown, on a trade by trade basis, of any extra costs including the cost of preliminaries and a reasonable allowance for contractor's overheads and profit not greater than the rate shown in **item 14 of schedule 1***

· reference to the rates and unit prices in any bill of quantities, if applicable

· reference to schedules of rates, if applicable

*· any documentation required to be provided under any *relevant legislation*

· any required adjustment to the date for practical completion

*· any *adjustment of time costs associated with the claim and*

*· detailed records of the cost of carrying out a *variation for which an instruction to proceed was issued under clause J3, including details of any quotation accepted under clause J3.*

Architect to assess claim

*3.1 The architect must *promptly assess the *claim to adjust the contract and in so doing the architect must consider:*

· the detailed claim submitted by the contractor and any further information the architect requests the contractor to supply

· any bill of quantities, if applicable

· the schedule of rates, if applicable

*· the extent to which the claim will affect the contractor's ability to complete the *works by the date for practical completion and*

· a reasonable allowance for the contractor's overheads and profit.

3.2 If the architect needs additional information to assess the claim, the architect must ask the contractor for it.

*3.3 The contractor must *promptly give to the architect any additional information the architect reasonably requests.*

Architect to give assessment

*4.1 The architect must, within 20 *working days after receiving the claim, issue to the contractor and to the owner its written decision specifying any adjustment to the *contract price or any adjustment to the date for practical completion, or both.*

4.2 The contractor may dispute the architect's decision issued under this clause in accordance with clause A8 but in accordance with clause P1, must continue to perform its contractual obligations.

Sum recoverable for claim for adjustment of time costs

*5.1 Where a sum or sums per day is shown in **item 15 of schedule 1**, a claim by the contractor is limited to that sum. If no sum or sums per day is shown, the contractor is entitled to an adjustment to the *contract price equal to the loss, expense or damage it incurs as a result of the approval of an adjustment by the architect to the date for practical completion.*

Architect may adjust contract in absence of claim

*6.1 If the contractor has not made a *claim to adjust the contract in relation to any change which results from complying with any instruction given under section J for a *variation to the *works or from causes of delay noted in clause L1 or L2, the architect may adjust the contract at any time up to the issue of the final certificate under clause N11, or a certificate under clause Q9 or Q17."*

36 Section L deals with adjustment of time.

37 Clause L.1 is in the following terms:

"Causes of delay which entitle making claim for adjustment of time with costs

*1.1 The contractor may make a claim for an adjustment to the date for practical completion and *adjustment of time costs, in respect of a delay affecting *working days caused by:*

…

cause 3 an architect's instruction …

*1.4 A claim to adjust the date for practical completion with or without *adjustment of time costs is a *claim to adjust the contract.*

*1.5 The requirements for making a *claim to adjust the contract and the procedures to be followed are stated in section H."*

38 Section M deals with completion of the works.

39 Clause M1 is in the following terms:

"Practical Completion

*1.1 The contractor must bring the *works to *practical completion by the date for practical completion shown in **item 20 of schedule 1** as adjusted in accordance with this contract. The *works are at *practical completion when, in the reasonable opinion of the architect:*

*· they are substantially complete and any incomplete work or *defects remaining in the *works are of a minor nature and number, the completion or rectification of which is not practicable at that time and will not unreasonably affect occupation and use*

*· all commissioning tests in relation to the plant and equipment shown in **item 21 of schedule 1** have been carried out successfully and*

· any approvals required for occupation have been obtained from the relevant authorities and copies of documents evidencing the approvals have been provided to the architect.

*1.2 Subject to clause M10, at 4.00pm on the date the architect issues the notice of practical completion, the owner takes possession of the *works.*

*1.3 This clause applies to each separable part shown in **item 22 of schedule 1**."*

40 Clause M10 is in the following terms:

*"**Possession of the works before practical completion***

*1.1 If the owner takes possession of the whole of the *works or a separable part of the *works before the architect issues the notice of practical completion, the whole of the *works or that separable part, as the case may be, are to be treated as having reached *practical completion. The architect must issue to the contractor and to the owner a notice of practical completion for the *works or that separable part, as the case may be, within 5 *working days after being advised in writing that the owner has taken possession, unless clause M3 applies.*

*1.2 Possession of the whole of the *works or a separable part of the *works, as the case may be, before the architect issues the notice of practical completion, is to be treated as an instruction to amend the program under clause G9 and the contractor may make a *claim to adjust the contract.*

*1.3 The requirements for making a *claim to adjust the contract and the procedures to be followed are stated in section H."*

41 Clause M11.1 is in the following terms:

*"If the *works have not reached *practical completion by the date for practical completion as adjusted, the architect must *promptly notify the contractor and the owner in writing of the owner's entitlement to liquidated damages."*

42 Clause M11.3 is in the following terms:

*"The contractor is liable to pay or allow to the owner liquidated damages at the rate shown in **item 23 of schedule 1**."*

43 Certain items contained in schedule 1 are replaced by Special Conditions. Special Condition 2 ("SC2") is in the following terms:

"2 Practical Completion is defined as the issuance of The Occupation Certificate by the PCA.

Separable Part	Handover Date	Practical Completion	Defects Liability Period	Liquidated Damages
Coles Supermarket	9th April	9th June	52 weeks	$1800/day
Internal Tenancies	9th April	9th June	52 weeks	$2500/day
External Tenancies	9th May	9th June	52 weeks	$1500/day"

44 There was no issue that "PCA" is a reference to the Wollondilly Shire Council.

THE SLAB DAMAGES CLAIM

45 The original specifications called for the basement slab to be constructed in accordance with a design produced by Kinsley & Associates, Consulting Engineers. It was to be a jointed concrete slab with multi-directional falls.

46 It was, however, common cause before the referee (and before me) that at some point the parties agreed to a proposal by the defendant for an alternative design being a flat slab with only localised falls to drainage pits. The defendant took the position before the referee that the modification was agreed by conduct at or about the time the Contract was executed in September 2003. The plaintiff asserted that the modification was finally agreed orally on 5 November 2003 in a telephone conversation between the representatives of the parties.

47 On 30 October 2003 Mr Gregory Ross, the defendant's project manager and contractor's representative wrote to the plaintiff in the following terms:

"We appreciate the advise [sic] from Kingsley [sic] with regard to the min. falls required and we consider that our proposal of providing local falls to the drainage pits of 50 mm with the remainder of the slab set level to enable construction of the tilt panels complies with the intent of the AS2890.1 clause 2.4.6.2. and the 0.5% gradient …

We consider that the current level slab design with local falls will have no effect on cleaning or maintenance of the basement carpark. We also consider that there are no liability issues with regard to the slab set level as the requirement of Clause 2.4.6.2 is for the provision of drainage only."

48 The parties held a site meeting on 4 November 2003. Minutes were taken. They include the following post-meeting note (which was added by the plaintiff following the 5 November 2003 conversation):

"Post meeting note:

Falls in Basement slab deleted on advice from Quasar

Discussions with GR and JC by phone 5/11 requires Quasar

Constructions to have Basement slab certified for structural adequacy and falls proposed by Quasar Constructions. This will not be certified by Kinsley and Associates"

49 The reference to "GR" is a reference to Mr Ross. The reference to "JC" is a reference to Mr Corbett.

50 Australian Standard AS2890.1 concerns minimum falls for slabs to facilitate drainage and provides for a minimum 0.5 per cent (or 1 in 200) slope over the whole of the slab.

51 Before the referee the plaintiff contended that the defendant had bound itself to provide a certification that the slab as modified met the requirements of AS2890.1 and had failed to do so.

52 The plaintiff contended that this was a breach of a contractual obligation by which it had suffered damages. It put that its damages were the likely construction costs of providing a bonded topping to the slab to improve its drainage performance to be equivalent to a slab which complied with the standard. It led evidence that the construction costs of providing such a topping was $789,000. The defendant led evidence that it would be $243,103. Although it was ultimately not necessary for the referee to decide quantum, he indicated a preference for the defendant's figure. During the adoption hearing the plaintiff accepted that if it had a claim it was restricted to the lower figure.

53 The referee rejected the plaintiff's claim on a number of grounds. The substance of them can be briefly stated as follows:

a *firstly, there was no binding obligation on the defendant to provide the certification because the defendant's promise to do so was no more than a request to which Mr Ross "may well have acquiesced in order to maintain a cooperative relationship with his client", "it was not a term of the parties' amended agreement" and was not supported by any consideration from the plaintiff;*

b *secondly, Mr Corbett could not seriously have expected that any water ponding on a flat slab would drain away to the same extent that would occur if there was a general fall of 0.5 percent as envisaged in the original design and AS2890.1, that Mr Corbett would have understood that the requirements of AS2890.1 as to minimum falls were in any event merely advisory rather than mandatory, and in the circumstances a certification document "is meaningless". The construction of a basement slab without falls had the inevitable and logical consequence that the minimum falls provided for in AS2890.1 were no longer applicable;*

c *thirdly, the plaintiff had not adduced any factual evidence to establish that the slab as constructed has given rise to any unsafe situations or public liability issues and there was no evidence of any problems arising with regard to safety or lack of drainage in the years since the car park had been in operation. The lack of certification did not mean that the basement slab was defective in some way; and*

d *fourthly, the plaintiff failed to produce any evidence to demonstrate that it had suffered a real detriment or loss flowing from the defendant's breach of such an obligation and had had the benefit of a fully functional basement slab since July 2004. There was no evidence of any loss or damage being incurred or of any necessary repairs or rectification work being undertaken since that time and there was no evidence of anything other than very minor ponding of water occurring occasionally on the surface of the slab.*

54 In challenging the referee's conclusion the plaintiff put that his rejection of the slab damages claim stemmed from an initial and manifest error of legal principle in the finding of lack of consideration for the promise.

55 It was put that this error set off a chain reaction which led to an ultimate wrong conclusion that there was no liability on the defendant.

56 After some debate between the Court and senior counsel for the plaintiff, the plaintiff's position was ultimately articulated as follows:

a on its proper construction the oral agreement concluded on 5 November 2003 bound the defendant to provide a certification that the slab as constructed displayed drainage characteristics no less effective than had it met AS2890.1;

b the obligation to provide such a certificate necessarily implied an obligation to have provided a slab that displayed drainage characteristics no less effective than had the slab met AS2890.1 (irrespective of whether it was certified or not);

c the defendant breached that obligation because the flat slab which it supplied did not and does not meet the performance criteria of a sloped slab in that more ponding will occur on the former than the latter;

d the damages to which the plaintiff is entitled as a matter of law for the breach are prima facie the reasonable cost of the work necessary to make the slab comply, which in this case is the cost of applying a bonded topping; and

e once the plaintiff establishes, prima facie, the cost of such work the onus is on the defendant, if it wishes to challenge it, to show that the cost is unreasonable.

57 I am inclined to think that the referee's conclusion that there was an absence of consideration for the defendant's promise to provide certification was incorrect. The undertaking (if given) was inextricably linked to the Contract including the reciprocal agreement between the defendant to provide and the plaintiff to accept a different slab. That agreement was bound up with all the other mutual promises of the parties, which supplied the necessary consideration.

58 The referee's finding was, however, by no means eccentric or unreasonable. Nevertheless, I will proceed on the assumption that were I to consider that matter on its own afresh, I would reach the conclusion that there was consideration.

59 However, lack of consideration was only one of the bases upon which the referee rejected the slab damages claim. None of the additional bases was dependent for its efficacy on the finding of lack of consideration. There was no (as the plaintiff would have it) chain of errors.

60 Beyond consideration, the plaintiff needed initially to establish:

a firstly, that the defendant agreed to provide certification in the terms asserted; and

b secondly, that such an undertaking brought with it the underlying obligation to provide a slab with drainage performance no less than one which met AS2890.1.

61 As to the first, the referee found that certification that AS2890.1 had been met would have been "meaningless" because a flat slab would not display the same drainage characteristics as one with multiple falls. He found that it was not a term of the parties' amended agreement that such a certificate be provided.

62 Far from the referee having fallen into error in that finding, I am of the view that he was correct.

63 The content of the obligation to certify was articulated in the adoption hearing in terms different to that articulated before the referee, no doubt to take account of the referee's self-evidently correct observations.

64 In its 30 October 2003 letter the defendant stated that it considered that the proposal "complies with the intent of the AS2890.1 clause 2.4.6.2 and the 0.5% gradient". The post meeting note of 5 November 2003 refers to the slab being "certified for structural adequacy and falls proposed by Quasar Constructions". A certificate dated 22 January 2004 concerning structural adequacy was provided and accepted by Mr Corbett as satisfactory.

65 The obligation for which the plaintiff (whether before the referee or before me) contends cannot fairly be derived from the words which were used by the parties. Certification "for structural adequacies and falls proposed by the defendant" equates neither to undertaking that the standard will be complied with nor to an undertaking that the slab would have performance characteristics no less effective than a slab which complied with the standard.

66 The objective meaning of the words used is not that for which the plaintiff contends.

67 To the contrary, as the referee found (and which was not challenged by the plaintiff – indeed it relied on it), it was (and is) obvious that a flat slab would not drain away fully to the same extent as one with a general fall as envisaged in the original design, and the minimum requirements of AS2890.1.

68 In their dealings the parties referred to the intent of the standard and to the structural adequacies and falls proposed by the plaintiff. The plaintiff was entitled to no more than that the slab was structurally sound and that the falls were effective to do the job they were designed to do.

69 As to the second, during the adoption hearing it was accepted by the plaintiff that the only route to the obligation to construct the slab for which it contends is to establish an implied term to that effect which meets the well-known requirements laid down in ***Codelfa Construction Pty Ltd v State Rail Authority of New South Wales*** (1982) 149 CLR 337 at 347 per Mason J (following ***BP Refinery (Western Port) Pty Ltd v Hastings Shire Council*** (1977) 180 CLR 266) which are as follows:

(1) it must be reasonable and equitable;

(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(3) it must be so obvious that "it goes without saying";

(4) it must be capable of clear expression;

(5) it must not contradict any express term of the contract.

70 A fair reading of the plaintiff's submissions before the referee indicates that an implied term of that kind was not contended for.

71 That might be a good reason in itself to reject the submission now made because the defendant might have approached the matter differently before the referee had it been put, and a right to be heard does not mean a right to be heard twice.

72 But in any event, the term contended for does not satisfy the requirements for implication at least for the reasons that it is not obvious (because the words used are by no means inconsistent with an obligation to provide a certificate that the slab as constructed is structurally sound and effective) and because in the objective circumstances of this matter it would not be reasonable.

73 The defendant put further that an undertaking to provide a certificate would be just and only that. There is force in that submission.

74 The referee went on to find that the slab as constructed cannot be said to be defective in any way and that the lack of certification did not mean that it is. He found that the basement is fully functional and that there was no evidence of any loss or damage being incurred or of any necessary repairs or rectification and nothing to suggest that anything other than very minor ponding of water occurs occasionally on the surface of the slab.

75 The reality of the matter is that the plaintiff got a slab which works and works properly.

76 The plaintiff put that the decision of the High Court in ***Bellgrove v Eldridge*** (1953-54) 90 CLR 613 stands for the proposition that once a plaintiff establishes what would be the cost of rectification of defective work, the defendant bears the onus of establishing that the case is not reasonable. In my view, ***Bellgrove v Eldridge*** does not stand for a proposition so articulated. It stands for the proposition rather that the wronged party is entitled to the reasonable costs of rectifying the departure or defect so far as that is possible but not only must the work undertaken be necessary to produce conformity, it must be a reasonable course to adopt.

77 In those circumstances it was fairly open to the referee to find, as he did, that no damage has been suffered by the plaintiff because to carry out the work which the plaintiff contended was necessary was not a reasonable course to adopt.

78 No error in principle on the referee's part has been demonstrated which infects his conclusion that the slab damages claim failed.

79 In those circumstances the referee's report with respect to the slab damages claim is to be adopted.

THE LIQUIDATED DAMAGES CLAIM AND THE DELAY CLAIM

80 The plaintiff's challenge to the liquidated damages claim finding involves challenges to the referee's findings of:

a the date on which practical completion occurred; and

b the adjustments to the dates for practical completion in respect of the three severable parts of the works. The adjustments depend on findings of delay caused by the plaintiff's variations.

81 The plaintiff's challenge to the delay claim finding involves challenges to the referee's findings of:

a the entitlement of the defendant to bring the delay claim notwithstanding its failure to comply with contractual formalities; and

b the delay occasioned by the plaintiff's variations (the rate of entitlement having been agreed).

82 Common to the plaintiff's challenges to the liquidated damages claim and the delay claim is its challenge to the referee's findings of the delays occasioned by the plaintiff's variation, which determine the extensions of time to which the defendant was entitled.

83 I will deal with the plaintiff's challenges in the following order:

a practical completion;

b the defendant's right to bring the delay claim; and

c the extension of time findings.

Practical completion

84 The central findings of the referee on practical completion are contained in pars 155 to 164 of the report, which are as follows:

> "*155. The proper determination of the Date <u>of</u> Practical Completion of the Works (and any separable parts thereof), as compared with the contractually defined Date(s) <u>for</u> Practical Completion, is fundamental to establishing CorCourt's entitlement to liquidated damages. In this regard, there are several issues which have arisen between the parties in relation to the question of when "practical completion" of the whole or the separable parts of the Works was achieved by Quasar. The basis for resolution of these issues lies within the terms of the Contract, particularly with reference to the provisions of clauses M1, M9, M10, M11 and SC2.*
>
> *156. The relevant provisions of clause SC2, which take precedence over the general provisions in Section M and Schedule 1 of the Contract, have been set out above. It can be seen that for each of the three defined separable parts of the works, the same date of 9 June 2004 has been nominated by the parties as the Date for Practical Completion. Quasar was thus obliged (pursuant to clause M1) to bring each of the separable parts to practical completion by that date, subject to adjustment of the date to allow for any EOT [extensions of time] to which Quasar may be entitled.*
>
> *157. The other important feature of SC2 is that by defining "practical completion" as being "the issuance of The Occupation Certificate" [sic], the parties have effectively overridden [sic] and conceptually changed the "standard" definition of practical completion, which is reflected in the wording of clause M1. This conceptual change renders some other provisions in Section M of the Contract somewhat uncertain. In particular, clause M10.1 deals with the situation where an owner takes possession before the work required to be performed under the Contract is completed. The clause provides that:*
>
> *"If the owner takes possession of the whole of the works or a separable part of the works before the architect issues the notice of practical completion, the whole of the works or that separable part, as the case may be, are to be treated as having reached practical completion".*

This deeming provision, together with a particular interpretation of the word "possession", is the key part of CorCourt's argument in its claim for liquidated damages, yet as discussed in the following paragraphs, clause M10.1 has been rendered ambiguous and probably irrelevant when construed in the light of SC2.

158. *With respect to construing "possession", CorCourt submits that the handover of a separable part for the purpose of fitout is not possession within the meaning of clause M10. That proposition at least is reasonably certain, given the scheme set out in SC2 whereby the handover of each separable part (for fitout) is anticipated 1 to 2 months prior to practical completion. CorCourt goes on to contend (final submissions, para. 152) that the only other meaning of possession in the context of this case must be possession for the purpose of trading. Accordingly, CorCourt submits that this is the appropriate way to construe clause M10 and thus the date of practical completion is deemed to be the date of commencement of trading. I note that this construction has been endorsed and used by Shahady in his assessment of the time-related issues.*

159. *CorCourt's position as to the appropriate dates of practical completion for each separable part is therefore based on Corbett's evidence of when CorCourt's tenants first commenced their trading activities. Those dates, according to Corbett (Exh. P1, paras. 148, 151), were 17 July 2004 for the Coles Supermarket, 4 August 2004 for the Internal Tenancies and 24 October 2004 for the External Tenancies. With regard to these dates, I note Quasar agrees that the Coles Supermarket commenced trading on 17 July 2004 but it disputes the validity of the other two dates. Quasar submits (final submissions, para. 344) that the phrase "commencement of trading" is, in any event, devoid of meaning and has no contractual significance. I also note that as a matter of simple logic, it does not necessarily follow that the date when a tenant commenced trading is the same as the date when CorCourt "took possession" of the tenancy. On this point, I agree with Quasar that there is no basis for treating the dates on which trading commences as the indicia of practical completion, as Corbett and Shahady appear to have done.*

160. *In order to maintain its contention that there are three 3 separate dates of practical completion, CorCourt has to avoid the overriding definition of "practical completion" in SC2 (see above). In this regard, CorCourt contends that the Interim Occupation Certificate (Exh. P1/JKC 46) issued by the Council on 16 July 2004 is not the certificate contemplated by the defining words of SC2. CorCourt raises several arguments in its final submissions. First, CorCourt contends that there is clearly a difference between "<u>The</u> Occupation Certificate" (my emphasis) referred to in SC2 and an Interim Occupation Certificate. Secondly, CorCourt says the interim certificate issued by the Council expressly states that it applies to the "Coles supermarket & carpark", which phrase (CorCourt submits) is inappropriate to include the internal and external tenancies. Thirdly, CorCourt points to the Council's understanding (as noted in Exh. P8 – an internal memorandum dated 3 August 2004) that the internal and external tenancies were not complete or authorised for occupation. Fourthly, CorCourt says the fact that a Final Occupation Certificate (Exh. P1/JKC 54) was ultimately issued in 2005 for the entire building indicates that the first (interim) certificate did not cover all the work. For these reasons, CorCourt concludes that "practical completion" was not achieved for any of the separable parts by the issue of the Interim Occupation Certificate.*

161. *Quasar on the other hand, takes a different view of the significance of the Interim Occupation Certificate. Quasar submits that the wording of SC2 plainly indicates that an occupation certificate (irrespective of whether it is qualified by "The" or "Interim") was intended to be the objective marker for practical completion being reached. Quasar points out that the Interim Occupation Certificate was not confined solely to the Coles Supermarket but also included reference to another major portion of the building (the carpark). However, the carpark was not one of the three defined separable parts. It is also apparent from the evidence that at that time, not only was the basement carpark complete but that in order to provide the public with safe and secure access between the carpark and the Coles Supermarket, several other parts of the building were also practically complete (in the usual sense of these words).*

162. *Quasar also points out that no further interim occupation certificates were required or issued by the Council prior to CorCourt taking possession of the Internal Tenancies or the External Tenancies. Moreover, it was never suggested by Corbett (in either of his roles as Owner's and Superintendent's representative) or by the Council that CorCourt's occupation of the Internal and External Tenancies prior to the issue of the Final Occupation Certificate in July 2005 was illegal. Quasar submits that in these circumstances, it is clear that both CorCourt and the Council considered the Interim Occupation Certificate issued on 16 July 2004 as authorising the occupation of the whole of the Contract Works, subject to the completion of the outstanding items of work within the internal and external tenancies. Quasar thus concludes that the Interim Occupation Certificate was in fact the certificate envisaged by SC2. Accordingly, the Date <u>of</u> Practical Completion of the works and of each of the 3 separable parts became 16 July 2004.*

163. *Having considered the competing contentions of CorCourt and Quasar as set out above, I have concluded that Quasar's construction of SC2 should be preferred. Although the wording of SC2 does not specifically refer to an "interim" certificate, it appears to contemplate only one occupation certificate being issued and it does not, by its terms, exclude an interim occupation certificate. Further, as a Special Condition, SC2 takes precedence over clause M10 and it must be construed and applied so as to provide a workable contractual regime for "Practical Completion". Accordingly, whatever the actual state of completeness of the internal and external tenancies might have been on 16 July 2004, the issue of the Interim Occupation Certificate at that time was, in my view, the step envisaged by SC2 as being the defining marker of "Practical Completion" for contractual purposes. I also note that from that time, the evidence of the progressive occupation of the tenancies and the*

overall completion of the work by Quasar was consistent with "Practical Completion" (as defined by SC2) having already been achieved.

*164. I have therefore determined, pursuant to the terms of the Contract, that the Date of Practical Completion for each of the separable parts and the whole of the Works was **16 July 2004**."*

85 The plaintiff put that the referee's conclusions with respect to the internal and external tenancies revealed an error of law in the finding that the issue of the interim certificate constituted practical completion on the basis that it was "*The Occupation Certificate*" described in SC2.

86 It put that the construction for which it contended, namely that the word "possession" in cl M10.1 should be construed as "commencement of trading", should be adopted.

87 As the report reveals, the referee (perhaps understandably) had some difficulty reconciling the operation of the definition of "*Practical Completion*" in SC2 with the operation of cl M10.

88 I agree with the plaintiff's submission that the construction (which is a matter of law) which the referee found, namely that an interim certificate with respect to less than the whole works was "The Occupation Certificate", is wrong.

89 The plain meaning of that term connotes one certificate in respect of the whole of the works.

90 One (but not the only) difficulty for the plaintiff in the context of the referee's finding is that the construction which it put to the referee was equally unsustainable. Possession in the sense in which it is used in the Contract is physical control coupled with an intention of holding that control. Clause M10 operates where the owner "*takes possession*". Possession (or handover) might be available, but if the owner does not take it, cl M10 does not apply.

91 Undoubtedly by the time the external and internal tenancies commenced trading the plaintiff had taken possession of them, but also undoubtedly it must have taken possession before then.

92 The proposition put by the plaintiff that the meaning of possession in cl M10 is to be construed as possession for the purposes of trading was correctly rejected by the referee.

93 When a written contract is construed the whole of the instrument has to be considered. Preference must be given to a construction which supplies a congruent operation to the various components of the whole of an instrument: ***Wilkie v Gordian Runoff Limited*** (2005) 221 CLR 522 at 529.

94 In my view cl M10 is easily and sensibly reconciled with SC2 so as to result in their congruent operation.

95 SC2 envisages practical completion being marked by a certificate sometime after what is referred to as the "*Handover Date*".

96 Clause M10.1 concerns the owner actively taking possession.

97 If on the "Handover Date" (or at any other time for that matter) the owner takes possession of the whole or part of the works practical completion is deemed to have occurred with respect to that of which it takes possession.

98 "Handover Date" no doubt involves the date on which it is envisaged possession will be given. If possession is not given then cl M10 does not come into operation. If it is, then there is no reason why the fact of possession will not constitute practical completion and cogent reasons why it should.

99 Indeed, cl M1 contemplates all approvals before practical completion occurs. Read together with cl M10 it provides for practical completion to occur before that event by possession.

100 There is no internal conflict or inconsistency between a date specified for handover before the issue of "The Occupation Certificate" and the definition of practical completion in SC2 on the one hand, and the operation of cl M10 deeming practical completion on possession on the other.

101 Before the referee and in the adoption hearing the plaintiff accepted that it took possession of the whole of the works before the final occupation certificate was issued in 2005 and that that date was not the date of practical completion.

102 The referee, however, did not rely entirely on the fact of the issue of the interim certificate as marking practical completion. In par 161 he found:

"It is also apparent from the evidence that at that time, not only was the basement carpark complete but that in order to provide the public with safe and secure access between the carpark and the Coles Supermarket, several other parts of the building were also practically complete (in the usual sense of these words)."

103 In par 163 he found:

"I also note that from that time, the evidence of the progressive occupation of the tenancies and the overall completion of the work by Quasar was consistent with 'Practical Completion' (as defined by SC2) having already been achieved."

104 These were sufficient findings of possession, in its correct meaning, on the part of the plaintiff and accordingly of practical completion.

105 Even if there were not, the plaintiff bore the onus in its claim of liquidated damages for establishing the date for practical completion. Having accepted that it must have occurred earlier than 2005, the plaintiff did not plump

for a date other than the incorrect date of commencement of trading. It failed to establish any other date or dates.

106 I consider that there is no good reason why the referee's finding of practical completion should not be accepted and every good reason why it should.

107 The report is to be adopted with respect to its finding that practical completion of the whole of the works occurred on 17 July 2004.

The defendant's entitlement to bring the delay claim

108 It is necessary to set out the referee's consideration of the plaintiff's contention that the defendant was not entitled to make the delay claim and his findings on that issue. It is set out in pars 17 to 34 of the report which are as follows:

"***2. <u>The Role of Corbett</u>***.

17. As I have noted above, the involvement of Corbett during the course of the project and particularly in the administration of the Contract has been an important factor in many of the issues I have had to consider during the Reference. Corbett was a director and the principal of both CorCourt and CorCon. He was nominated in the Contract as both the Owner's representative and the Superintendent's representative. In these two positions, he was the personification of both the Owner and the Superintendent under the Contract. As such, his role in administering the Contract was plainly one with potential for conflicts of interest and his dual persona was likely to cause confusion unless clearly delineated.

18. Quasar's pleadings in respect of the role of Corbett and the alleged consequential abrogation of the contractual procedures, are set out in sections C5 and C6 (paras. 9-17) of the Further Amended Cross Summons ("FAXS"). Quasar refers to the express terms of the Contract set out in clauses A2 and A6, which provide for CorCourt to appoint an architect (Superintendent) and for the Superintendent to administer the Contract. Clause A6.2 states that the Superintendent is to act as CorCourt's agent for giving instructions to Quasar, however in its role as assessor, valuer or certifier, the Superintendent is to act independently. Clause A6.3 requires that CorCourt must ensure the Superintendent acts fair [sic] and impartially, having regard to the interests of both CorCourt and Quasar and that CorCourt must not do anything to compromise the Superintendent's independence.

19. In addition, Quasar relies (in para. 14 of the FAXS) on an alleged implied term in the Contract, that CorCourt will ensure the Superintendent, in the exercise of its functions under the Contract, arrives at a reasonable measure or value of work and time and acts fairly, justly and equitably. In this regard, I note that I am satisfied, on the basis of the authorities (Perini Corporation v. Commonwealth [1969] 2 NSWLR 530 and Peninsula Balmain Pty. Ltd. v. Abigroup Contractors Pty. Ltd. [2002] NSWCA 211), that this term should be implied in this case. Quasar also relies on the provisions of clause A1.1 which require CorCourt and Quasar to act reasonably and to cooperate in all matters relating to the Contract.

20. In paragraph 17 of the FAXS, Quasar pleads that in breach of the express and implied terms of the Contract noted above, CorCourt failed to ensure that CorCon (as Superintendent and in the role of an assessor, valuer or certifier):

a. complied with the Contract;

b. acted fairly and impartially having regard to the interests of both CorCourt and Quasar;

c. arrived at reasonable measure or value of works; and

d. acted fairly, justly and equitably.

21. In light of the abovementioned contractual provisions, Corbett's decision to appoint himself as both the Owner's and the Superintendent's representative under the Contract was always likely to be fraught with difficulties and was quite naive (see T. 380-384), particularly for a person of his background and experience (see Section C of this Report). It seems that this decision was made primarily as a cost-saving exercise (T. 381.16), but regrettably it was the catalyst for many of the disputes which subsequently arose. The evidence of Corbett's actions (and inaction) during the course of the project clearly illustrates that he was putting himself in an untenable position of conflicting interests and obligations.

22. While Quasar did not raise any objection to Corbett's dual roles, it was not a situation where Corbett could do what he wished (see T. 2673.8 - 2675.2). Quasar was contractually entitled to expect that Corbett (on behalf of CorCourt) would ensure he discharged his functions (on behalf of CorCon) as properly, fairly and independently as he possibly could. In particular, it was imperative that a strict division of his contractual roles was maintained and was seen as such by Quasar. Yet such an approach was never implemented by Corbett. Rather, it appears that he proceeded (on behalf of both CorCourt and CorCon) with a general disregard for the formal and procedural requirements of the Contract.

23. In short, the evidence in the Reference proceedings indicates that from early on in the administration of the Contract, Corbett failed to distinguish between the positions of CorCourt and CorCon under the Contract and he did not take the necessary steps to ensure that the separation of his two roles was clearly observed in practice. In this regard, I agree with Quasar's submissions (paras. 164-168) that the inevitable result was that the formal procedures for the administration of the Contract were not observed or maintained.

24. I have set out below a selection of examples from the evidence, which lead me to the conclusion that Corbett had little regard for the independent Superintendent's role. I note that:

(a) Corbett dismissed his failure to follow contractual procedures for the certification of progress claims on the basis that if his actions were causing harm to Quasar, he would have been told (T. 454.38-47);

(b) Corbett asserted that although the issue of payment certificates was an important function of the Superintendent, it was unnecessary "in this case" for the Superintendent to undertake this task (T. 455.3 - 23, T. 458.35 and T462.17-26);

(c) Corbett admitted that there was a "willing departure" from the contractual procedures by both CorCourt and CorCon (T. 455.25-37);

(d) Corbett conceded that he did not, as Superintendent's representative, form an independent view "in a detailed sense" of Quasar's progress claims (T. 460.33-47, T. 474);

(e) Corbett improperly delegated the assessment of progress claim no. 11 (and later claims) to Kinsley (T. 503-509);

(f) Corbett, in appointing Fiadino to act (at certain times) as Superintendent's representative, had no regard to the contractual requirements or to Fiadino's lack of independence (T. 482.18 - 484.31 and T. 582-583);

(g) Corbett failed to distinguish between the respective roles of Owner and Superintendent in correspondence and notifications to Quasar (T. 596-597 and in the documentary evidence).

25. The manner in which Corbett (as Superintendent's representative) administered Quasar's claims for variations is a further example of his neglect of the Superintendent's role. Corbett conceded (T. 481.26-31) that the terms of the Contract dealing with the assessment and valuation of variations (and any associated extensions of time) were not adhered to, but that a "more informal approach" was taken. Yet the evidence indicates that even with his "informal" approach, Corbett was reluctant to deal with Quasar's variation claims at all and he neither assessed them himself nor referred them to BMT for assessment (T. 486.41-489.33). Notwithstanding Corbett's explanation that he had an understanding with Zaki (on behalf of Quasar) that his (Corbett's) determination of Quasar's variation claims would be deferred (T. 488), there is sufficient evidence to infer that Corbett's actions in this respect were primarily driven by commercial rather than contractual considerations. In this regard, I note that CorCourt, as owner, was operating under strict financial constraints arising from the terms of the tripartite deed with the bank (Exh. P3). If BMT had been informed of Quasar's variation claims and had assessed their proper value, it is likely to have added significant costs to the project (see Section I of this Report), with detrimental financial consequences for CorCourt.

26 The abovementioned matters have led me unequivocally to the conclusion that Corbett's dual roles and his conduct in the administration of the Contract have resulted in an abrogation of the functions of the Superintendent and a waiver of the related contractual procedures. Accordingly, compliance by Quasar with the procedural and claim notification provisions of the Contract was not only impractical but was rendered unnecessary. I have also concluded, for the reasons set out above, that Quasar's allegations of breach of contract by CorCourt (see paragraph 17 of the FAXS) have been substantiated. As for the question of what loss or damage Quasar has suffered as a result of such breaches, I am inclined to accept the answer provided by counsel for Quasar at T. 2713.24 - 2714.14, as to the appropriate measure of damages and the course I should adopt.

***3. The Notice Provisions of the Contract**.*

27. In its Response to the FAXS dated 19 January 2007, CorCourt pleads the notice provisions in Sections H, J and L of the Contract as a bar to Quasar's variation and time-related claims. CorCourt contends that unless Quasar's claims were submitted in strict compliance with the requirements of clauses H1.1, H2.1, J2.3, J2.4, J4.1, J4.3, J7.1, J7.2 and L3.1 (as may be relevant to a particular claim), then Quasar has no entitlement to its claim or (in some cases) to even make the claim. As part of its final submissions, CorCourt has provided three detailed schedules (H, J, L), specifically identifying the aspects of each of Quasar's claims which CorCourt contends do not satisfy the notice provisions of Sections H, J and L of the Contract.

28. CorCourt also refers in its final submissions (paras. 98-101) to clause A8 of the Contract. Clause A8.1 requires Quasar to give the Superintendent notice within 20 working days if it wishes to dispute a notice, decision or assessment issued by the Superintendent (or to dispute his failure to do so). Clause A8.2 also provides that if Quasar fails to give a notice under clause A8.1, it will not be entitled to dispute the matter at all. CorCourt thus submits (para. 101) that Corbett's failure to issue instructions, certificates or anything else under the Contract cannot be disputed by Quasar unless it has properly notified its dispute within 20 working days. As this did not in fact occur, CorCourt submits that there is no entitlement under the Contract for Quasar to maintain a claim in respect of any variations which were not approved by the Superintendent.

29. With the greatest respect to CorCourt's submissions in relation to the abovementioned notice provisions, it seems to me that they have had little regard for the actual manner in which the Contract was administered. As I have noted above, the weight of evidence indicates that both parties dispensed with the need to conform with the procedural and notice provisions of the Contract. I am satisfied that Corbett (and thus CorCourt and CorCon) did not consider himself under any obligation to observe the procedural provisions nor did he require Quasar to comply with those provisions. In these circumstances, CorCourt's denial of Quasar's claims, based on the notice provisions in Sections H, J and L of the Contract, has no merit and must fail. I note that I also reject CorCourt's submissions in relation to clause A8, as it is clear the subject clause can have no application in the circumstances of this case.

***4. Adjustment under Clause H6**.*

30. Quasar relies (in paragraph 28 of the FAXS and in paragraph C3.1(e) of its Reply to the Response to the FAXS) on the provisions of clause H6 of the Contract as a further basis for its various claims for damages and for the proper adjustment of the Contract. Clause H6.1 provides that "if (Quasar) has not made a claim to adjust the Contract in relation to any change which results from …… a variation to the works or from causes of delay noted

in clauses L1 or L2, the (Superintendent) may adjust the Contract at any time up to the issue of the final certificate ……". Quasar thus submits (final submissions paras. 198-220) that as a matter of law (for example, see Peninsula Balmain v. Abigroup, supra), I (as Referee) am entitled to find that the Superintendent, acting fairly and in accordance with the Contract, would have made the adjustments to the Contract now sought by Quasar, notwithstanding the absence of those claims at the relevant times during the course of the work.

31. The proper construction of clause H6.1 in the context of this case has been the subject of extensive submissions from both Quasar and CorCourt. Having considered those submissions and the relevant case law, I am satisfied that under clause H6.1, I am able to exercise the same power as the Superintendent to determine the appropriate adjustments to the Contract in respect of variations and time-related claims. In this regard, my determination of Quasar's claims are set out in detail in Sections I and J of this Report.

5. Waiver and Estoppel.

32. In paragraphs C3.1(c) and (d) of its Reply to the Response to the FAXS, Quasar pleads that as a result of the conduct of CorCourt and the Superintendent (CorCon) during the course of the Contract, CorCourt has waived any requirement for strict compliance with the claim procedures set out in the Contract and is thereby estopped from asserting that Quasar is disentitled from making its claims by reason of a failure to strictly comply with those procedures. In response to these pleadings, CorCourt submits (final submissions, paras. 185-188) that Quasar's allegation of waiver must fail, as it is excluded by virtue of clause R7 in the Contract. CorCourt further submits that there is no basis in the evidence to establish the elements necessary for an estoppel, in any event.

33. In responding to CorCourt's submissions, Quasar submits (paras. 182-184) that a clause such as R7.1, which requires a waiver to be in writing for it to be effective, can itself be waived by conduct. Quasar contends (paras. 188-189) that clause R7 does not operate to preclude a waiver in this case since it does not deal with the situation where the contractual procedure has been effectively displaced or abrogated by the conduct of the Owner or the Superintendent. Quasar argues that CorCourt's conduct, which (as I have found above) has resulted in a waiver of the need to strictly comply with the contractual procedures, is also implicitly a waiver of clause R7. Further, Quasar submits that CorCourt should not benefit from its own breaches of contract.

34. Having considered the parties' legal submissions on the question of waiver and estoppel, I am satisfied that in the particular circumstances of this case, clause R7.1 does not operate to preclude CorCourt's conduct from being a waiver (of compliance with the claim procedures in the Contract). I am also satisfied that in these circumstances and in the light of my findings on the issue of waiver, CorCourt's conduct will give rise to an estoppel of the nature pleaded by Quasar. Accordingly I find that CorCourt, by its conduct, has waived any entitlement it may have originally had to rely on the various notice provisions of the Contract."

109 With respect to these findings the plaintiff put the following submissions:

a firstly, the conduct of Mr Corbett described in par 24 of the report concerned abrogation of provisions other than the ones which related specifically to the claims for adjustment and were therefore insufficient to amount to waiver of those which related to the claims for adjustment;

b secondly, the referee's conclusion flew in the face of cls H1 to H6 and A8;

c thirdly, the Contract is a code and accordingly its provisions alone govern the relationship between the parties; and

d fourthly, the referee's findings lead to an unworkable situation because the residual provisions of the Contract remain.

110 The first submission is untenable. The referee found that Mr Corbett's dual roles and his conduct in the administration of the Contract resulted in the abrogation of the functions of the superintendent and a waiver of the related contractual procedures. He accordingly found waiver of the specific relevant provisions as a consequence of the position and conduct of Mr Corbett in relation to formal procedures for the administration of the Contract generally. There is nothing unsound about this finding. A party may expressly or impliedly give up its right to insist on a contractual condition: see ***The Commonwealth of Australia v Verwayen*** (1990) 170 CLR 394 at 406-7 per Mason CJ. On the evidence the referee found that that is what the plaintiff had done. By its conduct throughout it had waived a right to insist on strict performance of the conditions of the Contract with respect to the making of claims generally which included waiving its right to insist on performance of the particular formal requirements in respect of the delay claim.

111 So far as the evidence is concerned, par 24 of the report refers only to a selection of examples from the evidence which are themselves sufficient to make a conclusion that the referee's conclusion was justified. In any event it was not incumbent upon him to make reference to every piece of evidence he took into account.

112 The second and third submissions can be dealt with briefly. Waiver (or estoppel) outflanks the formal provisions of the Contract because they have been waived.

113 The fourth submission is also untenable. The operation of any particular provision will be determined according to the effect of the waiver found.

114 For these reasons I do not consider that there is any basis for rejecting the report with respect to the referee's finding as to the defendant's ability to claim adjustments.

115 There is a further reason why the report should be adopted in this respect.

116 As appears from pars 19, 20 and 26 the referee found that the same conduct of Mr Corbett which made out the waiver was a breach of the plaintiff's implied obligation to ensure that the superintendent arrived at a reasonable measure or value of work or time and acts fairly, justly and equitably.

117 This finding was not challenged before me by the plaintiff.

118 In par 26 of the report the referee expressed the view that he was inclined to accept the submission by the defendant's counsel 2713.24-2714.14 as to the appropriate measure of damages.

119 That part of the transcript was not tendered but I was informed from the bar table (by senior counsel for the defendant) without demur that the assessment contended for was an amount equivalent to the adjustment to which the defendant would (if it were shut out by non-compliance) otherwise have been entitled.

120 Accordingly, even were the referee's finding of waiver not to stand, the outcome on the referee's alternative findings would be exactly the same.

121 It is unnecessary to deal with the referee's finding of estoppel as an alternative basis for his finding on the defendant's entitlement, because during the adoption hearing the defendant did not seek to uphold the report on the basis of estoppel.

The extension of time findings

122 The referee found that the defendant was entitled to 41.5 days' extension in respect of the internal tenancies (that is to 12 August 2004) and 56 days in respect of the external tenancies (that is to 3 September 2004). Each of these dates is later than the date of practical completion and the referee found that the plaintiff was not entitled to liquidated damages in respect of those claims.

123 He found that the defendant's work on the site as a whole was delayed by 62 days, including 9.5 days attributable to inclement weather, which did not attract adjustment of time costs, leaving a balance of 52.5 days. The parties' experts had agreed that the defendant's delay costs were $6,200 per day, yielding an amount of $325,500 to which the defendant was entitled in respect of delay costs.

124 The dispute between the parties as to particular extensions of time involved an assessment of the time added to the "critical path" of the works caused variations required by the plaintiff (that is the delay must have affected a critical construction activity and thus the date of practical completion).

125 The referee's central findings are set out in pars 165 to 175 of the report which are as follows:

> "*165. During the Reference proceedings, there has been a large amount of hearing time and expert evidence devoted to the effect of delays (particularly where caused by variations) on the work under the Contract and to Quasar's subsequent entitlements to extensions of time (EOT). The factual evidence in this regard has been provided primarily by Ross in his "Extension of Time" affidavit dated 18 October 2006 (Exh. D14). In his affidavit, Ross sets out the details of Quasar's claims for EOT during the course of the works, which totalled 224.5 days. Of this total, 213 days were associated with Quasar's variation claims (see Section I of this Report) and the remaining 11.5 days were as a result of wet weather delays. In order to provide a basis for Quasar's EOT claims, Ross developed various construction programmes (identified as Rev. B, E, G, H and J) for the work Quasar performed. These revised programmes were based upon similar programmes which Quasar had submitted to CorCon during the course of the work, but the later revised programmes had logic links added to enable the critical path to be identified. Ross also incorporated some revisions to the sequencing of the works, to the handover periods for tenancies and to the construction methodology (Exh. D14, para. 40) in order to better reflect Quasar's actual work on-site.*
>
> *166. In relation to the questions raised in the Reference proceedings concerning the impact of the various delays on the construction work and thus Quasar's entitlement to EOT, both experts relied on Ross' revised programmes for their analyses. Zakos, on behalf of Quasar, carried out an independent assessment of the entirety of Quasar's EOT claims (Exh. E8, section 3.0). Zakos thus determined a total entitlement of 80.5 days EOT, the effect of which would be to extend the Date of Practical Completion of the works to 12 October 2004 (as pleaded by Quasar at para. 35 of the FAXS). In his assessment, Zakos relied on Ross' factual evidence (Exhs. D13 and D14) to assess when each delay occurred and the impact of that delay on the (Ross adjusted) programme current at the time of the delay.*
>
> *167. Shahady, on behalf of behalf of CorCourt, also carried out an assessment of the delays to the project (see Exhs. E10, E12) and addressed the related questions concerning the validity of Quasar's EOT claims and the date to which the Date for Practical Completion should properly have been extended. Shahady adopted a different and more theoretical approach to that of Zakos in assessing Quasar's EOT entitlements. He concluded that Quasar's entitlement was limited solely to the 9 (working) days of wet weather, since the EOT claims based on variations had not been made in accordance with the Contract and in any event, most of the subject variations (in Shahady's view) did not cause an actual delay to the progress of the works. Shahady later independently revised Quasar's variation claims and determined that only variation nos. 79 to 83 and 86 in fact gave rise to a delay (of 5 days) to the works and thus justified an EOT. Accordingly, the effect of Shahady's findings would be to extend the Date for Practical Completion of the works to 1 July 2004 (as pleaded by CorCourt at para. 20 of the FAS).*
>
> *168. In the course of the Reference hearing, I conducted several conclaves with Zakos and Shahady, (four of which were transcribed - see T. 1486-1504, T. 1707-1721, T. 1843-1870 and T. 2157-2190), in order to identify*

from within their respective reports and analyses, the matters on which they were in agreement and the specific nature of any disagreements. As a result of the initial conclaves, further work was undertaken by these experts and Zakos and Shahady ultimately produced a joint report dated 21 October 2007 (Exh. E19), summarising their work. Their specific agreements on the principles to be applied in their analysis of the programmes, (Exh. E19, section 4.1) were noted as follows:

(i) Primarily, two types of delays were to be considered, namely, wet weather and variations.

(ii) A delay to an activity and its impact on the programme is assessed at the time the delay occurs.

(iii) The impact of an instruction on the progress of the works occurs when the instruction is issued.

(iv) A delay should be assessed against the programme current at the time of the delay arising (subject to the current programme being a proper programme).

(v) Quasar claimed 11.5 days for wet weather and Corbett approved 9 days. Zakos and Shahady identified the difference between their own assessments as only 0.5 days and agreed that the wet weather delays to the project should be taken as being 9.5 work days.

(vi) With reference to delay to critical activities, the claimed delay must delay the critical activity to which it relates and hence delay the progress of the works to completion.

169. *At the commencement of the conclave process, it was apparent that Zakos' and Shahady's respective analyses of delays and EOT (as set out in their reports), had proceeded on the basis of different facts and assumptions. Nevertheless, having worked through the conclave process, with several meetings and the exchange of information and opinions, their resulting joint report (Exh. E19) indicates that they were able to achieve a high level of agreement on many matters. In particular, they were able to agree upon a common set of Quasar's programmes (as adjusted by Ross) to form the basis of their analysis and there was general agreement as to the facts and circumstances of the variations giving rise to the delays. I note in this regard that all of the variations relied upon by Zakos and Shahady in their respective delay analyses have been determined to be valid, as claimed by Quasar (see Section I of this Report).*

170. *After the production of their draft joint report, it was apparent that the only major difference between Zakos and Shahady concerned the methodology utilised by each expert to measure the impact of delays. Specifically, Shahady's view was that prior to carrying out any analysis, the base programme should be "statused" to take account of all delays (including those attributable to Quasar) which preceded or were concurrent with the claimed delay. Zakos, on the other hand, considered that "statusing" of the programme should only be done when the status could be determined at the actual point of the delay, otherwise it was likely that an incorrect critical path would be identified. I note that in Shahady's analysis, he in fact statused the programmes at the end of each month rather than at the actual time of each delay.*

171. *It was clear from my conclave discussions with Zakos and Shahady that there was little likelihood of them reaching a compromise on the question of the appropriate methodology to be applied. I was therefore left to make my determination of Quasar's EOT entitlement by choosing between the two experts' analyses (see T. 1863.37-44). In order to ensure that my choice was fully informed, I required the experts (T. 1718-1720) to verify each other's analysis on the basis of the assumptions inherent therein and to critically review each of their assumptions. This work was subsequently performed by Zakos and Shahady and is reported in Exh. E19, sections 4.3, 5.1 and 5.2.*

172. *In my conclave discussions with Zakos and Shahady on 26 October 2007 (T. 2157-2190), I had the opportunity to review their work and to consider their respective methodologies in considerable detail. I have also had the benefit of the parties' extensive final submissions (CorCourt – paras. 119-148, Quasar – paras. 265-342) on these matters. I have concluded from all this material that, on balance, Zakos' methodology is preferable and should be adopted in order to determine Quasar's entitlement for EOT. I have made this choice for the reasons summarised in the following paragraph.*

173. *In preferring Zakos' approach, I reiterate that I have no doubts as to either Zakos' or Shahady's expertise in these matters, nor do I reject Shahady's methodology as being invalid. However, I agree (to a large extent) with Quasar's submissions (paras. 285-316) that there are various uncertainties arising from Shahady's approach. First, there are questions raised in relation to the source materials on which Shahady relied in order to status the programmes, particularly where he utilised photographs (see T. 2553-2555). Secondly, Shahady's statusing of the programmes appears to have been heavily influenced by his own "as-built" program, which in some instances was clearly unreliable (see Quasar's final submissions, paras. 303-307). Thirdly, Shahady's method can sometimes result in an incorrect indication of the real impact of a delay (see T. 2565.17-2567.18). Finally, his approach of projecting losses of time forward to future events (see T. 2579.34) can also lead to anomalous and inconsistent conclusions (T. 2575.43-2580.23).*

174. *In Zakos' analysis, the key variations (and groups of variations) which are asserted to have caused delays (and EOT) to the project are identified as nos. 64, 9, (22, 36, 37), (68, 72), (73, 74, 75, 76, 79, 80, 81, 82, 83, 86) and 35 respectively. As I have noted above, an entitlement to each of these variation claims has already been determined in Quasar's favour. In respect of each of the subject variation claims, I have reviewed Ross' evidence concerning his assessment of the delay effect of the variation and I have considered the details within Zakos' and Shahady's analyses. I have also had regard to the matters raised in CorCourt's and Quasar's final submissions (paras. 129-138 and 341 respectively). As a result, I have concluded that Ross' evidence is generally reliable and that Zakos' reliance on Ross' evidence does not detract from my choice of Zakos' analysis as the preferred approach.*

175. Accordingly, having adopted Zakos' methodology (see Table 4.3.1 dated 26/10/07 in Exh. E19) for the reasons set out above, Quasar's entitlement to EOT is hereby determined as follows:

Separable Part	Original Date for Practical Completion	EOT	Adjusted Date for Practical Completion
Coles Supermarket	9 June 2004	19.5 days	9 July 2004
Internal Tenancies	9 June 2004	41.5 days	12 August 2004
External Tenancies	9 June 2004	56 days	3 September 2004
Whole of the Works	9 June 2004	62 days	14 September 2004"

126 The plaintiff attacked the referee's findings as a whole. In the alternative it challenged his findings with respect to 25.5 days out of the 52.5 allowed calculated in the following way:

a 17.5 days out of 37.5 days allowed as variation number 35;

b 6 days being the total allowed in respect of variations number 22, 26 and 36; and

c 2 days out of the 3 days allowed in respect of variations number 68 to 72.

127 The defendant relied on the lay evidence of Mr Ross as to the delays that were experienced and on an analysis of an expert building consultant, Mr George Zakos, based on Mr Ross' evidence, which yielded 62 days' delay.

128 The plaintiff relied on evidence from Mr Jonathan Shahady, a programming consultant, whose analysis yielded 10 days.

129 The referee accepted Mr Ross' evidence and the analysis of Mr Zakos based on it.

130 The referee preferred Mr Zakos' approach to that of Mr Shahady.

131 The challenge to the whole of the referee's findings on delay was put as follows:

a the referee should not have accepted Mr Ross' evidence unless corroborated by objective material or against the defendant's interest because the evidence established that he was prepared to lie under oath if it was to the defendant's advantage;

b Mr Ross' calculations of time (and his revised programs upon which Mr Zakos carried out his analysis) should accordingly not have been accepted by the referee;

c Mr Zakos' evidence should accordingly not have been accepted; and

d Mr Shahady's evidence should accordingly have been accepted and should be accepted now and the report adopted with the modification that the liquidated damages claim and the extension of time claim as contended for by the plaintiff be incorporated.

132 The referee made findings, including the following, with respect to the evidence of Mr Ross, Mr Zakos and Mr Shahady:

"*41. Ross was the main factual witness for Quasar and he has given extensive evidence in the Reference (see Section C of this Report). However, at one stage in his cross-examination, he responded to a question as follows (T. 836.1-4):*

"Q. So that if the financial benefit to Quasar was sufficient, you would be prepared to make inaccurate statements; is that your position?

A. As I say – yes."

CorCourt submits that this response from Ross is a typical example of his approach to the project and that as a result, the entirety of his evidence has been discredited. Moreover, there is a further passage of his cross-examination which resulted in Ross seeking to rely on the immunity afforded to him (against self-incrimination) under S.128 of the Evidence Act (see T. 2229-2233). CorCourt also relies on this evidence to submit that Ross' testimony should not be given any weight except where it is independently corroborated by documents.

42. Having reviewed Ross' evidence with particular attention to the matters outlined above, I do not agree with CorCourt's submissions. While Ross' answer at T. 836.4 certainly indicates that he was prepared to be economical with the facts if it was in Quasar's interests to do so, that is not an uncommon trait amongst some project managers. Whatever faults may have been exposed in Ross' character, I have found nothing in his evidence under oath in the Reference which is demonstrably false. On the contrary, I have found Ross' detailed evidence of the facts and circumstances arising during the project to be generally reliable and in most cases to be corroborated by documentary records. My main concern with the weight of Ross' evidence is that I have found (as with Corbett) that Ross' recollections are frequently coloured by hindsight. In summary, I accept the majority of Ross' evidence although parts of it need to be treated with caution. …

154. I have considered the reports from Zakos and Shahady in some detail and I have participated in several conclave discussions with them concerning their respective approaches to the analysis of the various programmes produced for the Picton Mall project and to the determination of Quasar's entitlements to EOT. In all this evidence, I have found little or nothing to support CorCourt's submission that I should accord Shahady's

opinions greater weight. Shahady's CV (Exh. E10) is impressive, but again there is nothing from which I could conclude that he is better qualified and experienced than Zakos. On the contrary, I am in no doubt that both Shahady's and Zakos' qualifications and experience make them equally well suited to carry out the programming analyses and to express the expert opinions which they have provided in the Reference. As far as Zakos' approach to the analysis of Quasar's programmes is concerned, I have concluded (see below) that in the context of the Picton Mall project, Zakos' analysis is, if anything, to be preferred over Shahady's approach. Additionally, I do not see any substance in CorCourt's criticisms of Zakos for his reliance on Ross' evidence. As I have previously noted, I have found Ross' evidence in relation to the events and circumstances which occurred during the construction work on the site to be generally reliable and in most instances, it is corroborated by the contemporaneous documentation. …

166. In relation to the questions raised in the Reference proceedings concerning the impact of the various delays on the construction work and thus Quasar's entitlement to EOT, both experts relied on Ross' revised programmes for their analyses. Zakos, on behalf of Quasar, carried out an independent assessment of the entirety of Quasar's EOT claims (Exh. E8, section 3.0). Zakos thus determined a total entitlement of 80.5 days EOT, the effect of which would be to extend the Date of Practical Completion of the works to 12 October 2004 (as pleaded by Quasar at para. 35 of the FAXS). In his assessment, Zakos relied on Ross' factual evidence (Exhs. D13 and D14) to assess when each delay occurred and the impact of that delay on the (Ross adjusted) programme current at the time of the delay. …

174. In Zakos' analysis, the key variations (and groups of variations) which are asserted to have caused delays (and EOT) to the project are identified as nos. 64, 9, (22, 36, 37), (68, 72), (73, 74, 75, 76, 79, 80, 81, 82, 83, 86) and 35 respectively. As I have noted above, an entitlement to each of these variation claims has already been determined in Quasar's favour. In respect of each of the subject variation claims, I have reviewed Ross' evidence concerning his assessment of the delay effect of the variation and I have considered the details within Zakos' and Shahady's analyses. I have also had regard to the matters raised in CorCourt's and Quasar's final submissions (paras. 129-138 and 341 respectively). As a result, I have concluded that Ross' evidence is generally reliable and that Zakos' reliance on Ross' evidence does not detract from my choice of Zakos' analysis as the preferred approach."

133 The thrust of the submission that the referee should not have accepted Mr Ross' evidence was that:

a Mr Ross' acceptance that he would be prepared to make inaccurate statements if it worked to the financial benefit of the defendant was a matter that should have caused the referee to reject his evidence entirely;

b Mr Ross' evidence of delays had not been made with reference to site diaries and that he had made a false statement in a statutory declaration on 13 February 2006 to the effect that he had summarised man hours expended on site "using site diaries". It was accepted, however, that much of the force of this point has been lost because on 18 October 2006 Mr Ross swore an affidavit making it clear that he was only able to locate site diaries for the period to June 2004 and from then his calculations were based on his knowledge of the trades and activities performed and the amount of work that the defendant performed; and

c Mr Ross' estimations had been prepared after the event and were therefore unreliable.

134 The basal premise upon which this submission rests is a false one. It by no means follows from Mr Ross's concession that the entirety (or for that matter any) of his evidence under oath before the referee should have been rejected. On one view of things his credit was enhanced by the concession he made under oath.

135 In any event, the referee gave proper and detailed consideration to the sustained attack on the credit of Mr Ross and formed the conclusion that his evidence should be accepted. He articulated clearly and cogently his reasons for his conclusion. It should be said that he gave equally proper consideration to the attack on the credit of Mr Corbett whose evidence he did not accept in a number of respects.

136 The referee was fully entitled to reach the conclusion that Mr Ross' evidence should be accepted and there is no basis to warrant interference with it.

137 It follows that he was also fully entitled to conclude as he did that the evidence of Mr Zakos based on the factual evidence of Mr Ross should be accepted.

138 He also gave proper and detailed consideration to the contest between Mr Zakos and Mr Shahady and accepted Mr Zakos, a course which he was likewise fully entitled to take and there is no basis to warrant interference with that finding either.

139 The challenge to the whole of the referee's findings on delay is unsustainable.

140 I turn then to the specific challenges.

Variation number 35

141 37.5 days out of the 62 days allowed by the referee was attributed to variation number 35, which concerned an alteration and amendments to aluminium shop front details including the provision of auto doors.

142 The plaintiff's submission was that the referee's finding was based on the evidence of Mr Zakos which, in turn, was based on the evidence of Mr Ross and that in respect of variation number 35 Mr Ross' own evidence did not establish 37.5 days but only 20 days.

143 The defendant did not accept that Mr Ross' own evidence did not establish 37.5 days but put that in any event that there was evidence from Mr Zakos based on an independent assessment of delays that enabled the referee to make the finding which he did and that accordingly it should be adopted.

144 In par 3.19 of his report dated 30 October 2006 Mr Zakos dealt with variation number 35 in the following terms:

"3.19 Quasar Variation 35 – EOT claim 75 days.

(a) I refer to paragraphs 170-193 of the Ross Affidavit. I agree with the analysis of Mr. Ross in support of the extension of time claim and with this response to the assessments of Mr. Kinsley, Mr. Oates and Mr. Shahady as set out in those paragraphs.

(b) The programme activities delayed are ID335 through to ID338 which deal with the changing of the glazed entries to the external tenancies. All these activities are shown as being critical on the programme. This activity was to commence and complete on 4 May 2004 (Day 144)(ID335 – Shop drawing approval). The other following activities following this one, flowed after approval of the shop drawings had been given.

(c) The actual approval for Quasar to proceed with the revised glazed entries was not given by the architect until 29 June 2004 (Day 181), some 37 days after the programmed start. This delay in giving approval for Quasar directly delayed the start of a critical activity by 37 days (Day 181-144).

(d) I have assessed that delay period involved was from the 4th May 2004 to the 29th June for the instructions received by Quasar to proceed with the revised glazed entries to the external tenancies.

(e) Therefore, based on my opinion that a critical activity was delayed as a result of Variation 35, I conclude that a critical delay of 37 days occurred to the works."

145 During his oral evidence the following exchange took place between the referee and Mr Zakos at T2185.

"THE REFEREE: You are not going to have an opportunity to revisit your report. As I understand it from what you have just said, as set out in your report you have relied on Mr Ross's version of the facts.

MR ZAKOS: Yes.

THE REFEREE: To the extent ultimately that I find they are correct, then it doesn't affect your analysis because that is what you have relied on.

MR ZAKOS: Correct.

THE REFEREE: To the extent that some of Mr Ross's factual findings turn out in my view to be incorrect, then that will impact upon your analysis potentially, but my understanding so far from your report and your descriptions of what you have done, I can determine how that impacts upon your analysis without any further input from you. Do you have any concerns about what I have just said?

MR ZAKOS: I don't think so. I don't see any immediate concern, because it is based on the Ross facts. If you find for the Ross facts, that is the basis of my opinion."

146 In par 174 the referee said "I have reviewed Ross' evidence concerning his assessment of the delay effect of the variation and I have considered the details within Zakos' and Shahady's analyses".

147 Mr Ross made the claim for variation number 35 in notice of delay number 8 in which he estimated 20 days to be the period of the delay. Mr Ross was cross-examined on that claim and the following exchange took place between him and counsel at T2136 – 2137.

"MR TAYLOR: Q. Do [you] see item 334 on revision H says "Shop drawing approval"?

A. Yes.

Q. And that's in respect of the external tenancies?

A. Yes

Q. Although it's marked as being planned for on 4 May, in fact the program indicates that it wouldn't become critical until about 20 May; is that fair?

A. Well, it's got 14 days float on it.

Q. In other words, it wouldn't cause any delay to the completion of the project so long as it is provided within that 14-day period?

A. Yes.

Q. You were in a position as at 27 May, the date mentioned on that delay notice, to commence the measure and manufacture of the shopfronts, were you not?

A. That appears to be the case, yes.

Q. Not just on the program, but in fact?

A. Well, the program says "measure 21 May".

Q. And the position, I want to suggest to you, is that in late may and well before late June when you had that conference with Mr Corbett, which was followed up by the informal written instruction, you were in a position to do measures and commence manufacture of the shopfronts?

A. I believe so, yes.

Q. So that much of the shopfronts were not delayed until the meeting in late June; it was only the auto doors that were awaiting that approval in that meeting?

A. No, there were still a lot of questions about the shopfronts in terms of what we were actually building, and that continued for quite some time.

Q. What I want to suggest to you is that the shopfronts were being installed on the site in early June 2004?

A. There may have been some, yes.

Q. That was because much of what was involved in the shopfronts had been approved?

A. It wasn't really approved until 29 June.

Q. The auto doors weren't approved until 29 June, but the shopfronts were being installed prior to 29 June?

A. But the auto doors and the shopfronts were all combined together as a unit. That whole western elevation of the external tenancies, they go hand in hand.

Q. So are you telling us that Quasar went ahead and installed windows, part of the shopfronts, without obtaining approval?

A. Well, I didn't think we'd built the auto doors, and the shopfronts until the auto doors until after 29 June.

Q. So you would disagree with me, would you, if I suggested that you were installing the windows of the shopfronts at the beginning of June?

A. Not to that western elevation.

Q. I see. We will come back to that. Mr Ross, you will see that in paragraph 177 of your affidavit you refer to a conversation directed at the doors; do you see that?

A. Yes.

Q. And that's because that was the matter that hadn't been approved as at 24 June?"

148 Mr Zakos was also cross-examined on the document at T2627 – 2628:

"Q. Could I show you a document which is MFI42 part of exhibit P18; is that a document to which you had regard in calculating the delay attributable to variation 35?

A. If this was a document that was included in the Ross affidavit variations I would have seen it.

Q. If it wasn't include [sic] in the Ross affidavit?

A. I couldn't have seen it.

Q. If you assume that it's not included in the Ross affidavit, then we can take it that you paid no regard to this document; that's correct?

A. Correct.

Q Do you see that it's a document from Mr Ross asserting a delay commencing 27 May 2004 and dated 28 May 2004?

A. Yes.

Q. Would you accept that had you access to that document at the time you prepared your report, it may have made a difference to your calculation of the period of the delay?

A. Correct, it may have."

149 In its written submissions to the referee the plaintiff put a submission as follows at par 138:

"Secondly, a further chunk of this delay claim is removed by the acknowledgement or concession by Mr Ross that no delay was occasioned by this item until 27 May 2004 as claimed by Quasar in the Notice of Delay. Mr Zakos accepted that this document would change his view had he been provided it by Quasar when he prepared his report."

150 The plaintiff's submission that Mr Zakos accepted that the document would have changed his view went further than what Mr Zakos actually accepted. He accepted that the document **may** have made a difference to his calculation of the period of delay.

151 The cross-examination, however, did not extend to seeking, let alone obtaining, from Mr Zakos a concession that the material which he relied upon in par 3.19 of his report was wrong or that his conclusions and assessment of the delay were incorrect.

152 The defendant in its written submissions to the referee put amongst others that the plaintiff's submissions misstated the purport of Mr Ross' evidence on the matter and that the reference in the notice to an estimated delay period of 20 days was not itself a concession. It also put that there was other evidence that indicated lengthier delay.

153 The evidence which the plaintiff placed before the Court was very limited and did not even include pars 170 – 193 of the affidavit of Mr Ross referred to in par 3.19(a) of Mr Zakos' report of 30 October 2006.

154 In his evidence at T2136 – 2137 Mr Ross did not accept that they were installing the windows **of all shop fronts** at the beginning of June. The plaintiff threatened to come back to the issue but I was not referred to any passage where that threat was carried out.

155 In my view on the material before him it was clearly open to the referee to find as he did. It certainly cannot fairly be put that it was not open to him to do so. Moreover, on the material before the Court it is certainly not open to make a finding that only a 20 day critical delay was occasioned by variation number 35.

156 In the circumstances the referee's finding on variation number 35 is to be adopted.

Variations number 22, 36 and 37

157 In accepting Mr Zakos' evidence the referee accepted a 6-day delay adjustment in respect of variations 22, 36 and 37 which was based on Mr Ross' "program G", the delay being from 15 to 21 March 2004.

158 The variation related to the "architect" issuing revised details requiring set downs in the slabs for the cool rooms.

159 The submission during the adoption hearing was that Mr Ross' evidence showed that program G only commenced on 6 April 2004 and therefore acceptance of Mr Zakos' evidence must have been in error and that he should have assessed it under "program E".

160 The joint report of the experts showed the claim as being under "program G".

161 In relation to this claim the defendant made the following written submission to the referee.

*"Ross dealt with the issue relating to this variation in his evidence in re-examination: **[T2355/17 – 2357/14]**. The submission made by Corbett Court is that Zakos has erroneously assessed this variation delay under program G and that it should have been assessed under program E. This submission appears to be borne of the selective factual analysis carried out by Shahady.*

Ross's evidence establishes that on 17 April 2004 Corbett Constructions forwarded the document at [Q3/3/22/29] to Quasar indicating that "Variation No 22 for coolroom setdown in Tenancy ¾ is not approved". This delayed Ultrafloor in completing the design of the setback to that tenancy. In any event as at 24 March 2004, Ultrafloor had not commenced the design of the slab with respect to the amendments of the affected tenancies and that (even in the absence of the instruction of 17 April 2004) would take one to two weeks to complete.

In the circumstances Zakos was correct in assessing the delay under program G."

162 The referee resolved this factual contest in favour of the defendant on the basis of evidence upon which it was open for him so to do.

163 In the circumstances the referee's findings on variations number 22, 36 and 37 are to be adopted.

Variations number 68 to 72

164 Variation number 68 involved installing two air conditioning works to some of the tenancies which took approximately two days to carry out.

165 Mr Zakos said in his report of 30 October 2006 at par 3.30 the following:

"*(c) As a result of variation 68 and 72, Quasar had to install air-conditioning works to some of the tenancies. The works took approx. 2 days to carry out.*

(d) I have assessed that the critical delay period involved was from the 29 June 2004 (Day 181) until 30 June 2004 (day 182), the time taken to carry out the revised instructions received by Quasar. This yields 2 days of critical delay.

(e) Therefore, based on my opinion that a critical activity was delayed as a result of Variation 68 and 72, I conclude that a critical delay of 3 days occurred to the works."

166 There appears to be an inconsistency in that sub-pars (d) and (e) are inconsistent with Mr Zakos finding two days of critical delay but concluding that three days delay occurred.

167 In par 3.39 Mr Zakos makes it clear that one of the two days concerned was concurrent with variation number 35.

168 The plaintiff put that only one day was sustainable out of the three which the referee allowed.

169 The defendant made the following written submission to the referee:

"Paragraphs 134 and 135 deal with variations 68 and 72. Corbett Court criticises Zakos's assessment of 3 days in item 4.3.1 of the Joint Report.

*The thrust of paragraph 134 is not readily apparent since in paragraph 3.30 of his report [**EXHIBIT #E8**], Zakos made it clear that he assessed 2 days critical delay for variations 68 and 72. He subsequently altered his assessment to 3 days after reviewing the material and the adjusted programs for the purpose of the joint report. If the criticism is that he altered his position from his initial assessment then that is a criticism that applies equally to Shahady.*

The submission in paragraph 35 demonstrates the difficulty with an anecdotal attempt at critical path analysis, which cannot take into account the changes in interaction between linked activities and durations that computer modelling is designed to achieve and demonstrate. Zakos's methodology using the adjusted program H resulted in activity ID 340 being delayed by 3 days. This finding using the Zakos methodology was checked and verified by Shahady, as indicated in the Summary of Delay Conclusions (Item 4.3.4) of the Joint Report. If Zskos's [sic] methodology is accepted as the preferable methodology, then his finding of 3 days delay is sound.

It is important to note that Item 4.3.4 of the Joint Report represents more than a mere mathematical verification by Shahady of the calculations carried out by Zakos. This is evident from the fact that when checking and verifying Zakos's methodology in Item 4.3.4 Shahady arrived at differing conclusions with respect to a number of delays and as to the total extension of time allowable."

170 Mr Zakos' evidence provided a basis for a finding that three days were to be allowed.

171 The referee decided the contest in favour of the defendant by accepting that evidence and it was open to him so to do.

172 In the circumstances the referee's finding on variations number 68 to 72 are to be adopted.

Conclusion

173 It follows that the plaintiff's challenges to the referee's three particular assessments of time fail.

OTHER MATTERS RAISED BY THE PLAINTIFF

174 The plaintiff made a submission (in the end put faintly) that the referee had misconceived the onus.

175 It is plain that the referee was faced with factual and legal contests. I have dealt with legal errors above and their effect.

176 So far as factual matters are concerned he properly and correctly resolved them on the probabilities on the material before him.

177 The plaintiff also raised an issue with respect to variations (variations number 73 to 86) which would have affected only the referee's finding on the adjusted date for practical completion. It is not necessary to deal with that submission because even if it succeeded it would not have brought the adjusted date for practical completion to a date earlier than 17 July 2004 and therefore would have no effect even if resolved in favour of the plaintiff.

THE DEFENDANT'S CHALLENGE

178 The defendant initially sought a variation to the report in the following terms: "Reduction of the amount payable by the defendant to the plaintiff by $33,536 in respect of preliminaries costs allowed for defect rectification".

179 The referee did not however award that amount for preliminaries in respect of damages for defects. He in fact allowed $36,542 under that head.

180 The variation in the amount initially sought related not only to preliminaries but also to a 20 per cent builder's margin which the referee allowed in respect of other amounts for defect rectification (ie not preliminaries).

181 The referee reached the figure he allowed (as appears from paragraphs 56-58 of the report) by applying a rate of 54 per cent of the direct damages found of $56,392, totalling $30,452, together with a builder's margin on that amount of 20 per cent (ie $30,452 plus $6,090) on the basis that Mr Finnane's estimate of preliminaries totalled $19,230 which was 54 per cent of Mr Finnane's direct rectification cost estimate of $35,435.

182 During the adoption hearing no submissions were put in respect of the referee's allowance other than for preliminaries. Oral submissions restricted the challenge to one that there was no evidence before the referee that the actual cost of preliminaries would exceed $19,230 (there was no challenge to the 20 per cent margin). This approach would have resulted in the referee allowing $23,076 (ie $19,230 plus 20 per cent), as opposed to $36,542 which he allowed – a difference of $13,466.

183 I reject the defendant's submission that the report should be varied with respect to the amount which the referee allowed for preliminaries on defect rectification. The referee's approach was a matter of judgment within his field of expertise and his reasoning process is disclosed. Moreover, his conclusion is manifestly reasonable and not arbitrary. It was based on an extrapolation from the evidence of the defendant's own independent expert.

184 The report should be adopted with respect to the finding that $30,452 (before the builder's margin) be allowed for preliminaries with respect to defect rectification for which the defendant is liable.

CONCLUSION

185 The report is varied by reducing the amount of $736,263.77 found to be due by the defendant to the plaintiff by the amounts of $163,599 and $1,260 and is otherwise adopted.

186 I will hear the parties on costs and with respect to any further issues that remain outstanding.

Mr P.T. Taylor SC with M.E. Luitingh (Plaintiff) instructed by Swaab Attorneys
D.D. Feller SC with A.S. Kostopoulos (Defendant / Cross-Claimant) instructed by Kreisson Legal