Judgment : Beazley JA ; Giles JA ; Basten JA : New South Wales Court of Appeal. 10th October 2005.

1 **BEAZLEY JA:** I have had the advantage of reading in draft the reasons of Giles JA and Basten JA. I agree with the reasons of Basten JA. I also agree with the reasons of Giles JA in respect of damages, which state in more detail the issues which arose in this case in relation to damages.

2 **GILES JA**: The circumstances in which the questions in the appeal arose are described in the reasons of Basten JA, which I have had the advantage of reading in draft. I draw upon his Honour's reasons and avoid undue repetition.

Progress claim 8

3 FPM Constructions claimed to be entitled to payment of $122,921.54 certified by the Superintendent on 28 March 2003. The Council contended that it was entitled to withhold payment pursuant to cl 43.3 of the Contract, on the ground that the statutory declaration provided to the Superintendent as required by cl 43.2 was false.

4 A statutory declaration declared by Mr Anwar Yazbek as representative of FPM Constructions was provided on 2 April 2003. It said that all subcontractors had been paid, which in terms satisfied cl 43.3. The Council contended that it was false, and therefore of no effect as a statutory declaration satisfying cl 43.2, because money was due and payable to at least three subcontractors: Allen Jack + Cottier ("AJC"), architects; Barry C Smith & Associates Pty Ltd ("Smith"), mechanical and electrical engineers; and Acor Consultants Pty Ltd ("Acor"), structural, civil and hydraulic engineers.

5 FPM Constructions accepted that, if the unpaid subcontractor fell within cl 43.2 and its claim to payment was not disputed, a statutory declaration in which it was falsely stated that all subcontractors had been paid all moneys due and payable to them would be ineffective for the purposes of cl 43.2. It did not say that cl 43.2 was satisfied by a statutory declaration which, although in the right terms, was false. It contended, however, that -

(a) AJC and Smith were not subcontractors falling within cl 43.2 because, either pursuant to cl 43.4 of the Contract or under an arrangement with the Council, they were to be paid directly by the Council;

(b) no moneys were due and payable to AJC or Smith because on 1 April 2003 Mr Yazbek withdrew his approval of payment to them; and

(c) payment to AJC, Smith and Acor was disputed.

6 It is necessary first to consider the operation and purpose of the requirement in cl 43.2 for a statutory declaration.

7 Clause 43.2 stated a pre-condition to entitlement to payment, not an obligation. I consider it is better seen as a non-promissory condition (see ***Brewarrina Shire Council v Beckhaus Civil Pty Ltd*** (2003) 56 NSWLR 576 at [22]; ***Perri v Coolangatta Investments Pty Ltd*** (1982) 149 CLR 357 at 551-2, 565), and the Contractor would not be in breach of the Contract if it failed to provide a statutory declaration. If a statutory declaration was not provided the Principal could, but did not have to, withhold payment.

8 If the Contractor could not provide the statutory declaration, for example if it did not have funds enabling payment or if there was a genuine dispute with a subcontractor, the Contractor was not without remedy. The last paragraph of cl 43.3 allowed the Contractor to provide to the Superintendent "satisfactory proof of the maximum amount due and payable to … subcontractors", and entitled it to payment the amount of the certified payment in excess of that maximum amount. If the Contractor was without funds it could also invite the Principal to act, or the Principal could itself decide to act, by making direct payment out of money payable to the Contractor, pursuant to cl 43.4, whereupon the statutory declaration could be provided and the Contractor would be entitled to payment of the balance of the certified amount.

9 Clause 43.2 benefited the Principal, by motivating the Contractor to make timely payment to subcontractors; so also did cl 43.4 benefit the Principal, by enabling it to ensure subcontractors were paid. The risk to progress of the works because of a dissatisfied subcontractor was reduced, and the Principal retained control of money in the event of a claim under legislation such as the *Contractors Debts Act* 1997.

10 This operation and purpose gives little encouragement to a confined construction or application of the reference in cl 43.2 to moneys due and payable to subcontractors.

(a) Direct payment

11 The Contract provided in cl 43.4 for deduction by the Principal from the amount otherwise payable under a payment certificate in respect of work performed or material supplied by a subcontractor, and payment of that amount on behalf of the Contractor directly to the subcontractor. Any direct payment was "at the Principal's sole discretion".

12 The arrangement with the Council appears to have been something other than giving effect to this provision, and was obscure, described by the judge only as an arrangement whereby there would be payment directly by the Council. According to Mr Yazbek, he was asked by Council officers if he had any problem with payment of AJC, Smith and Acor directly subject to approval of their invoices, and he said that he did not. Mr Yazbek told the subcontractors to send their invoices to the Council, with copies to him for approval. A necessary relationship with an amount payable to FPM Constructions in respect of the work the subject of the invoices was not demonstrated, nor was it purely discretionary. Whatever the arrangement, it was accepted that it left FPM Constructions with a liability to the subcontractors.

13 FPM Constructions submitted that where the Council knew whether or not AJC and Smith had been paid, from acting or not acting pursuant to cl 43.4 or from giving effect to the arrangement, there was no point in a statutory declaration which extended to telling it that they had been paid, or in the Council withholding payment to it when they had been paid. Since the Council would already know whether or not they had been paid, cl 43.2 should be construed to exclude from the subcontractors falling within it those subcontractors dealt with pursuant to cl 43.4 or pursuant to the arrangement.

14 I do not think the arrangement was a giving effect to cl 43.4, but if it was I do not agree that cl 43.4 called for a construction of cl 43.2 such that the subcontractors to which cl 43.4 referred did not fall within it. Clause 43.4 did not modify the content of the statutory declaration. It applied where the Contractor was unable to provide the statutory declaration as well as where the Contractor could and did provide it. Failure to provide a statutory declaration could well be the occasion for the Principal to make direct payment in the exercise of its discretion. If a statutory declaration was not provided, or the statutory declaration which was provided was ineffective because false, the Principal was entitled to withhold payment and in its discretion could make direct payment pursuant to cl 43.4. The two provisions were complementary, and cl 43.4 did not qualify cl 43.2.

15 On the alternative basis of an arrangement outside cl 43.4, the submission fares no better. A side arrangement could scarcely alter the proper construction of cl 43.2. Whatever arrangement there may have been for direct payment of some subcontractors, outside cl 43.4, FPM Constructions knew or could find out whether the subcontractors had been paid, and if they had been paid could provide the requisite statutory declaration. Clause 43.2 meant what it said, and the subcontractors the subject of the arrangement were subcontractors falling within it.

(b) Withdrawal of approval

16 This is linked with the contention that payment to the subcontractors was disputed, but is a separate matter. The approval was Mr Yazbek's approval of invoices involved in the arrangement for direct payment. Its withdrawal had no effect on whether the amount of the invoices was due and payable. A debtor cannot make an amount undue or unpayable by declining to approve its payment.

(c) Dispute

17 If FPM Constructions genuinely disputed the subcontractors' invoices, the statutory declaration was nonetheless false. At the least, moneys might have been due and payable, and it was false to declare as an absolute that all moneys due and payable had been paid. In my opinion, on the operation of cl 43.2 earlier described it required the statutory declaration as an absolute, and a Contractor in genuine dispute with a subcontractor could not provide the statutory declaration. The Contractor had to fall back on providing satisfactory proof as allowed by the last paragraph of cl 43.3, and thereby obtaining the balance of the certified amount. The disputed amount would be held, if the Principal so chose, until the dispute was resolved.

18 If that be incorrect, I am not satisfied that there was a genuine dispute as to at least the AJC and Smith invoices; the statutory declaration was false for that reason.

19 The work the subject of AJC's invoices was carried out in or prior to June 2002: it stopped work at that time because earlier invoices had not been paid. $78,285.60 remained unpaid as at 2 April 2003, representing part of an amount invoiced on 16 July 2002 and the whole of the amounts invoiced on 10 October 2002 and 5 December 2002. All three invoices had been sent to the Council. On 18 January 2003 Mr Yazbek endorsed the last as approved for payment; presumably the others had also been approved. Smith's two invoices were dated 2 December 2002. Both were sent to the Council. It had also earlier stopped work because it was not being paid. On 18 January 2003 Mr Yazbek endorsed them as approved for payment. Why the invoices were not promptly paid did not appear; in mid February 2003 Mr Yazbek was complaining that the Council had not paid AJC. Mr Yazbek withdrew approval on 1 April 2003, saying he did so "[d]ue to the number of issues raised and comments made by [the Council's] consultant Paul Stevenson on the design documentation currently provided". This was not elucidated in the evidence.

20 In his affidavit Mr Yazbek said that he withdrew approval "because I was of the view that the design work which they had provided was unsatisfactory and was not suitable for use as a design for construction by the Plaintiff". But in his response on 2 April 2003 to the show cause notice Mr Yazbek rejected what he described as the Council's "accusation of providing a false statutory declaration", being an earlier statutory declaration of 30 January 2003, on the ground that there was no money then due and payable because the invoices did not become payable until 15 February 2003. Although Mr Yazbek was directing himself to the end of January 2003, in April 2003 reference to later dispute could be expected.

21 The judge was critical of Mr Yazbek's credibility, although not specifically as to the statutory declaration of 2 April 2003 because he focused on the earlier statutory declaration. The assertion of a dispute on 1 April 2003 appears to have been a device intended to remove the amounts of the invoices from the category of moneys due and payable.

22 In my opinion, FPM Constructions was not entitled to be paid the amount certified on progress claim 8.

Progress claim 9

23 FPM Constructions claimed to be entitled to payment of $285,580.90 the subject of progress claim 9 delivered on 9 April 2003. The Council contended that it was not obliged to pay because the Contract was terminated on 10 April 2004, before FPM Constructions became entitled to payment. For present purposes I assume that the

Contract was validly terminated, see later in these reasons. The Superintendent did not issue a payment certificate on the progress claim, prior to termination or at all.

24 I will return to the question of a false statutory declaration in relation to progress claim 9.

25 FPM Constructions contended that the termination of the Contract discharged the parties from further performance, but did not divest "rights which have already been unconditionally acquired" (***McDonald v Dennys Lascelles Ltd*** (1933) 48 CLR 457 at 477 per Dixon J); it said that it had an accrued right to payment. If it did, it could recover the payment notwithstanding termination (see ***Hyundai Heavy Industries Co Ltd v Papadopoulos*** (1980) 1 WLR 1129; ***Stocznia Gdanska SA v Latvian Shipping Co*** (1998) 2 WLR 574). The argument came down to the submission that, by force of cl 42.1, having delivered the progress claim it had an accrued right to recover either the amount certified by the Superintendent or, if the Superintendent did not issue a payment certificate within 28 days, the amount of the progress claim; that it had the right at the time the Contract was terminated even though it was not then known which of the amounts it could recover because there had not been certification and the 28 days had not elapsed; and that, after the lapse of the 28 days without certification, the amount was known to be the amount of the progress claim.

26 We were referred to ***Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd*** [2004] VSCA 18. Implicit in the discussion of ground 7 in its [31]-[45] was that the contractor under AS4303-1999 had an accrued right to be paid its progress claims at the time the contract was terminated. From the decision at first instance, ***Minson Nacap Pty Ltd v Aquatec-Maxcon Pty Ltd*** [2000] VSC 402, the progress claims 13, 14 and 15 had been delivered and the Superintendent had not issued payment certificates within the required 35 days, all before termination. The case does not assist on the present question.

27 By cl 44.10, on termination of the Contract the rights and liabilities of the parties were "the same as they would have been at common law had [FPM Constructions] repudiated the Contract and [the Council] elected to treat the Contract at an end and recover damages". This did not exclude the accrued right principle of ***McDonald v Dennys Lascelles Ltd***; it made it necessary to decide whether FPM Constructions had the accrued right.

28 In asking whether FPM Constructions had the accrued right, there must be considered whether the Superintendent had power to issue a payment certificate after termination of the Contract. If termination of the Contract brought to an end his power in that respect, FPM Constructions could not have a right to the amount certified by him, because it could not call for certification. Nor do I think it could have a right to the amount of the progress claim in default of certification within 28 days, because the default provision assumed possible, indeed expected, certification by the Superintendent and operated in default of that occurring. I do not think it operated if the default was that the Superintendent's power had come to an end.

29 It is well established that the acceptance by an innocent party of the repudiation of a contract does not bring the contract to an end for all purposes. An arbitration clause part of the contract may continue to have effect (***Heyman v Darwins Ltd*** (1942) AC 356; ***Codelfa Constructions Pty Ltd v State Rail Authority of New South Wales*** (1982) 149 CLR 337), as may a choice of forum, a choice of law or a limitation clause (***Photo Production Ltd v Securicor Transport Ltd*** (1980) AC 827; ***Port Jackson Stevedoring Pty Ltd v Salmond and Spraggon (Australia) Pty Ltd*** (1980) 144 CLR 300).

30 In ***Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd*** (2002) BCL 322 this Court held that the Superintendent under AS2124-1992 could grant an extension of time after the contract had been terminated, even if the contractor had not applied for it prior to termination; see at [80]. The decision has been questioned by a learned commentator in 18 BCL 281, although with less doubt if the contractor had applied for the extension of time prior to termination, and does not directly transpose to certification of payment under the Contract. The notion of a Superintendent's power surviving termination for some purposes was nonetheless recognised.

31 The Contract provided for appointment of a Superintendent, and provided that the Principal should ensure that there was at all times a Superintendent and that "*in the exercise of the functions of a Superintendent under the Contract*" the Superintendent should act honestly and fairly, in a timely manner and reasonably (cl 23). The Superintendent was given a number of "functions". Some could only arise while work was being carried out (for example, interpreting ambiguities or discrepancies (cl 8.1), approving a proposed subcontractor (cl 9.2), providing information for setting out (cl 28.1), directing the order of works (cl 33.1), directing suspension of work (cl 32.1) and variations to the work (cl 40.1)). Others were not functions to be performed only while work was being carried out (the obvious example is issuing the Final Certificate (cl 42.6)). Granting extensions of time and issuing payment certificates were functions which could be performed after work had ceased, since they called for assessment of past carrying out of work.

32 It is another question again whether the functions could be performed after termination of the Contract. Reference to exercise of the functions of a Superintendent "under the Contract", however, did not in my view mean that the Contract had still to subsist. It meant that the functions were found in the Contract. Nothing else confined the exercise of the function of issuing a payment certificate, at least where the exercise of the function has been initiated by delivery of a progress claim, to the subsistence of the Contract.

33 The duration of the Superintendent's power must be found in the parties' intention as revealed in the Contract. There was no express revelation. There was, however, provision for FPM Constructions to receive periodical payment for work it had carried out, with a mechanism for arriving at an amount payable. The mechanism of progress claim followed by certification and payment or default payment recognised that FPM Constructions

should be paid for work it had carried out, the payment being on account only and subject to a final working out of the position between the parties (cl 42.1 last sentence). There was obvious good sense in the Superintendent dealing with a progress claim outstanding at the time of termination, in order to give effect to the mechanism for payment for work carried out in the past, and a Principal which terminated the Contract (or accepted a repudiation) could scarcely complain if it nonetheless had to pay for the past work in accordance with the contractual mechanism earlier set in motion.

34 In my opinion, despite the termination of the Contract the Superintendent could issue a payment certificate on progress claim 9.

35 The effect of cl 23 was that the Council had to ensure that the Superintendent dealt with the progress claim, and to that extent further performance was required of it. But the Contract made provision for failure in timely dealing with the progress claim, and so for what happened when the Council did not ensure that the Superintendent dealt with it – not by way of damages, but by the default entitlement to payment of the amount of the progress claim.

36 In ***Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd (in liquidation)*** (1936) 54 CLR 361 a selling agent was appointed to buy tractors from the manufacturer in America for resale, and was entitled to a percentage rebate payable on arrival of the tractors in Australia. It bought some tractors. The agency agreement was thereafter terminated, but before the arrival of the tractors. It was held that the manufacturer was liable to pay the rebate.

37 The joint judgment of Dixon and Evatt JJ included (at 379-80) - *"The first ground upon which the appellant company denies its liability to pay the percentage upon these tractors is that under the terms of the agreement no such liability could arise until the goods arrived at Fremantle and before this happened the contract ceased to have any further executory operation. When a contract comes to an end by reason of the occurrence of an event upon which the parties have by an express provision made it terminate, the question whether an inchoate liability arising thereunder does or does not become enforceable must in the end be governed by the intention of the parties. It is a rule of law that when a simple contract is discharged by the election of one party to treat himself as no longer bound after the other has committed a breach of the contract, rights and obligations which have already arisen from the partial execution of the contract shall remain unaffected (see* ***McDonald v. Dennys Lascelles*** *Ltd. No doubt it is open to the parties to provide in advance for such an event and by a stipulation to the contrary to produce some other effect. When the parties themselves have provided for the determination of the contract on a given contingency, the consequences flow altogether from their contractual stipulation and are governed by their intention, either actual or imputed. In the present case, however, all the agreement expressly says is that in any of the specified events it shall immediately terminate and be at an end. In applying such a compendious provision to a continuing relationship of the complicated character which the agreement establishes some guidance may be found in the nature of the agreement and of the obligations to which it gives rise. But primarily it remits the inquiry to a general consideration of what is involved in the sudden termination of an executory agreement under which liabilities are accruing from day to day. We are concerned only with a liability to pay a liquidated demand. In general the termination of an executory agreement out of the performance of which pecuniary demands may arise imports that, just as on the one side no further acts of performance can be required, so, on the other side, no liability can be brought into existence if it depends upon a further act of performance. If the title to rights consists of vestitive facts which would result from the further execution of the contract but which have not been brought about before the agreement terminates, the rights cannot arise. But if all the facts have occurred which entitle one party to such a right as a debt, a distinct chose in action which for many purposes is conceived as possessing proprietary characteristics, the fact that the right to payment is future or is contingent upon some event, not involving further performance of the contract, does not prevent it maturing into an immediately enforceable obligation.*

38 I do not think that provision for certification by the Superintendent involved FPM Constructions' entitlement to payment being contingent on further performance of the Contract. If the Superintendent certified, exercising his function notwithstanding termination of the Contract, FPM Constructions was entitled to payment pursuant to the Contract and notwithstanding its termination – no question of accrued right arose. If the Superintendent did not certify, the event on which the right to payment turned was the lapse of 28 days; not performance of the Contract, but if anything its non-performance. As ***Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd (in liquidation)*** shows, it does not matter that FPM Constructions' inchoate right matured into an enforceable obligation only after termination. In my opinion, subject to considering its bifurcation it should be held that FPM Constructions had an accrued right as at the termination of the Contract.

39 I do not think it matters that it was not then known whether the right would be an entitlement to the amount in a payment certificate or, in default, the amount of the progress claim. A right to damages for breach of contract may be an accrued right, although the amount of the damages is not known. A right to one amount of damages plainly differs from a right to one or other of two amounts depending upon whether a payment certificate is issued, but it demonstrates that what matters is the right, not its outcome. FPM Constructions had a right which would result in one or other of the two amounts, in the manner the mechanism worked a right to the amount of the progress claim after the lapse of 28 days defeasible to a certified amount if the Superintendent issued a payment certificate. In my opinion, that was within the accrued right principle of ***McDonald v Dennys Lascelles Ltd***.

40 I return to the question of a false statutory declaration in relation to progress claim 9.

41 The Council's pleaded defence alleged that FPM Constructions had not given the Superintendent a statutory declaration as required by cl 43.2. The language was of no statutory declaration at all, unlike that of the defence in relation to progress claim 8 which alleged that a false statutory declaration had been provided.

42 According to an affidavit of Mr Yazbek sworn on 19 June 2003, a statutory declaration declared on 16 June 2003 and referable to progress claim 9 was sent to the Council on that date. The Council's defence was dated 16 June 2003 and was filed on 17 June 2003. It is readily understandable that it was prepared and filed without knowledge of the statutory declaration.

43 The statutory declaration said that all subcontractors had been paid, in the same manner as the statutory declaration of 2 April 2003. The Council's evidence included evidence from representatives of AJC and Smith that the invoices earlier mentioned were unpaid as at 16 June 2003. That was not contested in other evidence.

44 The Council's written submissions provided to the judge identified as one of the issues - "c. *What was FPM Constructions Pty Limited ('FPM') required to deliver in accordance with clause 42.1 of the contract ('the contract') between FPM and the Council for the City of the Blue Mountains ('BMCC') in submitting payment claims (relevantly Progress Claim 8* ***and 9****) to the superintendent, was such material delivered and the effect, if relevant, of any non-delivery on the determination of the superintendent?*" (emphasis added)

45 Although the Council's defence with respect to progress claim 9 was not amended, this provides strong grounds for the conclusion that the defence with respect to that progress claim became the same as the defence with respect to progress claim 8, that the statutory declaration provided to the Superintendent was false. No reason appears why the Council would not have propounded that defence, its evidence extending to the falsity of the statutory declaration of 16 June 2003, and the written submissions indicate that it relied on the defence. The body of the written submissions, however, dealt only with the false statutory declaration in relation to progress claim 8, although it did so as part of "Issue 3: the clause 42.1 obligation", apparently referable to the issue c earlier identified. The Council accepted in the supplementary written submissions later mentioned that it "did not submit to the trial judge that Progress Claim 9 was not payable because the relevant statutory declaration was false", which in the light of the issue c must mean did not expressly submit.

46 FPM Constructions' written submissions before the judge did not address either the statutory declaration of 2 April 2003 or that of 16 June 2003. They addressed a different statutory declaration again, that of 30 January 2003 the subject of the notice to show cause. It was in slightly different terms, and was accompanied by a letter referring specifically to AJC and Smith. The judge spoke of "the" or "a" statutory declaration; he said that he "refer[red] to the other proceedings as well", but that the statutory declaration was "part of the area of concern as far as the Council was concerned when it issued the Show Cause notice … ". This left uncertain whether his Honour had in mind a statutory declaration other than that of 30 January 2003, and if so which one or ones. His Honour did hold that the defence in respect of progress claim 8 had been made out, "particularly having regard to the deficits, if I could use that word, in the statutory declaration". He did not say the same as to progress claim 9, no doubt because he upheld the defence involving termination of the Contract.

47 If the Council's submissions dealing with the false statutory declaration in relation to progress claim 8 were accepted, the defence would seem to extend inevitably to progress claim 9. Whether the falsity of the statutory declaration of 16 June 2003 was in issue at the trial, as a defence with respect to progress claim 9, was nonetheless itself in issue on appeal. FPM Constructions maintained that it was not; the Council maintained that it was. These positions were taken, with each party stating the basis for its position, when after judgment had been reserved the Court sought clarification of the treatment of the matter in the submissions on appeal. Supplementary written submissions were received. Remarkably, the Council's written submissions perpetuated the error that the statutory declaration material to progress claim 8 was the declaration of 28 January 2003.

48 FPM's grounds of appeal appeared to be influenced by a misunderstanding that the only statutory declaration in question was that of 31 January 2003. They challenged that it was false. The written submissions did the same. The misunderstanding was appreciated in the course of FPM Constructions' oral submissions, and counsel put submissions in relation to the statutory declaration of 2 April 2003 and the defence concerning its falsity with respect to progress claim 8. But in commencing his oral submissions on appeal, counsel for FPM Constructions referred to "the statutory declaration to support progress claim 9" and said, "There is no suggestion that there is any falsity about that statutory declaration". His statement was not then controverted by counsel for the Council. He did not revisit progress claim 9 after the misunderstanding came to be appreciated.

49 The Council's written submissions were responsive to those of FPM Constructions, and did not expressly deal with the falsity of either of the other statutory declarations. When in due course counsel for the Council put oral submissions in relation to the statutory declaration of 2 April 2003 with respect to progress claim 8, at their conclusion he said, "Progress claim No 9 raises similar issues in relation to the stat dec and I don't need to go over them again". He did not elaborate.

50 Counsel for FPM Constructions did not return to the matter in reply.

51 It seems to me that the likely position is that, while the falsity of the statutory declaration of 16 June 2003 was an issue at the trial, the Council did not make fully clear that it relied on that falsity as a defence with respect to progress claim 9 and, perhaps with an erroneous focus on the statutory declaration of 31 January 2003 alone, FPM Constructions did not appreciate that the Council took that defence. Unfortunately, that remained the case on

appeal, until the Court was moved to enquire further by the contrasting assertions in oral submissions to which I have referred.

52 It would be unpalatable to decide the appeal in this respect on a point over which there had been a misunderstanding. The Council submitted, however, that despite the regrettable history there could be no prejudice to FPM Constructions because it had stated plainly that progress claim 9 "raised similar issues in relation to the stat dec", FPM Constructions had not returned to the matter in reply, there was nothing FPM Constructions could say to avoid the inevitable extension of the defence to progress claim 9, and FPM Constructions had not said anything on the substance of the matter in its supplementary written submissions. It asked that, if a formal notice of contention was required, it have leave to file one.

53 The point arises only because I have held that FPM Constructions had an accrued right at the time the Contract was terminated, because its right was "[s]ubject to the provisions of the Contract", and thus subject to the Council withholding payment if a statutory declaration had not been provided to the Superintendent as required by cl 43.2. Beazley and Basten JJA are of a different view and the appeal in this respect will therefore fail on the prior question.

54 As at present advised, I consider that the statutory declaration defence in relation to progress claim 9 was before the judge, and was raised in the appeal and should be permitted to be formalised by a notice of contention; I am unable to see how FPM Constructions could distinguish recovery of progress claim 9 from recovery of progress claim 8 in this respect. I have, however, some disquiet that, even now, FPM Constructions has not addressed the substance of the defence. Accordingly, while I agree with the orders proposed by Basten JA, I have sought fully to explain the circumstances in which I have come to the view that the defence succeeds, and hence the appeal fails, as to progress claim 9.

Termination of the Contract

55 The Council claimed to have validly terminated the Contract pursuant to cl 44 and to be entitled to damages for FPM Constructions' breach of contract. FPM Constructions contended that, for a number of reasons, the purported termination was invalid, and that in any event the Council had failed to prove damages. It claimed to have itself terminated the Contract, by accepting a repudiation constituted by the Council's invalid termination, and to be entitled to recover the security sum and the retention money; it did not maintain a claim to damages.

56 FPM Constructions submitted that the purported termination was invalid because -

(i) the Council had not made out, as the precondition to giving a notice to show cause in cl 44.2, that it had committed a substantial breach of contract;

(ii) the Council had not made out, as the other precondition to giving a notice to show cause in cl 44.2, that it considered that damages may not be an adequate remedy;

(iii) the notice to show cause was defective because it did not adequately specify the alleged substantial breach, as required by cl 44.3(b); and

(iv) the notice to show cause was ineffective because the Council officer who signed it did not have authority to do so and it was therefore not given by the Principal.

57 The notice to show cause asserted failure to proceed with the work under the Contract with due expedition and without delay (cl 44.2(g)) and provision of a knowingly false statutory declaration in respect of cl 43 (cl 44.2(h)). The second allegation of breach fell away in the course of the appeal; the circumstances of the provision of the statutory declaration and FPM's response to the notice to show cause may well have shown cause or made reliance on the breach unreasonable. It is sufficient to consider the first allegation of breach.

58 As to (i), FPM Constructions' submissions were concerned to make out that its breach in failing to proceed with due expedition and without delay was not substantial; there was complaint that the judge had gone beyond the matters in the notice to show cause in finding substantial breach. This was beside the point, and the judge was led into consideration of a false issue; the false issue was perpetuated in FPM Constructions' submissions on appeal and to some extent in the Council's submissions. Clause 44.2 defined what were substantial breaches for the purpose of the Contract. One was failure to proceed with due expedition and without delay. If there was the failure, by force of the Contract there was substantial breach within cl 44.2. There plainly was the failure, going beyond the de minimis, and the precondition was satisfied.

59 As to (ii), as explained by Basten JA the precondition depended on an opinion held by or on behalf of the Council, and it was established that the opinion was held; the opinion could not be said to have been unreasonably held.

60 As to (iii), I respectfully agree with Basten JA's discussion of what is sufficient to specify an alleged breach. In my opinion, the notice to show cause did specify the failure to proceed with the work under the Contract with due expedition and without delay.

61 The breach was asserted in para 7.1 of the notice to show cause and particularised in para 8.

62 FPM Constructions submitted that the specification was defective because it was not contractually obliged to do the things in paras 8.1 – 8.3. If that were a correct reading of the notice to show cause, it may be that the notice was valid but cause could readily be shown. But it is not a correct reading. The structure of the notice to show cause was to say that, if FPM Constructions was to proceed with due expedition and without delay, it was necessary for it to do the things in paras 8.1 – 8.3, and to allege in para 8.4 that it had not done so and had

failed to proceed with due expedition and without delay. The obligation was practical, not contractual, and it was open to show cause that it was erroneous, but the notice to show cause was quite sufficient to tell FPM Constructions what the alleged breach was.

63 FPM Constructions also submitted that para 8.2 was defective, but to anyone with basic knowledge of critical path programming, as Mr Yazbek had and was known to have had – a basic critical path programme had been provided with the tender – its meaning would have been clear enough. The practical obligation was to work to a programme which did not suffer the vice of being not realistically achievable because most significant activities were on the critical path. The only obscurity lay in the concluding words, "as evidenced by the failure to proceed in accordance with those programs". Implicit in para 8.2 was that FPM Constructions had worked to programmes suffering the vice, and those words unnecessarily commented on inability to achieve them. This could not mislead; the ultimate complaint in para 8.4.2 was that the January 2003 programme had not been followed or met. As Basten JA has explained, it did not mislead.

64 FPM Constructions also submitted that para 8.4 was defective because of the words "achieved or completed as the case may be", saying that it left unclear what of the work identified in para 8.3 was not achieved and what was not completed. The submission is, with respect, without merit. It was meant that the things in para 8.3 had not been done.

65 As to (iv), for the reasons given by Basten JA the notice to show cause was given by the Principal.

66 It was accepted that, if the giving of the notice to show cause survived these challenges, cause had not been shown at least as to failure to proceed with due expedition and without delay. The termination was valid; FPM Constructions' claim to have itself terminated the Contract fails.

Damages

67 At the trial the Council contended that its damages were $2,187,419, being the reasonable cost of the works as assessed by Mr Meredith, $8,250,000, less the contract price (excluding variations), $6,062,581. This was loss of bargain damages, implicit in which was that FPM Constructions' price was very favourable and it was in all probability a losing job. The Council claimed $750,000, abandoning the excess as beyond the monetary jurisdiction of the District Court. FPM Constructions did not dispute the loss of bargain approach. It contended that the Council had not proved the reasonable cost of the works.

68 The judge apparently had some concerns about Mr Meredith's assessment, at one point referring to "some degree of speculation" in the amount at which he arrived, but was satisfied that FPM Constructions had "under-quoted for the work" and that the Council's "additional costs" would have "well exceeded" $750,000,

69 FPM Constructions maintained on appeal its contention that the Council had not proved the reasonable cost of the works. It submitted that, on a proper reading of Mr Meredith's report and oral evidence, he had assessed the reasonable cost of the works as subsequently changed in substantial respects in their completion by subcontractors to the Council, without allowing for the changes, and that the assessment was therefore not an available comparator with the contract price.

70 We were taken in some detail to Mr Meredith's report and oral evidence, by FPM Constructions and further by the Council. I am satisfied that FPM's submission was incorrect.

71 Mr Meredith prepared as Appendix C to his report an "elemental measure and priced based on the rates current in mid 2003". It was called "summary of cost to complete", but was the cost of the whole of the works, not just the work after termination of the Contract. There were three columns, the first from FPM Constructions' tender (total $6,127,914), the second Mr Meredith's estimate (total $8,315,000) and the third the Council's actual cost to complete (total $8,234,276). Mr Meredith referred to Appendix C in Part 8 of his report. In para 8.6 of the report he referred to Appendix C as a check comparison with the costs of a swimming pool complex at Emerton, and said that $8,315,000 could be compared with the Emerton costs and the actual cost and they were within a few percentage points. He said in para 8.8, "I conclude that the amount of $8,234,000 is well within reason and that the Fyntray Contract sum of $6,062,000 was unrealistic".

72 The report also attached an Appendix D, giving a total figure of $8,250,000 as the "estimated cost of work". The references to Appendix D in the body of the report were to a document which could not have been the attached Appendix D; it may be that the schedule in para 6.24 was a later version and embodiment of an earlier Appendix D, and the report seems to have gone awry. This does not seem to have been raised at the trial, but no doubt explained why counsel for FPM Constructions initially focussed on Appendix C. Appendix D was explained in Mr Meredith's oral evidence, see later in these reasons.

73 In cross-examination Mr Meredith was asked about his comparison of the Emerton works with the Blue Mountains works. He said that he compared "the tender specifications" for the Blue Mountains, as at 2000-2001, with those for the Emerton works. He did not compare "what was actually built at Lower Blue Mountains" with the tender specifications, and was unaware of any substantial changes. There were put to him a number of changes; he said he was unaware of them.

74 The cross-examination then was -

"*Q. The exercise that you've carried out in your report depended upon the tender works of FPM and the as-built being substantially the same with only minor variations, didn't it?*

A. No.

Q. Why do you say no, Mr Meredith?

A. Because what I then proceeded to do was actually to look at what I will call the contract documents and prepare my own base estimate on that.

Q. When you say 'contract documents' you mean tender documents?

A. The tender documents. …

Q. Mr Meredith, I put to you this morning some changes, and you can take them from me that there's been evidence in this court that they occurred, about which you had no knowledge.

A. Yes.

Q. What I suggest to you is that you approached the exercise that you did on the basis that the $8.2 million that the council told you they spent was, with a minor variation for about $168,000, spent doing the works that FPM would have done. Isn't that right?

A. No. Can I explain why?

Q. Yes.

A. I may be sceptical, but I have some doubt as to the accuracy of the figures that were given to me by the council, because when I totalled them up, right, there seemed to be a number of gaps. I haven't audited the actual figures. What I did was I looked at Emerton as the first basis, then as a second basis I actually took what I will describe as the contract documents, and based on that, I actually prepared, for want of a better word, a cost plan, right, because that is probably the most accurate way I've got of doing it.

Q. Where's you cost plan that you said you prepared? What part of your report?

A. That's summarised at appendix D."

75 It was put to Mr Meredith that he had looked at the Council's post-termination subcontract agreements. He agreed, but said that the Council's actual cost had not included preliminaries or "smaller trades" and "to a certain extent I don't know about the validity of the $8 point whatever million I was given". He was taken at some length to Part 8 of the report and was pressed to agree that, in saying that the $8,234,000 was within reason, he had assumed that the Council's subcontract agreements were the same as "the subcontract agreements for FPM". The furthest he went was a Delphic "within reason".

76 Mr Meredith was taken to Appendix C. It became apparent that the $8,315,000 in Appendix C was not Mr Meredith's estimate of the reasonable cost of the Blue Mountains works, but his estimate of the cost of the Emerton works after adjustments intended to make the works more comparable with the Blue Mountains works. It was affirmed that Appendix D was Mr Meredith's assessment of the reasonable cost of the Blue Mountains works.

77 Mr Meredith was then asked a number of questions about the sources of components of the $8,250,000, some coming from FPM Constructions' tender, some based on an adjusted "Emerton comparable", and others being Mr Meredith's estimate. The cross-examiner did not return to usage of the Council subcontract documents as distinct from the tender specifications; at one point Mr Meredith said that he obtained a component, $1,350,000 for building services, from "my own calculations based on the design brief" (emphasis added).

78 The evidence was at times confusing, in part because of the manner the report was put together and in part because, with some justification, the cross-examiner did not initially appreciate the exercise Mr Meredith had undertaken. In the end, however, it seems to me clear that -

(a) Mr Meredith's assessment of the reasonable cost of the works was in Appendix D;

(b) the assessment was based on the tender specifications, not on a scope of works incorporating the post-termination changes reflected in the Council's subcontract documents;

(c) the exercise in Appendix C, and what was said about it in the report, was directed to the conclusion that FPM Constructions underquoted, by rough comparison with an estimate of the cost of the adjusted Emerton works and the Council's actual cost;

(d) the exercise did not demonstrate that Mr Meredith assessed the reasonable cost of the works according to the works as subsequently changed; in particular, he was unaware of any significant difference between the works according to the tender specifications and as built, and he doubted that the figure provided to him as the actual cost was all the actual cost; his regard to the figure, and to the Council's subcontract documents, was no more than part of the rough comparison in Appendix C.

79 Mr Meredith's figure of $8,250,000 could not properly be taken as a firm and inflexible figure. In my opinion, however, the judge could have found that the reasonable cost of the works was a figure of that order. With the benefit of the extended examination of the evidence on appeal, a luxury not enjoyed by his Honour, I consider that it would not reasonably have been open to do otherwise. Quite apart, therefore, from the evidence of Mr Yazbek to which Basten JA has referred, the judge's satisfaction that damages of at least $750,000 had been proved was well-founded; and I consider that it can be concluded that damages of a greater amount, in round figures of the order of $2,000,000, were proved.

80 In my opinion, the Council is entitled to damages of $750,000.

Security and retention money

81 The contract provided for FPM Constructions to provide security of $30,000 by an irrevocable bank guarantee, and for deduction of retention money when certifying payment. It seems that a bank guarantee was not provided and $30,000 was instead deducted in the payment certificate on progress claim 6. The progress certificate on progress claim 8 recorded retention to that time, including the $30,000, of $161,461.40.

82 As I have indicated, FPM Constructions claimed those amounts in the event of its own termination of the Contract. That has not been made good. I apprehend that the Council must give FPM Constructions the benefit of the security and the retention money. It is entitled to have recourse thereto (cl 5.5), but it can not make a profit. However, that is a matter outside the proceedings; and where the Council has incurred a loss of the order I have accepted, it will not make a profit.

The award of costs

83 The judge ordered that Mr Yazbek pay the Council's costs. For the reasons given by Basten JA his Honour appealably erred in doing so; in that respect, his Honour's orders can not stand.

The result

84 I agree with the orders proposed by Basten JA.

85 **BASTEN JA**: This appeal involved three separate proceedings commenced in the District Court and heard together. The proceedings arose out of a contract to design and construct an Aquatic Centre, at Buttenshaw Park, Springwood, in the Lower Blue Mountains. A tender for the project was let by the Council of the City of Blue Mountains ("the Council"). The successful tenderer was a company controlled by the Second Appellant, Mr Anwar Yazbek. That company with the agreement of the Council assigned its interest to another company controlled by Mr Yazbek, which is now known as FPM Constructions Pty Ltd ("FPM Constructions"), the First Appellant.

86 The first proceedings arose out of the failure of the Council to make payment in response to progress claim no. 8. The claim was for an amount of $373,569.69. It was set out in a letter dated 17 March 2003 from FPM Constructions to the superintendent of works. A certificate of the superintendent was issued in an amount which, according to the calculation, amounted to $122,921.54. (The conclusion reached by the superintendent was then set out in both words and figures, the words providing for payment of $123,716.82. The statement of claim sought the lesser amount, together with interest.)

87 Pursuant to clause 43.2 of the contract, set out below, a precondition to the payment of a progress claim was the making of a statutory declaration by FPM Constructions that the various subcontractors had all been paid, or all other than those particularised in a schedule. The Council resisted payment primarily on the ground that the statutory declaration by Mr Yazbek, which accompanied the claim, was false. Other defences were pleaded, but this was the sole defence relied on at the hearing.

88 The second proceedings arose in respect of progress claim No. 9. That claim was made on 9 April 2003, in an amount of $285,580.80, but no payment was made by the Council. Proceedings were commenced in the District Court by way of liquidated demand five weeks later.

89 In its defence to this claim, the Council alleged that it had properly terminated the contract on 11 April 2003 and that no obligation had arisen as at that time because the superintendent under the contract had not certified the claim in accordance with the contract.

90 The third set of proceedings were commenced by the Council as plaintiff and were brought against FPM Constructions. The Council claimed that it had terminated the contract upon failure by FPM Constructions to show cause why the contract should not be terminated. The Council alleged that it had suffered loss and damage as a result of the default of FPM Constructions, which it calculated as the cost of obtaining an alternative contractor to complete that part of the project which FPM Constructions had failed to complete. The loss or damage was alleged to be in excess of $3 million, but the Council abandoned so much of its claim as exceeded the jurisdiction of the District Court, namely $750,000, and limited its claim to that amount.

91 This third set of proceedings gave rise to a dispute as to whether the contract had been properly terminated or whether the conduct of the Council amounted to an unlawful repudiation. FPM Constructions cross-claimed for its loss of profit on the contract, together with certain consequential losses.

92 The three sets of proceedings were heard by a judge of the District Court and judgment was delivered on 23 August 2004. His Honour dismissed both proceedings brought on behalf of FPM Constructions and gave judgment for the Council in the proceedings commenced by it, for the full amount of $750,000 plus interest. His Honour further ordered that the Council's costs were to be paid by both FPM Constructions and Mr Yazbek, who was the managing director of FPM Constructions. Mr Yazbek, who had not been a party to the original proceedings in the District Court, joined with FPM Constructions in the appeal lodged by the company in this Court. The fourth set of issues concerns the proprietary of the order made by the trial judge that Mr Yazbek (the Second Appellant) bear joint and several liability for the costs of the unsuccessful proceedings brought by and against FPM Constructions.

Background

93 At some time prior to April 2001, the Council resolved to construct a new aquatic centre at Springwood in the Lower Blue Mountains. The centre was to be constructed on land owned by the Council, which was also the consent authority in relation to the necessary development approval. The Council prepared a written description and a schematic design for the proposed facility. Tenders were sought for a contractor to design and build the proposed centre, which would be provided to the Council as a fully functional and equipped aquatic centre at the end of the contract.

94 The initial tender submitted by a company associated with Mr Yazbek was made in April 2001, but there were numerous changes made prior to the conclusion of an agreement. The Council and Fyntray Constructions Pty Ltd entered into the contract the subject of these proceedings on 17 October 2001.

95 The contract provided for a total payment of a little over $6 million. Subject to certain modifications which are not relevant for present purposes, the agreement adopted the "General Conditions of Contract for Design and Construct" known as AS4300-1995.

96 For the purposes of this judgment, it is sufficient to identify the contractor as FPM Constructions Pty Ltd. On 5 August 2002 the original contracting party, Fyntray Constructions Pty Ltd, assigned its interest in the contract to Fyntray Project Management Pty Ltd. On 22 January 2003 the company filed a notification of resolution changing its name from Fyntray Project Management to FPM Constructions Pty Ltd.

97 Under the original timetable, FPM Constructions was to obtain possession of the site from the Council on 19 October 2001, prepare a development application and obtain development approval by 25 January 2002. It was expected that work would commence on the site on 18 February 2002, with completion and handover scheduled for 17 January 2003. The period thus allowed from commencement of construction to completion was 48 weeks.

98 The initial period for the obtaining of development approval and a construction certificate took considerably longer than anticipated. It appears that work commenced on the site on or about 13 September 2002, some seven months late. By that stage, the projected completion date was 22 September 2003, which allowed a construction period of approximately 53 weeks.

99 The administration of such a contract was obviously a matter of some complexity. Two aspects need to be noted for present purposes. The first is that the contract works could be broken down into separate items, some of which could be carried out contemporaneously with others but, overall, the completion of the contract involved a significant number of sequential steps. Accordingly, at least in relation to the sequential steps, it was necessary to prepare a program in order to ensure that the final stages would be completed by the handover date. The tender document provided by the predecessor to FPM Constructions appears to have been accompanied by a "tender program" which was amended from time to time.

100 The second matter to be noted in relation to the administration of the contract is that significant aspects of the work were to be undertaken by subcontractors. Pursuant to provisions which will be set out shortly, the contract sought to ensure that the owner or principal would not be required to pay the contractor unless entitlements of subcontractors had been paid in full. As the present case demonstrates, there may be disputes as to the amount and timing of entitlements both between the contractor and the subcontractors and between the contractor and the principal.

101 The third matter to be noted concerning the administration of the contract was that provision was made for the principal to appoint a superintendent, who had certain functions, noted below, in relation to certifying progress claims for payment and in relation to the resolution of disputes.

Progress claim No. 8

102 It is convenient to deal first with the appeal by FPM Constructions against the dismissal of the proceedings for payment of progress claim No. 8. Relevant provisions in clause 42 of the contract provided for the making of claims for progress payments, the assessment of those claims and the entitlement to payment of the claims. Thus, so far as presently relevant, clause 42.1 provided: *"At the times for payment claims or upon completion of the stages of the work under the Contract … the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then otherwise due to the Contractor arising out of the Contract. …*

Within 14 days of receipt of a claim for payment, the Superintendent shall assess the claim and shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the Superintendent's opinion, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference.

… Subject to the provisions of the Contract, within 28 days of receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, … the Principal shall pay to the Contractor … an amount not less than the amount shown in such certificate as due to the Contractor … or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim. A payment made pursuant to this Clause 42.1 shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable … ."

103 One of the provisions to which the paragraph last extracted above, creating the obligation to make a payment, appears to be subject, is clause 43.2, which relevantly reads as follows:

"**43.2 Payment of Subcontractors**

Not earlier than 14 days after the Contractor has made each claim for payment under Clause 42.1, and before the Principal makes that payment to the Contractor, the Contractor shall give to the Superintendent a statutory declaration by the Contractor or, where the Contractor is a corporation, by a representative of the Contractor who is in a position to know the facts declared, that all subcontractors have been paid all moneys due and payable to them in respect of work under the Contract.

43.3 Withholding of Payment

If the Contractor fails –
(a) to provide, within 5 days of the direction by the Superintendent pursuant to Clause 43.1, the statutory declaration or the documentary evidence, as the case may be; or
(b) to comply with Clause 43.2,
then notwithstanding Clause 42.1, the Principal may withhold payment of moneys due to the Contractor until the statutory declaration or documentary evidence, as the case may be, is received by the Superintendent.

If the Contractor provides to the Superintendent satisfactory proof of the maximum amount due and payable to workers and subcontractors by the Contractor, the Principal shall not be entitled to withhold any amount in excess of the maximum amount."

This provision has curious features. First, the obligation of the principal to make a payment, set out in clause 42.1 is not expressed to be subject to clause 43.2, but this effect is achieved by clause 43.3, which expressly conditions the obligation of the principal. Secondly, the declaration may not be made before the superintendent has assessed the claim and given a payment certificate; but when it is made, it is given to the superintendent, not the principal. Thirdly, if the contractor provides 'satisfactory proof' of the maximum amount payable to subcontractors, who presumably have not been paid, the principal must apparently pay the balance to the contractor.

104 The factual circumstances surrounding this claim, and the refusal to pay it, can be shortly stated: the legal liability under the contract is less clear.

105 The claim was made in writing on 17 March 2003 for work performed during the period 18 January 2003 to 17 March 2003. The total amount said to be due was $373,569.69. On 28 March 2003 the superintendent issued a certificate entitling FPM Constructions to a payment of $122,921.54. On 2 April 2003 Mr Yazbek made a statutory declaration on behalf of FPM Constructions in unqualified terms to the effect that "all subcontractors to the Contractor have been paid all moneys which as at the date of this declaration are due and payable to them by the Contractor for the performance of work under the Contract". The Council rejected the entitlement to payment on the basis that the statutory declaration was false in a material respect.

106 During the hearing of the appeal, there was some confusion as to whether the falsity of this notice was relied upon as a substantial breach. In fact it was an earlier statutory declaration, sworn on 31 January 2003, which was said to be false. However, the response given by Mr Yazbek in relation to that complaint is instructive and will be noted below. In the pleadings concerning progress claim no. 8, no reference was made by the plaintiff in its amended statement of liquidated claim to the requirement to provide a statutory declaration, nor to the right of the principal to withhold payment pursuant to clause 43.3, until the statutory declaration was received by the superintendent. Rather, the pleadings stated that the issue of the payment certificate on 28 March gave rise to the obligation to pay on 12 April. In its defence, the Council pleaded the lack of a statutory declaration and the lack of "satisfactory proof of the maximum amount due and payable to … subcontractors" under clause 43.3. There was no reply filed by FPM Constructions. Nor did FPM Constructions plead to the set-off pleaded by the Council.

107 No one seems to have troubled much about the pleadings in this matter. Indeed the Appellant, in a chronology filed in this Court, stated that they commenced on 27 May 2003, which was the date of the amended statement of claim. On 23 April 2003 Mr Yazbek swore an affidavit in the proceedings, which had clearly commenced on or before that date. On 6 June 2003 he swore a further affidavit responding to the factual allegations raised by the Council in its defence. In that affidavit, two defences were raised: first, it was asserted that because the subcontractors were, by arrangement with the Council, being paid directly by the Council, subject to his approval of their accounts, they were not "subcontractors of the plaintiff". Secondly, he asserted that in relation to two of the subcontractors, Allen Jack + Cottier and Barry C. Smith & Associates Pty Ltd, the work was unsatisfactory and not suitable for use by FPM Constructions and hence his approval was withdrawn on 1 April 2003, the day before the making of the declaration.

108 When the allegation of falsity was made in the show cause notice, in relation to the progress claim of February 2003, reliance was placed by the Council on the same invoices of Allen Jack + Cottier and Barry C. Smith. The response given by Mr Yazbek at that stage was that, although they related to work done in October-December and had each been issued in early December on terms requiring payment in 14 days of rendering the account, they "did not become due and payable" until 15 February 2003 and hence the statutory declaration of 31 January 2003 was correct in stating that there were no amounts "due and payable" to those subcontractors. It will be necessary to return to that assertion in dealing with the right to terminate.

109 The Appellant's response to the claim that Mr Yazbek's statutory declaration was false in a material respect was threefold:
(a) although not expressly so limited, both clause 43.2 of the contract and his declaration were to be understood as not referring to subcontractors in relation to whom the Council had agreed to make payments direct;
(b) because he had, the day before his statutory declaration, withdrawn his approval for payment of the accounts in question, the statutory declaration was true because there were no moneys "due and payable" to the subcontractors, and
(c) if indeed there was a dispute as to the entitlement of the subcontractors, the statutory declaration was satisfactory if Mr Yazbek believed it was true.

None of these propositions is self-evidently plausible.

(a) Subcontractors paid by Council

110 The falsity, as ultimately pressed, was said to arise from the fact that two (or possibly three) contractors had outstanding accounts totalling approximately $70,000. However, the status of these accounts was in dispute. In order to understand the context of the dispute, it is necessary to make reference to a further part of clause 43, namely clause 43.4, entitled "direct payment". As amended by the parties, clause 43.4 did not accord with the standard form of AS4300-1995, but read as follows:

> ***"43.4 Direct payment***
>
> *Where a payment certificate issued by the Superintendent under Clause 42.1 includes an amount payable to the Contractor in respect of work performed or materials supplied by a subcontractor, the Principal may, at its sole discretion, deduct an amount otherwise payable to the Contractor under the payment certificate and pay it, on behalf of the Contractor, directly to the subcontractor and the amount so paid by the Principal to the subcontractor shall be a debt due from the Contractor to the Principal. …*
>
> *Any payment made by the Principal under this Clause shall not:-*
>
> *(a) relieve the Contractor of its obligations under this Contract; or*
>
> *(b) prejudice the rights of the Principal under this Contract or otherwise."*

111 The relevance of this provision in relation to the issues agitated in the Court was somewhat obscure. There was no finding by his Honour that the payment certificate issued by the superintendent in fact included an amount payable to a subcontractor. Nor were the parties able to advise the Court whether they understood that to be the case. What was asserted, however, was that an informal agreement between FPM Constructions and the Council existed whereby at least some subcontractors were paid directly by the Council. Who assessed the entitlement to payment under that agreement was never explained and the agreement itself appears not to have been consistent with the terms of the contract. The findings of the trial judge were identified in a passage in which his Honour considered the evidence of the representative of the Council, Mr Martini. In relation to the three subcontractors whose accounts were outstanding in April 2003, his Honour summarised the evidence as follows (judgment at p.56): *"But the bottom line of the evidence there is along the lines that [Mr Yazbek] accepted and understood that some arrangements were in place where those three consultants would be paid directly by the Council, and there really seems to be no issue about that."*

However, his Honour considered that the legal responsibility for payment of the subcontractors remained with FPM Constructions. That conclusion was not challenged.

112 A statement, whether in a statutory declaration or not, made in absolute terms, but subject to an unexpressed qualification or exclusion, may readily be seen to be false or misleading, in any business situation: see, eg, ***Commonwealth Bank v Mehta*** (1991) 23 NSWLR 84, 88 (Samuels JA), and **Fraser v NRMA Holdings Ltd** (1994) 52 FCR 1 and (1995) 55 FCR 452. The statement 'none of my subcontractors has an account outstanding' is quite a different proposition to the statement 'none of my subcontractors other than those whom you have agreed to pay directly has an account outstanding'. Arguably, the proper course was to make a declaration with a schedule listing those whose accounts remained unpaid, to the knowledge of the declarant, with a note as to the reason. It may not be necessary to do that by a statutory declaration: arguably the clause envisages either a statutory declaration that no amounts are outstanding, or some more flexible form of "satisfactory proof" as to what is unpaid. Such a statement would perhaps have prompted the Council to ask whether the account rendered by FPM Constructions included any amounts on account of those subcontractors. I would reject the suggestion that the declaration should be treated as a fair and accurate statement of the true position known to Mr Yazbek, on that understanding of the facts.

113 In his response to the show cause notice, Mr Yazbek clearly recognised that these subcontractors were subcontractors to FPM Constructions, until the arrangements for payment directly by the Council were made. However, there was nothing in the arrangement deposed to in the affidavit which suggested that any contractual relationship changed with that informal verbal agreement about method of payment. Furthermore, such a view is inconsistent with the second basis on which Mr Yazbek rejected the falsity of the declaration, namely that the work they had done was "unsatisfactory and was not suitable for use as a design for construction by the plaintiff". (Emphasis added.) The trial judge was correct to reject the first defence.

(b) Accounts not due and payable

114 As to the second defence, apart from Mr Yazbek's bald assertion, there was no evidence relied on by FPM Constructions in this Court to demonstrate that there had been a total failure of consideration in relation to both accounts. The very fact that the approval was not "withdrawn" until 1 April 2003, almost four months after the accounts had been rendered and two and a half months after they had been "approved" suggests that the so-called withdrawal of approval was a belated device to attempt to reverse an existing payment obligation, which was ultimately an obligation of FPM Constructions.

115 The argument that the declaration was correct because Mr Yazbek had written a letter the day before withdrawing approval for payment of the accounts is unacceptable. An accurate declaration in that circumstance would have identified the fact that accounts had been rendered and were outstanding but would have noted Mr Yazbek's belief that no part of the accounts were due and payable, for some identified reason. It seems implausible that none of the three subcontractors was entitled to payment of any part of their accounts, even if there were a bona fide dispute in relation to some of the work done. Nor was the Court taken to any evidence to suggest that Mr Yazbek reasonably held such a belief. Rather, the case for FPM Constructions was that, Mr

Yazbek having withdrawn approval for payment, the onus was on the Council to demonstrate that some part of an account was payable in fact and law, in order to establish that the statutory declaration was false.

116 Again, in my view, it would not be reasonable to conclude that the accounts ceased to be due and payable on "withdrawal of approval", so that a precondition to a progress payment under the contract was then satisfied. Rather, the Council sufficiently demonstrated a failure to comply with the precondition in clause 42.1 by tendering evidence that accounts had been rendered and were outstanding at the time the statutory declaration was provided.

117 Whether a debt is "due and payable" has been the subject of discussion in a number of contexts. In the present context, however, the question is whether, where a subcontractor has submitted an account seeking a payment due under the terms of the contract, the payment is not "due and payable" for the purposes of clause 43.2, where the amount claimed or the quality of the work done is in dispute. The answer to this question depends upon the terms of the contract.

118 The terms of the contract generally are inconsistent with the proposition that an amount ceases to be "due and payable" because a dispute has arisen. A number of provisions support this conclusion. First, clause 42.1 expressly provides, in relation to payments required to be made by the principal, on a certificate from the superintendent in the following terms: *"A payment made pursuant to this Clause 42.1 shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under Clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or the Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.*

Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided under Clause 42.6."

Clause 42.6 deals with final certificates and does not affect the present issue.

119 Although no attention was addressed to this question in the course of argument before this Court, it may not be irrelevant that the account rendered by Allen Jack + Cottier on 5 December 2002 contained a statement that the claim was made under the *Building and Construction Industry Security of Payment Act* 1999. Such a statement is required, for the claim to satisfy the definition of "payment claim" in s 13(2) of that Act. Where the procedures for disputing a claim are not followed, liability will arise pursuant to s 14(4). In addition, s 11 of the Act identifies when a progress payment under a construction contract becomes "due and payable". Because these matters were not raised in argument, and because the matter can be dealt with on the terms set out above, it is not appropriate to address this question further.

(c) Nature of requirement that declaration true

120 At one point in the argument it seemed to be asserted that the truth or falsity of the declaration was irrelevant, so long as Mr Yazbek had some reasonable ground for asserting that he held the view that it was true, at the time it was made. To the extent that the Council sought to rely on the untruth of the statutory declaration for the purpose of demonstrating a "substantial breach", justifying the issue of a written notice to show cause, as a preliminary to termination, it was required to assert that there was a breach in "knowingly providing a statutory declaration … which contains a statement that is untrue": clause 44.2(h). One may infer from this provision that a statutory declaration will not satisfy the requirements of clause 43.2 unless it is true, but it does not justify the conclusion that a statutory declaration will be sufficient if it is believed to be true by the person making it. A declaration which is, in fact, untrue will justify the withholding of a payment, but not the termination of a contract. This approach is consistent with the more generally applicable principle that it is the objective circumstances of a contract which may justify conduct which would otherwise constitute a breach, whether the party was aware of the relevant facts at the time of the conduct or not: see ***Shepherd v Felt and Textiles of Australia Ltd*** (1931) 45 CLR 359 at 377 (Dixon J).

121 His Honour held that FPM Constructions had not demonstrated an entitlement to progress claim No. 8. In my view the Appellant has not shown that his Honour was wrong in that regard. Accordingly the appeal in relation to the judgment in that proceeding should be dismissed with costs.

Progress claim No. 9

122 This progress claim, in an amount of $285,580.80 was issued on 9 April 2003. Because the contract was terminated the following day, the question which arose was whether there was an entitlement to payment which survived the termination of the contract. The closeness of these events was not entirely coincidental: the Council had issued a "show cause" notice pursuant to clause 44 of the contract on 2 April 2003.

123 On 16 June 2003 Mr Yazbek swore a statutory declaration in relation to progress claim No. 9. The Council did not actively pursue a claim that this statutory declaration was false in a material respect. The response of the Council in relation to proceedings with respect to this claim was, in effect, that the contract having been lawfully terminated before the pre-conditions to payment of the claim could be fulfilled, no obligation to pay had arisen. In the Council's view, the question of entitlement depended upon the evaluation of outstanding obligations after lawful termination.

124 In these circumstances, it is convenient to defer questions relating to this claim until the issues in relation to termination of the contract have been addressed.

Termination of contract

125 At the heart of this appeal was the allegation that his Honour had erred in holding that the Council lawfully terminated the agreement by written notice 11 April 2003. FPM Constructions challenges each step in the process by which the Council sought to justify the termination: accordingly, it is convenient to commence by identifying the contractual provisions relied upon by the Council.

126 Clause 44 of the contract is headed "Default or insolvency". Sub-clause 44.1 is entitled "Preservation of other rights" and provides:

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

The key operative provision is sub-clause 44.2 which reads as follows:

44.2 Default by the Contractor

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

Substantial breaches include but are not limited to –

(a) failing to perform properly the Contractor's Design Obligations; …

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

(h) in respect of Clause 43, knowingly providing a statutory declaration or documentary evidence which contains a statement that is untrue.

Further requirements are imposed by sub-clause 44.3 in relation to a notice to show cause, in the following terms:

44.3 Requirements of a notice by the Principal to show cause

A notice given under Clause 44.2 shall –

(a) state that it is a notice under Clause 44 of these General Conditions of Contract;

(b) specify the alleged substantial breach;

(c) require the Contractor to show cause in writing why the Principal should not exercise a right referred to in Clause 44.4;

(d) specify the time and date by which the Contractor must show cause (which time shall not be less than 7 clear days after the notice is given to the Contractor); and

(e) specify the place at which cause must be shown.

127 The power to terminate the contract is provided by sub-clause 44.4, which reads as follows:

44.4 Rights of the Principal

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

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

(b) terminate the contract.

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

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

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

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

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

Sub-clause 44.10 is also relevant in this context.

44.10 Rights of the parties on termination

If the contract is terminated pursuant to Clause 44.4(b) or 44.9, the rights and liabilities of the parties shall be the same as they would have been at common law had the defaulting party repudiated the contract and the other party elected to treat the contract as at an end and recover damages.

Validity of notice

128 The notice given by the Council on 26 March 2003 complied with the formal requirements in clause 44.3(a), (c), (d) and (e). However, it is necessary to set out the substantive complaints identified in the notice in paragraphs 6-9, in order to understand the attack made by FPM Constructions on the steps taken by Council to terminate the contract.

"6 Pursuant to Clause 44.2 of the General Conditions:

6.1 FPM has committed the substantial breaches of the Contract detailed in paragraph 7 below;

6.2 The Council considers that damages may not be an adequate remedy in respect of such breaches; and

7. Council requires FPM to show cause in writing why Council should not exercise the right given to it in Clause 44.4 of the General Conditions to terminate the Contract. The substantial breaches are:

7.1 Failure to proceed with the work under the Contract with due expedition and without delay pursuant to Clause 33.1 of the General Conditions – particulars of which are detailed in paragraph 8 below.

7.2 FPM knowingly provided a statutory declaration, as required by Clause 43.3 of the General Conditions, containing an untrue statement, namely that all subcontractors to FPM have been paid all moneys due and

payable to them in respect of work under the Contract – particulars of which are detailed in paragraph 9 below.

8. As regards the substantial breach referred to in paragraph 7.1 above, FPM was obliged to have:

8.1 Proceeded with the work under the Contract in accordance with the Contractor's Program supplied by FPM (MS Project file saved date 6/5/2002) pursuant to Clause 33.2 of the General Conditions and subsequent updates to that Contractor's Program that showed completion by the Date for Practical Completion as adjusted in accordance with the terms of the Contract;

8.2 Provided and worked to adjusted programs that did not have most significant activities (including structural steel, pools and filtration) on the critical path to the extent that the program was not realistically achievable, as evidenced by the failure to proceed in accordance with those programs; and

8.3 Completed concrete footings, substantially completed fabrication of structural steel, commenced pool shell construction, have finalised details for and engaged sub-contractors to provide and install pool filtration equipment and substantially completed in-ground hydraulic services,

if it was proceeding with the work under the Contract with due expedition and without delay as it is obliged to do under Clause 33.1 of the General Conditions.

8.4 FPM failed to proceed with the work under the Contract with due expedition and without delay in breach of Clause 33.1 of the General Conditions in that:

8.4.1 The Contractor's Program provided (MS Project file labelled "Contractor Program 18-1-03.mpp") at the end of January 2003, reflecting progress of the work under the Contract to that date, showed a Date for Practical Completion of 3rd September 2003 being three (3) full weeks later than the adjusted contractual Date for Practical Completion of 12th August 2003;

8.4.2 Subsequent to the provision of the Contractor's Program referred to in paragraph 8.1 above, work under the Contract performed by FPM on and off site has not proceeded in a sequence or at a rate in accordance with that Contractor's Program.

8.4.3 The work under the Contract identified in paragraph 8.3 above has not been achieved or completed as the case may be.

9. As regards the substantial breach referred to in paragraph 7.2 above, pursuant to Clause 43.2 of the General Conditions, on or about 20th February 2003 Council received the statutory declaration of Anwar Yazbek, on behalf of FPM, dated 31st January 2003. In this statutory declaration Mr Yazbek declares nil exceptions under item 8c. Council received Mr Yazbek's statutory declaration dated 31 January 2003 under cover of an accompanying letter dated 20th February 2003, signed by Mr Yazbek, in which it is noted that the statutory declaration of Mr Yazbek dated 31st January 2003 'does not cover' Allen Jack + Cottier and Barry C Smith & Associates, both being subcontractors to FPM in respect of work under the Contract."

The letter concluded as follows:

Dated: ……..

Signed: …….. (Tony Martini)

The Council of the City of Blue Mountains

The date was handwritten and in the space for a signature, the letter was signed by Mr Martini.

129 On 2 April 2003 FPM Constructions responded to the substance of the complaints set out in paragraphs 8 and 9 of the notice. It will be necessary to consider below the substance of the response in relation to the particular matters now the subject of challenge. For present purposes, it suffices to say that Council did not accept that reasonable cause had been shown and, by notice dated 10 April 2003, terminated the contract pursuant to clause 44.4(b), "with immediate effect". Although the typed date on the notice is 10 April 2003, the handwritten date over the signature of the general manager of the Council is 11 April 2003. The latter is accepted by the parties as the correct date of termination.

130 FPM Constructions challenged the validity of the termination on the following bases:

(a) the show cause notice was signed by an officer of the Council who did not have an appropriate delegation, and was therefore invalid;

(b) the Council failed to prove that it did not consider damages an adequate remedy, proof of which was an essential pre-condition to the service of a valid notice;

(c) so far as the allegations of delay were concerned, they were not defined with sufficient precision to allow the contractor to show cause, and hence the notice did not satisfy the requirement of clause 44.3(b), in that it did not specify the alleged substantial breach, and

(d) there had been no failure to proceed with due expedition and without delay, and therefore no substantial breach in accordance with clause 44.2(g), and the termination was therefore invalid.

These complaints will be addressed in turn, but there is significant overlap between (c) and (d), each of which requires reference to the specified breaches.

(a) Delegation to sign notice

131 The argument presented by FPM Constructions in relation to the execution of the notice to show cause was based on the proposition that, under the contract, the "Principal" was the Council and, accordingly, only the Council could exercise the function, or power, conferred by clause 44. The giving of such notice was, it was argued, not merely a matter of the day-to-day administration of the contract, but depended on the requirement that the Council form

an opinion as to whether damages might be an adequate remedy in relation to identified breaches. Accordingly, unless it had validly delegated the relevant power, the Council was required to form the opinion itself and to give notice itself. Although Mr Martini had been appointed the representative of the Council for the purpose of the day-to-day administration of the contract, because the contract expressly conferred the power under clause 44 on the Principal and not on a representative of the Principal his view would not suffice. Further, it was said that, although the Council could delegate its powers, for example under s 378 of the *Local Government Act* 1993, no relevant delegation had been proved, appointing Mr Martini a delegate for this purpose.

132 The flaw in this argument lies in the assumption that the Council did not "give notice" itself and, if it be relevant, that the Council did not form the opinion which was a pre-condition to the giving of notice. In relation to the first point, the form of the notice identified the Council as the party responsible for the document, although it identified the person signing as Mr Martini. In other words, the document, on its face, purports to be the document of the Council and not the document of Mr Martini. The evidence before the Court shows that the Council received a confidential report at its meeting on 11 March 2003. The report contained the following recommendations:

"*1. That Council receives and notes the report.*

2. That the Principal's representative proceed with the management of the contract in the recommended manner contained within the report."

The first recommended course of action was to issue a show cause notice to FPM Constructions on 14 March 2003.

133 Mr Martini was cross-examined in relation to this matter and gave the following evidence:

"*Q: Before you signed the notice to show cause did you meet with Council to discuss your views and about the contract?*

A: Yes.

Q: Did you meet with the Council in session? Did you meet with all the councillors?

A: Yes. …

Q: Did you prepare any notes of what you said with the Council?

A: There was some briefing notes from the solicitor and there was a report that Council got, a confidential report.

Q: A confidential report by whom?

A: Myself.'

That evidence was followed by a call for a copy of the report, which was ultimately produced and tendered. The cross-examination, in the meantime, continued as follows:

"*Q: Mr Martini, you were instructed to send the notice to show cause, weren't you?*

A: Instructed by what? I am not quite sure what you mean?

Q: I'm asking you were you instructed by somebody to send the notice to show cause?

A: Yes.

Q: Who instructed you to do that?

A: I believe the Council did.

Q: So the Council made a resolution to instruct you to … ?

A: They adopted the recommendation of the report."

134 It is crystal clear from this evidence, extracted by counsel for FPM Constructions in cross-examination of Mr Martini, though not referred to in the course of submissions on the appeal, that the show cause notice was issued on the authority of the Council, by Mr Martini acting on its instructions. In those circumstances, the question of formal delegation of power under the *Local Government Act* does not arise. The first ground of challenge to the issue of the notice was without merit and must be rejected.

(b) Inadequacy of damages

135 As noted above, clause 44.2 provides the following, as preconditions to the giving of a show cause notice: *"If the contractor commits a substantial breach of contract and the Principal considers that damages may not be an adequate remedy … ."*

Several grounds of appeal related to the "adequate remedy" condition. Although expressed in a number of ways, one group of grounds assumed that the inadequacy of the remedy needed to be established to the satisfaction of the primary judge. That contention relied in part on the fact that the contract provided for liquidated damages of $300 per day in relation to the delay in achieving practical completion.

136 Reliance by the Appellant on the figure for liquidated damages may have resulted in an underestimate of the damages available to the Council under the contract. The grounds of appeal could have been pursued without reliance upon that figure, as the Council accepted in the course of the hearing. The substantial problem with the grounds lay elsewhere: the assumption that the condition imposed an objective standard was clearly fallacious. Rather, the condition depended upon an opinion formed by or on behalf of the Council.

137 A second ground in effect conceded that proposition, but asserted that the view in fact formed was formed by Mr Martini, without authority. For the reasons given in relation to the first attack on the validity of the notice, that ground should be rejected. Paragraph 6.2 of the show cause notice stated: *"The Council considers that damages may not be an adequate remedy in respect of such breaches"* -

and the evidence did not establish that that proposition was untrue.

138 The next complaint was that Mr Martini, who was responsible for putting that view to the Council, could not himself have formed the relevant opinion *"because he took into account events and matters other than the alleged substantial breaches set out in the notice to show cause"*. The view of the Council, it was argued, was similarly tainted. This complaint is not consistent with the complaint that liquidated damages would suffice, being damages for delay. Of the substantial breaches identified in the contract, delay was, for the reasons outlined below, of foremost significance. Nevertheless, it is asserted in a ground discussed below that the termination of the contract took place on the basis of breaches other than those identified in the notice. If that ground is not made out, there is no separate reason for concluding that the Council took account other breaches (impliedly thereby increasing the nature and kind of the loss suffered so that damages would no longer be an adequate remedy). In any event, the basis of this supposed legal error was not identified, nor show to be established on the evidence.

139 To the extent that the Appellant's case depended on the view that the delay caused the Council quite limited loss, which could be readily compensated by damages, that submission should also be rejected. The Council was a public authority seeking to make available a large recreational centre for use by ratepayers. The public interest involved in that exercise may have been adversely affected, in the view of the Council, by delay which prevented the construction being completed before the change of seasons, a detriment to ratepayers which would not be adequately remedied by damages recoverable by the Council.

140 It may be thought curious that the requirement that the principal consider whether damages may be an adequate remedy for any breach is expressly identified only clause 44.2, in relation to the power to give a written notice to show cause. Nevertheless, it may be inferred that termination would not be appropriate if the contractor could demonstrate that the principal should not be so satisfied. Indeed, there might be other entirely extraneous matters on which the contractor would wish to rely in seeking to persuade the principal not to exercise a right which might be engaged, pursuant to clause 44.4.

(c) Failure to specify breaches

141 Next, the notice was said to be invalid because it failed adequately to specify the alleged substantial breaches of the contract. The first and primary ground of substantial breach identified in the show cause notice was the failure to proceed with due expedition and without delay. The obligation said to be contravened in this respect was that contained in clause 33.1 of the contract. As appears from the particulars in par 8.1 of the show cause notice, the obligation thus identified incorporated the requirements of clause 33.2 of the contract. The relevant parts of clauses 33.1 and 33.2 read as follows:

> "**33.1 Rate of progress**
>
> *The Contractor shall proceed with the work under the Contract with due expedition and without delay. …*
>
> *The Superintendent may direct in what order and at what time the various stages or parts of the work under the Contract shall be performed. If the Contractor can reasonably comply with the direction, the Contractor shall do so. If the Contractor cannot reasonably comply, the Contractor shall notify the Superintendent in writing, giving reasons.*
> …
>
> ***33.2 Contractor's program***
>
> *For the purposes of Clause 33, a 'Contractor's Program' is a statement in writing showing the major activities in the work under the Contract, the dates by which or the times within which key decisions are to be made and information is to be provided and the various stages or parts of the work under the Contract are to be executed or completed.*
>
> *A Contractor's Program shall not affect rights or obligations in Clause 33.1.*
>
> *The Contractor may voluntarily furnish to the Superintendent a Contractor's Program.*
>
> *The Superintendent may direct the Contractor to furnish to the Superintendent a Contractor's Program within the time and in the form directed by the Superintendent.*
>
> *The Contractor shall not depart, without reasonable cause, from –*
>
> *(a) a Contractor's Program included in the Contract; or*
>
> *(b) a Contractor's Program furnished to the Superintendent.*
>
> *The furnishing of a Contractor's Program or of a further Contractor's Program shall not relieve the Contractor of any obligations under the Contract including the obligation not to depart, without reasonable cause, from an earlier Contractor's Program.*"

142 The second substantial breach alleged in the notice was knowingly providing a statutory declaration containing an untrue statement. That breach was identified at paragraph 7.2 and particularised at paragraph 9. The statutory declaration was identified as that dated 31 January 2003; the declaration that all subcontractors had been paid amounts due and payable to them was said to be untrue because amounts payable to Allen Jack + Cottier and Barry C. Smith & Associates had not been paid, a fact identified in the covering letter to the statutory declaration. It is true that the notice incorrectly identified the paragraph in the declaration, referring to the paragraph relating to payment of workers, rather than payment of subcontractors. However, that error was clearly apparent from the terms of the particulars themselves and was identified as such by Mr Yazbek in his response. It was not an error which could be said to invalidate the notice. During the trial, FPM Constructions put on evidence through Mr Yazbek of the value of variations to the project which it had undertaken, and sought to put a value on the cost increases which would result from those variations. That exercise appears to have played little part in the assessment made by the primary judge and no complaint was made of that on appeal.

143 The challenges by FPM Constructions, first, to his Honour's acceptance that there was a substantial breach justifying a show cause notice and, secondly, that the breaches were sufficient to justify termination, tended to run

together in the course of argument, so that the objective evidence of delay, the apparent views of the Council in relation to that delay (including the views of Mr Martini), the material provided in response to the show cause notice and reliance on delay to terminate the contract, were not kept separate.

144 For present purposes, it is unnecessary to determine the question whether proof that there was no substantial breach invalidates the notice or merely precludes termination. It was not disputed by the Council that absence of a substantial breach, as defined, would prevent lawful termination. However, it may be noted that clause 44.3, setting out the required contents of a notice, requires it to specify "the alleged substantial breach", which suggests that proof that there was no such breach, will not, by itself, invalidate the notice.

145 In considering the adequacy of the notice in its terms, it is convenient to consider first what is required to be specified, as failure to comply with such a mandatory requirement may invalidate the notice. Further, the complaint that the notice in fact given was insufficiently precise was related to the complaint that his Honour looked outside the matters particularised in order to determine that there had been a substantial breach.

146 What may be sufficient to "specify" a matter sufficiently for a particular purpose has been considered in differing contexts with different levels of precision and detail required. Thus, in ***Drummoyne Municipal Council v Australian Broadcasting Corporation*** (1990) 21 NSWLR 135 at 137, Gleeson CJ made the following remarks in the context of pleadings in a defamation proceeding. *"The requirement that a plaintiff must 'specify' the act or condition which he claims was attributed to him, that is to say, the statement which he says was made about him, which follows from the scheme of the Defamation Act, the provisions of the Supreme Court Rules, and the ordinary rules of pleading, is one which, in its practical application, raises questions of degree. Almost any attribution of an act or condition to a person is capable of both further refinement and further generalisation. In any given case a judgment needs to be made as to the degree of particularity or generality which is appropriate to the occasion, and as to what constitutes the necessary specificity. If a problem arises, a solution will usually be found in considerations of practical justice rather than philology."*

His Honour went on to note that whilst the principles remain constant, their practical application may depend upon the circumstances of a particular case. Similar principles were discussed by the Full Court of the Federal Court in ***Evans v Minister for Immigration and Multicultural and Indigenous Affairs*** (2003) 135 FCR 306 at [23]-[28] (Gray J), [43]-[45] and [55]-[57] (Kenny J), [93]-[110] (Downes J), and in cases discussed in those judgments.

147 What constitutes a sufficient specification of an alleged substantial breach, so as to satisfy the terms of clause 44.3(b)? On one view, it may be sufficient to specify a breach in terms of one of the paragraphs in clause 44.2, or by identifying some other course of conduct at an equivalent level of generality. On the other hand, it may be argued that greater particularity in relation to the specific conduct or lack of activity on the part of the contractor may be required. Thus, in ***Re Stewardson Stubbs and Collett Pty Ltd v Bankstown Municipal Council*** (1965) NSWLR 1671 at 1675 (50) Moffitt J noted in relation to a contractual provision in somewhat simpler terms: *"A default can be specified in two ways; one is by directing attention to the provision in the contract in respect of which default is made. The other is by giving particulars of the manner in which a breach has occurred. In order to specify the default I think at least the former must be pointed out. But each case will depend on its own circumstances as to whether in order to specify the default there must be added some particulars such as will identify the particular breach alleged. … The question of what precisely constitutes a failure to proceed with reasonable diligence is a matter of some difficulty. However, it is an allegation of a general failure to proceed with that degree of promptness and efficiency that one would expect of a reasonable builder who has undertaken a building project in accordance with the terms of the contract in question."*

148 A similar approach was adopted by Megarry J in ***Hounslow London Borough Council v Twickenham Garden Developments Ltd*** (1970) 1 Ch 233 at 265. In considering the precision with which a "default" needed to be identified, Megarry J stated: *"I do not read the condition as requiring the architect, at his peril, to spell out accurately in his notice further and better particulars, as it were, of the particular default in question. All that I think that the notice need do is to direct the contractor's mind to what is said to be amiss … . If the contractor had sought particulars of the alleged default and had been refused them, other considerations might have arisen."*

149 A similar approach was followed, though without significant discussion, in the Queensland Court of Appeal in ***Yendex Pty Ltd v Prince Constructions Pty Ltd*** [1989] 5 BCLR 74 at 75 where Moynihan J stated (Kelly SPJ and Ryan J concurring): *"I am content to approach the matter on the basis that the contractual provision which I have set out above required a notice which conveyed to a 'commercial builder' what was said to be amiss so that he (in this case the subcontractor) could turn his mind to it and show cause as Clause 41(a) contemplated."*

Moynihan J referred to passages in the two authorities noted above in support of that proposition. He also held that the notice should be unequivocal in the sense that it was not adequate to refer to "examples" of alleged failures. Nor, the Court held, was it adequate to complain of a failure "to provide materials as required by the contract", without seeking to specify the contractual requirement which was not complied with. However, unlike the present case, that case involved a notice to which the subcontractor had responded by stating that it was not a proper notice in that it did not sufficiently specify the default, and thus was one with which compliance was not required. The Court upheld that submission.

150 In addition to the need to take into account the understanding and expertise of the recipient of the notice, there is authority for the proposition that it is appropriate to take account of surrounding circumstances. Although not obliged to decide this aspect of the challenge to a particular notice, Collins J stated in ***Eriksson v Whalley*** [1971] 1

NSWLR 397 at 401-2: *"However, I doubt if it is possible to construe this document in isolation from it surrounding circumstances and accompanying declarations. Although the clause must be strictly construed, I do not think that a notice such as this should be similarly construed. Despite certain ambiguities, the parties … acknowledge that it was a purported notice under Clause 19(a)(2). In my opinion it is open to tribunal of fact to decide, or not to decide, that the notice is an elliptical specification of default under this subclause accompanied by perhaps gratuitous suggestions as to the way the default could best be discontinued. [Counsel for the builder] objects that the requirements set out in the letter were not contractual but at least the first of these is a clear reference to an alleged breach of clause 6 of the contract."*

151 It follows that a contractual notice should be read with the understanding which will be brought to the exercise by the recipient, including his or her knowledge of the circumstances in which it is given. If the recipient is a builder, it should not be assumed that the reader will understand technical legal terms, but it may be assumed that expressions commonly adopted in that industry will be understood. However, each case will turn upon its own particular circumstances, including the identity of the contracting parties. In the same way, the notice need not be construed as a contract, eschewing reference to any material not identified on the printed page. That does not mean that the builder should be left to guess at the provision said to have been breached, nor as to the particular conduct said to be in breach, if that has not been specified and if there is doubt as to its identity. Further, in considering whether a particular notice is adequate to identify a particular breach, a court may take into account the response of the builder. That is not, of course, to say that the builder can demonstrate inadequacy by simply claiming that no response can properly be given; however, where an appropriate response is provided, the adequacy of the notice may be difficult to dispute.

152 In two respects, the Appellant's complaints about the show cause notice derive from problems with the formulation of paragraph 8 of the notice. Thus, the opening words of paragraph 8 seek to particularise, not so much the substantial breach referred to in paragraph 7.1 above, but the obligations which underlay the breach. The breaches are identified in paragraph 8.4. Thus, properly understood, paragraph 8 reads as follows:

As regards the substantial breach referred to in paragraph 7.1 above,
(1) FPM was obliged to have [done the things identified at 8.1-8.3] if it were proceeding with the work under the Contract with due expedition and without delay as it is obliged to do under Clause 3.1 of the General Conditions.
(2) FPM failed to proceed with the work under the Contract with due expedition and without delay in breach of Clause 33.1 of the General Conditions in that it acted as alleged in [8.4.1-8.4.3].

So understood, the allegations in paragraph 8 are structured in a comprehensible manner; such a reading requires but minor variation to the form in which the paragraph is set out and is how a reasonable reader would have understood it.

153 The second element of this complaint focuses on paragraph 8.2 which states that if FPM was obliged to have - *"provided and worked to adjusted programs that did not have most significant activities (including structural steel, pools and filtration) on the critical path to the extent that the program was not realistically achievable, as evidenced by the failure to proceed in accordance with those programs."*

This sub-paragraph is, concededly, badly constructed. Despite infelicities of expression, it would seem that the paragraph should reasonably be understood as follows:
(a) FPM was obliged to work to programs which had been adjusted from time to time;
(b) the programs identified various activities, some of which were important and should be identified as "significant activities", of which three examples were given;
(c) such activities were significant in the sense that they had to be completed in a particular sequence;
(d) working back from practical completion, dates could be fixed by which identified activities had to be completed;
(e) in working out a commencement date for an activity, some leeway should be allowed;
(f) an activity may be described as on a "critical path" if there is no longer any leeway if it is to be done by the latest date for its completion;
(g) if "most" significant activities were on the critical path, the program was not realistically achievable, and
(h) that conclusion was demonstrated by the fact that failure to proceed in accordance with earlier programs had resulted in adjustments being made.

154 This exegesis is required in part because of the grammatical awkwardness of the language of the paragraph, but also because terms such as "critical path" do not have an obvious meaning to a reader without experience in the industry. The question, ultimately, is whether the particulars were reasonably comprehensible to Mr Yazbek as the governing mind of FPM Constructions: for reasons noted below, it is clear that they were. However, it is also clear that the language of the notice cannot be construed in the abstract: it refers to contractual conditions which are not set out, a contractor's program identified but not reproduced, and a history which is not spelled out in detail, but which is tolerably clear from correspondence between the parties ante-dating the notice.

155 In relation to the prior discussions, on 6 February 2003, Mr Martini, for the Council, wrote to Mr Yazbek, the contractor's representative, in the following terms: *"I express my deep concern regarding Fyntray Project Management Pty Ltd's (FPM) lack of progress on the abovementioned project, as expressed to you at the project site meeting of 4 February 2003. As a result of this concern over lack of progress, I refer FPM to Clause 33.1 … and require that FPM proceed with the work under the Contract with due expedition and without delay.*

Since 10 December 2002, there has been very little change in the progress of works on-site; similarly during this same period I have noted very little, if any, change of the on-site resources deployed by FPM on the project. Certainly there has been no evidence of any escalation of on-site activity from 13 January 2003… .

The project's program has undergone some significant sequence changes to key program elements without any previous substantive explanation as to the reasons for such changes, other than to accommodate delays on FPM's part. FPM advised at the site meeting of 4 February 2003, that FPM had experienced some difficulties … . Whilst I am sympathetic to FPM's difficulties, it is clearly FPM's problem and not that of the Principal. The delivery date of the project is presently 9 August 2003 and the Principal expects FPM to deliver the project, in accordance with the Contract by this date.

The most recent program presented by FPM at the 21 January 2003 project progress meeting shows practical completion is not until early September 2003 which is a month late, that a significant number of the construction activities are now on the critical path, and that progress since then has not proceeded to match the program. …

FPM advised at 4 February 2003 site meeting that the following works are scheduled for completion on site by 21 February 2003:

1. *All structural steel column/footing hold-down bolts would be received on site by 13 February 2003,*
2. *All structural steel column/footings, including the set-up and casting in-place of all associated hold-down bolts, would be formed and poured, and*
3. *The pool hydraulics subcontract would be let.*

I consider achievement of these is essential for FPM to demonstrate due expedition, and I will be taking close interest in monitoring FPM's progress in this regard."

The following day, the superintendent wrote to Mr Yazbek, in response to a request for a significant extension of time, giving an extension of one working day and an adjusted date for practical completion of 12 August 2003. The point for present purposes is not whether the position taken by the Council was reasonable or not, but merely that the correspondence between the parties provided a background against which the notice to show cause should be read, and when so read, was reasonably comprehensible.

156 That it was satisfactorily understood is demonstrated by the response provided by FPM Constructions on 2 April 2003. Thus, in relation to paragraph 8.1, Mr Yazbek responded that his records did not include a contractor's program having the "saved date" noted but referred to programs issued on 17 April and 28 May 2002. His response continued: *"Neither of these programs showed practical completion in accordance with the contract end date. Furthermore, the Contractor is under no obligation to provide updated construction programs that reflect an end date that matches the current end date approved by the Superintendent."*

The letter continued that the contractor had made an extension of time claim of 50 days, which had been rejected by the superintendent (although not so stated, in fact on 31 December 2002) which was said to be "currently in dispute". The delay apparently related to the date of issue of the construction certificate. The letter complained about the lack of extensions, but merely referred to the claim being made and rejected, without reference to any attempt to engage the dispute mechanism under the contract. (A dispute had been notified on 7 March 2003, but that concerned additional costs and appears not to have related to the delay relied upon in the letter showing cause. Further unrelated disputes were notified on 18 March 2003.)

157 In relation to paragraph 8.2 of the show cause notice, Mr Yazbek responded: *"In your paragraph 8.2 you state that the program is not realistically achievable. The program provided at the time of tender is a statement in writing showing the major activities and sequence of events. To date the contractor has followed those sequences and if a task is taking longer to complete it is reviewed and where appropriate an extension of time is claimed."*

This was responsive, so far as it went, and there was no suggestion that the thrust of the complaint was not understood.

158 In response to the next sub-paragraph, Mr Yazbek replied: *"In your paragraph 8.3 you state a number of activities that should have been completed. Upon review of the last updated program issued on 17/03/2003, the concrete footings have been completed ahead of time, steel fabrication has commenced to enable erection to be completed by 20/05/2003 (however your procrastination in paying the subcontractor would undoubtedly delay this task) and inground hydraulics was not due to commence until today. We acknowledge that the forming of the pool shells has been delayed however this is no justification for the issue of a show cause notice."*

159 The letter continued: *"In your paragraph 8.4.1 you state that the program issued on 18/01/2003 showed an end date of 3/09/2003 as opposed to the adjusted date for practical completion of 12/08/2003. If you are implying that this is a basis for terminating the contract, then we strongly suggest that you obtain a legal opinion, as you will truly be in breach of contract."*

The letter concluded: "*We trust that the Contractor has shown sufficient cause by way of the above.*

We advise that should you continue with your intended course of action in terminating the contract we shall instruct our solicitors to commence legal proceedings against the Principal."

160 The explanation of the notice, taken with Mr Yazbek's response, demonstrate that it sufficiently specified, in a practical sense, what were alleged by the Council to be substantial breaches by FPM Constructions. This challenge to the validity of the notice must fail.

(d) No substantial breach of contract

161 The final challenge to the validity of the notice relied on the fact that the existence of "substantial breaches" was a precondition to the issue of a valid notice. For reasons noted above, that construction of clause 44.2 is unattractive. However, because the Council relied upon clause 44.4 as a basis for terminating the contract, this ground, if made out, will provide a direct challenge to the validity of the termination. Accordingly, it is convenient to turn directly to that separate ground of appeal.

Validity of termination of contract

162 The challenge to the termination of the contract had a number of limbs, which may be separately identified as follows:

(i) there was no significant delay;

(ii) to the extent that there was delay it had either been caused by the Council or accepted by the superintendent as reasonable;

(iii) the delay did not constitute a breach of the obligation in clause 33.1;

(iv) the delay did not constitute a breach of the contractor's program, but was within its terms; and

(v) the trial judge erred in considering events occurring over the whole period of the relationship between the parties, and so far as it was able, the contractor had shown reasonable cause in its reply to the Council.

163 Before dealing in detail with these submissions, it is necessary to give some consideration to the scope and operation of the contractual conditions.

164 Underlying this aspect of the Appellant's case was the assertion that the termination of the contract depended clause 44 of the "General Conditions of Contract for Design and Construct", the relevant parts of which have been set out above. A number of points are relevant in this context. First, clause 44.2 permits a show cause notice to be issued by the principal, if it "considers" that damages may not be an adequate remedy. That issue will be dealt with below, but, on its face, does not require proof by the principal that, as a matter of fact, damages are not an adequate remedy. By contrast, the first limb of the provision requires that the contractor commit a "substantial breach" of the contract. That might be seen to be an objective requirement, not satisfied by the view formed by the principal, despite the fact that the consequence which follows is that the principal is empowered to give a show cause notice. On another view, the right to give such a notice should not depend upon a conclusion as to the existence or otherwise of a substantial breach, the purpose of the notice being to give the contractor an entitlement to demonstrate that no substantial breach has taken place. Arguably, if the contractor demonstrates to the satisfaction of the principle that no such breach has taken place, the result should be that the power to terminate the contract is not engaged, rather than that the notice is invalid. Accordingly, the better construction may be that a principal is entitled to issue the notice if it is satisfied, in good faith, that there has been a substantial breach by the contractor and a notice issued in those circumstances will be valid.

165 More importantly in relation to this limb of the clause, what is a "substantial breach" is at least in part defined by clause 44.2 itself. Whether the law would infer that certain breaches were substantial or not, and sufficient to trigger the right to terminate, the definition identifies some breaches which are, in effect, deemed to be substantial breaches for the purposes of clause 44. One of those is failing to proceed with due expedition and without delay in breach of clause 33.1.

166 Of the separate limbs to the challenge identified at [161] above only the last involves a matter of legal principle: the first four limbs concern the factual circumstances which have, at least in part, already been discussed. It is convenient to start with the relevant legal principles. The Appellant complained that the trial judge did not restrict his consideration of relevant delay to that particularised in the show cause notice. There are two broad responses to that complaint. First, it is apparent from the paragraphs quoted above that the show cause notice sought an assessment of the current stage reached in the construction works against a background which included the history of adjusted contractor's programs. Secondly, it is clear that Mr Yazbek also saw the matter in that way. His response focused to a significant extent on the delay in issuing the construction certificate, prior to the commencement of construction.

167 The complaint that the trial judge took into account matters other than those specified in the notice appears to derive from his discussion of clause 44.2, in the course of which he noted (at p 59) that the list was not exhaustive and that "other breaches could also be taken into account". However, I do not read his Honour as saying in this passage that he in fact took into account matters not specified in the notice in considering the lawfulness of the termination. That is because, having the made the statement just referred to, his Honour continued: *"But relevantly, para (g), following 44.2 is in these terms …*

The requirements of a show cause notice are set forth in Clause 44.3, not the least of which is a requirement to 'specify the alleged substantial breach'."

168 In considering the nature of the delay and responsibility therefor, his Honour also returned to this question (at *77-77*), in the following terms: *"It seems to me that the question of the breach as such is not necessarily limited to what is set forth in the show cause notice. I say that because of the authority of* ***Shepherd v Felt and Textiles of Australia Ltd****."*

After referring to particular passages in the judgment of Dixon J, his Honour continued: "So *it does seem to me that whilst the show cause notice is relatively limited in its terms, that is a prima facie view that one can certainly take. The overall circumstances leading up to the delay and the reasons for it have clearly emerged in the evidence and in my view that does not necessarily bind the Council to setting forth only those matters in the show cause notice and I also*

note the particular concerns of Mr Martini which were not referred to in the show cause notice, but they were concerns that he had at all relevant times."

169 It is not, with respect, entirely clear what view his Honour took of the scope of the show cause notice, nor in what respect he considered that the grounds relied upon to justify termination of the contract fell outside the notice. As his Honour noted, central to the Council's case was the question of "delay". The relevant contractual obligation was identified as that defined in clause 33.1 as the requirement to proceed with the work "with due expedition and without delay". In a major construction contract, a failure to comply with that obligation will only be capable of identification by reference to the progress made in terms of a contractor's program, which, in effect, breaks the contract down into numerous separate parts and identifies which are consecutive and which may be carried on concurrently and the time period at which each part must be undertaken, in order to reach practical completion by the agreed date. Understandably, the allegation of substantial breach depended upon the identification of the stage which the contract had reached at the date of the notice. However, the notice also called-in-aid earlier progress (or lack thereof) for the purpose of assessing what was realistically achievable. The earlier delays were not the subject of specific complaint, except in that context.

170 What was established by the notice with some care was that the Council would, in evaluating any response FPM Constructions provided, take into account failure to proceed in accordance with earlier programs. The purpose of that assessment was to determine whether the response, when provided, showed reasonable cause why the Council should not terminate the contract. That involved a judgment as to whether the reasons given by FPM Constructions demonstrated that there had not been a breach of clause 33 or, if there had been, that the breach was likely to be rectified expeditiously.

171 In the present case, once the power to terminate was engaged, the contractor was likely to have difficulty in persuading the Council to maintain the contract. On 12 December 2002, Mr Yazbek wrote to the Council seeking to draw attention to a number of issues *"preventing the performance of the contract"*. The letter concluded: *"In summary, for the reasons stated above we are unable to perform the requirements as set out in the contract and believe that due to circumstances beyond the control of the contractor that the contract is frustrated and we recommend that the contract be dissolved and that the parties retain their rights to recover damages from each other."*

On 16 December 2002 Mr Martini responded rejecting the proposition that the contract had been frustrated and not accepting the recommendation that it be "dissolved". FPM Constructions was asked to confirm that it would "*continue to perform its obligations under the contract*". Further, it was clear from the correspondence between FPM Constructions and the superintendent in the period between December 2002 and March 2003 that FPM Constructions was unhappy with the approach adopted by the superintendent in relation to the contract. One of the disputes notified on 18 March 2003 concerned "the refusal by the superintendent to terminate the appointment of the superintendent's representative".

172 The evidence in the case suggested that the parties had, by April 2003, differing views in relation to the on-going relationship. For Mr Yazbek's company, which tendered for the project, it was the first "design and construct" contract of such a scale which it had sought to undertake. Before the construction had commenced, the contractor, Fyntray Constructions Pty Ltd, had assigned the rights and obligations under the contract. It was clear that FPM Constructions not only had difficulty meeting the target dates for completion of stages of the project, but had difficulty in paying its subcontractors. Whether the assignment of the contract to FPM Constructions was undertaken to protect the assets of Fyntray Constructions Pty Ltd was a matter put to Mr Yazbek in cross-examination, but denied by him. The trial judge did not find it necessary to make a finding on that disputed evidence. Mr Yazbek provided a personal deed of guarantee for the performance of the contract by FPM Constructions.

173 On the other side of the record, it appeared that the Council obtained a contractual arrangement at a highly favourable price, to the extent that, at least with hindsight, it could be said that Mr Yazbek, through his company, had significantly underestimated the cost of carrying out the work. The Council had an interest in holding FPM Constructions to its bargain, for so long as it appeared to be performing its obligations.

174 The relevant legal issue depended, however, solely on whether there had been a breach of contract justifying termination by the Council or there had not. If there had been such a breach, the discretionary exercise by the Council of its contractual power to terminate could not be challenged. Accordingly, the beliefs of Mr Yazbek and of Mr Martini as to likely future events were of limited relevance. The material to which the trial judge was referring as being concerns not identified in the show cause notice fell into this category. Accordingly, in the circumstances of the case, I would not be satisfied that the contract was terminated for any reason going beyond the matters identified in the show cause notice, as discussed at [152]-[160] above.

175 The factual issues may more readily be disposed of. That there was delay, which would prevent the project being completed on time was substantially conceded by Mr Yazbek in his letter, on behalf of FPM Constructions, responding to the notice. He stated: *"Combined, extensions of time claims 1 and 2 total 73 days. Once added to the original practical completion date of 30/06/2003, the earliest revised date for practical completion is 10/10/2003. To this must be added inclement weather days, breaches by the Principal, public holidays and industry lost days off."*

Extension of time claim no. 2 was for a period of 50 days which, the letter noted, had been "rejected by the superintendent". Although said to be "currently in dispute" the claim had been made on 18 December 2002, and rejected on 31 December 2002. As at 2 April 2003, no dispute had been notified under the contract in relation to the rejection. The delay concerned the date of issue of the construction certificate. The letter alleged: "*Any competent person could ascertain that based on the time from issue of the development application approval to the issue of the construction certificate, a total of 115 days had lapsed and that the tender allowance of 65 days was exceeded by 50 days. Whilst we maintain that this delay was a direct result of the continual interference by the Principals' [sic] representatives and the superintendent directing changes to the construction documentation to suit the Principals' [sic] needs (and their subsequent denials), the fact is the construction certificate took 50 days longer to obtain.*"

Despite Mr Yazbek's protests, the Council clearly did not accept that it was responsible for the delays complained of, nor did the superintendent accept that it was. Because each stage of the carrying out of the contract was the subject of evidence before the trial judge, his Honour was led to express the view that the delay at this stage "falls fairly and squarely at the feet of FPM": Judgment, p 15.

176 The Appellant's case did not in substance challenge the factual finding that delay had occurred and that the delay constituted a "substantial breach" for the purposes of the contract, in accordance with its own definition of that term. Nor was it sought to be established in this Court that the delay was caused by the Council. Accordingly, his Honour's conclusion that the contract had been validly terminated is not shown to have been in error.

Progress claim no. 9 revisited

177 As already noted, the second set of proceedings instituted by FPM Constructions related to progress claim no. 9. Although the pleading alleged that the claim was delivered to the Council, it was, correctly, addressed to the superintendent. It was made some two weeks after the notice to show cause had been served and one week after the response had been given to that notice. There was one clear day between the date of the progress claim and the date of termination of the contract. The claim was for an amount of $285,580.80.

178 By way of response, the Council asserted that no entitlement arose under the contract, simply by delivering a claim to the superintendent. Pursuant to clause 42.1 the superintendent was required to assess the claim and issue a payment certificate, within 14 days of receipt of the claim. The obligation of the principal is to pay "an amount not less than the amount shown in such certificate", either within 28 days of delivery of the claim to the superintendent or within 14 days of the issue of the certificate, whichever is the earlier. No certificate was issued by the superintendent before the termination of the contract, or at all.

179 FPM Constructions asserted that the obligation to provide a certificate survived the termination of the contract, a proposition which is not supported by any language in clause 42. Further, it is inconsistent with clause 44.10, on which the Council relied, which reads as follows:

"***44.10 Rights of the Parties on Termination***

If the contract is terminated pursuant to Clause 44.4(b) or 44.9, the rights and liabilities of the parties shall be the same as they would have been at common law had the defaulting party repudiated the Contract and the other party elected to treat the Contract as at an end and recover damages."

180 An alternative way in which FPM Constructions advanced its argument was by relying on the default provision in clause 42.1 that "if no payment certificate has been issued, the Principal shall pay the amount of the contractor's claim". This right crystallized 28 days after delivery of the claim to the superintendent. Thus, the case for the contractor had to be that the default period continued to run after the termination of the contract, with the result that an entitlement accrued.

181 There are three reasons for concluding that the contract does not envisage this result. First, clause 42.1 provides a speedy means for determining progress claims on an interim basis. As the final paragraphs of clause 42.1 set out at [118] above demonstrate, it is premised upon the continued operation of clause 47, dealing with "dispute resolution". Clause 47.1 ends with the following sub-paragraph: "*Notwithstanding the existence of a dispute, the Principal and the Contractor shall continue to perform the Contract and, subject to Clause 44, the Contractor shall continue with the work under the Contract and the Principal and the Contractor shall continue to comply with Clause 42.1.*"

Accordingly, and subject to clause 44, both clauses 42.1 and 47 each contemplate the continued operation of the other and thus the maintenance of the contract. They are, however, subject to clause 44.

182 The second difficulty is created by clause 44.4, set out at [127] above. That clause provides that upon giving a notice to show cause, the principal "may suspend payments to the contractor" until, relevantly, it takes action to terminate the contract. In ***Aquatec-Maxcon Pty Ltd v Minson Nacap Pty Ltd*** (2004) 8 VR 16 at [44], the Court of Appeal in Victoria held that no written notice was required to give effect to the power to suspend payments. What is important, however, is the effect of the suspension. According to the sub-clause, the suspension operates until the earlier of three possible events. The first event is the contractor showing reasonable cause, at which point the right to take one of the steps under pars (a) and (b) falls away and the contract continues. The third specified event occurs 7 days after the last day for showing cause. Up to that point in time, the contract will have continued on foot. Whether or the not the principal then loses its right to take steps under pars (a) or (b) is unclear; the obligation to make payments, however, is reinstated. The third event identified is that on which the principal takes action under clause 44.4(a) or (b). Under par (a) the work is taken out of the hands of the contractor. In that

event, as the final sentence in clause 44.4 states, the suspension is, in effect, continued until the final position between the parties is established, pursuant to clause 44.6, depending on whether the principal in fact is required to pay more for the work taken out of the hands of the contractor than it would have had to pay if the contractor had completed the work. Whatever the ultimate right to payment, it arises under clause 44.6 and is not a revived entitlement under clause 42.

183 The final possibility is termination under clause 44.4(b). The only provision made in that respect is that found in clause 44.10, leaving the rights and liabilities of the parties, upon termination pursuant to clause 44.4(b), "as they would have been at common law" in the event of repudiation. The question will then be whether a payment, the right to which has been suspended up until the moment of termination, can still be described as an "accrued right", in the relevant sense. This concept is addressed at [192]-[193] below.

184 Because progress claim no. 9 had not been made when the notice was given under clause 44.2, no right to payment had arisen at that time and questions of suspension of such a right are not engaged in the present case. However, if the effect of such a notice is to give the principal power to "suspend payments to the Contractor" it would seem to follow that no new right to payment can arise. Further, it would seem to follow more clearly that no new right can arise after the contract has been terminated. That conclusion is consistent with the first point raised above, namely that the rights to payment under clause 42 are, in effect, interim rights pending the resolution of any disputes, which are to be resolved under clause 47 whilst the contract remains on foot.

185 The third argument against the Appellant's position is that acknowledged by Giles JA at [28] above, namely that the right to payment on default of certification by the superintendent, depends on the continued existence of the power of the superintendent to certify, after termination. As Giles JA further notes at [32] the discharge of functions by the superintendent "under the contract" merely directs attention to the manner in which those functions are identified and the time at which they may be exercised. However, I do not, with respect, accept his Honour's conclusion that the duration of the power with respect to a progress payment claim under clause 42 was not expressly revealed: see [33] above. As indicated in the preceding paragraphs, the limits on the power of the superintendent under clause 42.1 are expressly identified in terms which assume the continuation of the contract. Absent some clear expression of intention that the superintendent have powers which survive termination, an inference to that effect should not be drawn. That is because clause 23, which confers powers on the superintendent, is in terms an obligation imposed on the principal. It is the principal's duty to ensure that "there is a superintendent" and that the superintendent acts in the manner prescribed. There is nothing in clause 23 itself which suggests that the contractual obligation thus imposed on the principal continues to operate after the termination of the contract pursuant to clause 44.4. Nor, in my view, can questions of "obvious good sense" prevail over the clear intention of the specific clauses identified above. The only question for the Court is whether the parties have reached agreement to that effect or not.

186 The question remains whether this conclusion is precluded by authority. As Giles JA notes at [30] in ***Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd*** [2002] NSWCA 211, this Court dealt with the question whether an extension of time, varying the date for practical completion, could be granted after termination of the contract, in circumstances where the date for practical completion had been extended to 26 April 1999, but no further extension had been sought prior to 1 December 1999 when the contract was terminated: at [69]. The referee, dealing with a dispute in relation to liquidated damages, had treated the date for practical completion as if it had been extended until 5 June 1999.

187 In this Court, Hodgson JA (with whom Mason P and Stein JA agreed) accepted that no extension could be deemed to occur, absent a power in the superintendent to extend time, no claim for extension having been made prior to termination. His Honour concluded at [80]: *"In my opinion also, the power to extend time, including the power to do so even if no claim has been made within time, does not automatically come to an end with the termination of the contract for the builder's breach. Clause 35.6, providing for liquidated damages, expressly operates after the contract has been terminated under clause 44; and in order for it to so operate there must be a date for practical completion on which the clause can operate after termination of the contract. If an application had been made within time before termination and not yet determined by the superintendent at the time of termination, it is plain in my opinion that the superintendent would have power to determine that claim after termination. … I do not think the superintendent's power is lost on termination, even if the claim for exercise of the power to extend notwithstanding non-compliance had not been made until after termination."*

188 There are three reasons why this conclusion need not be applied in the present case. First, as Giles JA acknowledges at [30] above, the decision *"does not directly transpose to certification of payment under the contract"*. That is because each contractual power must be identified by reference to the specific terms in which it is granted. Nevertheless, Giles JA notes that the "notion of a superintendent's power surviving termination for some purposes" has been recognised. That gives rise to two further points, namely that, in my view, and consistently with the critique of Mr Adrian Bellemore in *"Must a Superintendent Extend Time?"* (2002) 18 B&CL 281, it is at least doubtful that such a conclusion arises from clause 35.6. Secondly, in so far as Mr Bellemore seeks to identify provisions which permit the superintendent to exercise powers after the termination of a contract, it is also doubtful whether those clauses should be so understood.

189 To deal with the point of construction raised in ***Peninsula Balmain***, it is necessary to consider the terms of clause 35.6, which relevantly read as follows: *"If the Contractor fails to reach practical completion by the date for practical completion, the Contractor shall be indebted to the Principal for liquidated damages … for every day after*

the date for practical completion to and including the date of practical completion or the date that the Contract is terminated pursuant to Clause 44, whichever first occurs.

If after the Contractor has paid or the Principal has deducted liquidated damages, the time for practical completion is extended, the Principal shall forthwith repay to the Contractor any liquidated damages paid or deducted in respect of the period to and including the new date for practical completion."

As noted by Adrian Bellemore, supra at 285, the first paragraph of clause 35.6 does not give rise to any inference involving post-termination powers. Liquidated damages, calculable under this clause, will cease on termination if the date "of" practical completion had not then arrived. However, I doubt that this was the part of clause 35.6 to which his Honour was referring in *Peninsula Balmain*. Rather, the second part of the clause envisages that an extension may be granted after liquidated damages have been deducted. In any event, Mr Bellemore's criticism of the Court's reasoning appears to depend significantly on a view of clause 35, read as a whole, which would limit the right of a contractor to an extension of time on account of the conduct of the principal, to a right to make a claim within 28 days of the conduct occurring. Thus, the author is critical of the view that the superintendent can unilaterally extend time in favour of the contractor, when no such claim has been made by it. This complaint cannot be fully answered, because the reasoning in the judgment does not engage the language of clause 35 with sufficient particularity. However, that fact also limits its relevance for the purposes of the present case.

190 Secondly, if the suggestion by Giles JA that other powers extending beyond the termination of a contract have been identified refers to the two examples given by Mr Bellemore in his comment **on *Peninsula Balmain*** (supra at p 285), I am not persuaded that they take the argument further. The first provision which the author relies upon is clause 44.6, but that clause deals with adjustment on completion of work taken out of the hands of a contractor pursuant to clause 44.4(a) and does not deal with termination under clause 44.4(b). The effect of that clause has been addressed above. Secondly, the author refers to clauses 46 and 47 dealing with notification of claims and notices of dispute. As already noted, in my view clause 47, dealing with dispute resolution, envisages the continuation of the contract. Clause 46 is, in my view, premised on the same assumption. Thus, clause 46.4 provides that the superintendent shall assess the claim and notify the parties of the decision. It continues: "*Unless a party within a further 28 days of such notification serves a notice of dispute under Clause 47.1 which includes such claim, the Superintendent shall include the amount of that assessment in the next payment certificate issued pursuant to Clause 42.*"

At least on its face, this clause also bears the hallmarks of an exercise of power only in relation to an extant contract.

191 In these circumstances, I am not persuaded that ***Peninsula Balmain*** is authority demanding a contrary conclusion to that obtained by reference to the relevant clauses of the contract now under consideration.

192 Finally, it is necessary to refer to the common law principles invoked by clause 44.10. In a well known passage in ***McDonald v Dennys Lascelles Ltd*** (1933) 48 CLR 457 at 476-477, Dixon J held: "*When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired.*"

The passage relied upon by Giles JA at [37] from the joint judgment of Dixon and Evatt JJ in ***Westralian Farmers Ltd v Commonwealth Agricultural Service Engineers Ltd*** (1936) 54 CLR 361 at 378-380 does not qualify this principle, although it provides some further context for its application. It makes clear a distinction between a right to payment in the future which is contingent upon an event which does not involve further performance of a contract and one which does. It is only in the former case that an accrued right can be said to have arisen. That distinction returns one to the terms of the contract in order to determine whether a future contingency depends upon the further performance of the contract. To the extent that the contingency in the present case requires the continued exercise of power by the superintendent, pursuant to clause 23, it requires the further performance of the contract by the principal whose obligation it is to see that there is a superintendent and that the superintendent discharges its functions in the prescribed manner. Where the relevant period has not expired, it is not possible to identify an "unconditional" right to a payment vested in the contractor, as at the date of termination in the sense identified in ***Dennys Lascelles***. That right will only crystallize where the principal continues to ensure that the superintendent exercises its power. Not only does that power not outlive termination, but if it did, it would require continued performance by the principal.

193 No right to a payment having arisen prior to termination, the effect of clause 44.10 is that no further rights will arise under the contract and the parties are left with their rights under the general law, subject to any relevant statutory provision to different effect, and none applies in the present case. It follows that the primary judge was correct in giving judgment for the defendant in the proceedings with respect to progress claim no. 9.

Calculation of damages

194 Having determined that the contract had been validly terminated, the trial judge assessed the damages suffered by the Council as a result of the breach of contract by FPM Constructions. The assessment was based on evidence of the additional cost to the Council of completing the contract with the services of a new contractor. The evidence relied on by his Honour was the evidence of an expert consultant, Mr Meredith, who had analysed the costs of the

Council incurred in completing the project and formed the view that those costs were reasonable. It is true that his Honour dealt with the matter relatively briefly. That was because, on Mr Meredith's calculation, the costs incurred by the Council were marginally short of $2 million. Because the Council elected to sue in the District Court, it was required to forego any amount in excess of the jurisdictional limit of the Court, namely $750,000: *District Court Act*, s 50.

195 Mr Meredith sought to assess the cost of completion of the project in two ways. First, he sought to value the work in the contracts let by the Council; secondly, he sought to make his own assessment of the cost of constructing the works. In cross-examination, it was put to him that there were two exercises he had not undertaken, namely an assessment of the cost of the work for which Fyntray tendered and, secondly, the cost to complete so much of the project as had not been completed on 11 April 2003.

196 There was some substance in these criticisms of the exercise undertaken by Mr Meredith, but they did not require the trial judge to discount his evidence entirely. Mr Yazbek's evidence in cross-examination, relied upon by his Honour, provided support for the view that to complete the contract would have cost FPM Constructions an amount some 10-15% in excess of the contract price. Mr Yazbek was clearly hesitant in putting a figure on it, but the range he identified was between $600,000 and $900,000. In the absence of more precise evidence, his Honour was entitled to form the view that the cost of completion was "at the very least" in excess of the jurisdictional limit of the Court. I would reject the challenge to that finding.

197 I also agree with the additional reasons of Giles JA set out at [67]-[80] above.

Award of costs against Second Appellant

198 On 24 August 2004 the primary judge handed down a further judgment with respect to the costs of three sets of proceedings. His Honour ordered that, in each proceeding, both FPM Constructions and Mr Yazbek pay the Council's costs. Those costs were to be assessed on a party and party basis up to an including 4 August 2004 and thereafter on an indemnity basis. The order for indemnity costs followed a rejected offer of settlement put on behalf of the Council.

199 The challenge to these orders is limited to so much of each order as imposed an obligation to pay costs on Mr Yazbek personally.

200 The power of the District Court to award costs in these proceedings is located in s 148B of the *District Court Act* 1973, which reads as follows:

148B(1) Subject to this Act and the rules and subject to any other Act -

(a) costs in or in relation to any proceeding shall be in the discretion of the court;

(b) the court has full power to determine by whom, to whom and to what extent costs are to be paid in relation to any proceedings; and

(c) the court may order costs to be assessed on the basis set out in Division 6 of Part 11 of the Legal Profession Act 1987 or on an indemnity basis.

It was not suggested that there was any relevant statutory provision or rule which restricted the scope of the power conferred by par (b).

201 In ***Knight v FP Special Assets Ltd*** (1992) 174 CLR 178, the High Court held that a rule of the Queensland Supreme Court Rules permitting the costs of and incident to all proceedings to be in the discretion of the court was wide enough to allow an order to be made against a non-party. Section 148B is more explicit in its breadth than the Queensland rule so that the conclusion applies *a fortiori*. Further, as noted in the joint judgment of the whole Court in *Owners of "**Shin Kobe Maru" v Empire Shipping Co Inc*** (1994) 181 CLR 404 at 421: *"It is quite inappropriate to read provisions conferring jurisdiction or granting powers to a court by making implications or imposing limitations which are not found in the express words."*

202 The principles established in ***Knight v FP Special Assets*** were affirmed in ***Re JJT; Ex parte Victoria Legal Aid*** (1998) 195 CLR 184 but were not extended to allow the Family Court to make an order against a legal aid authority, being a body with no interest in the proceedings, requiring it to incur expenditure for the conduct of litigation over which it had no control, namely the separate representation of a child.

203 The reasoning in ***Knight v FP Special Assets*** was expressly applied in relation to the power of the District Court under s 148B of the *District Court Act* in ***New South Wales Insurance Ministerial Corporation v Edkins*** (1998) 45 NSWLR 8 at 11D-12B: per Priestley JA, Spigelman CJ and Sheppard AJA agreeing. The power was applied in relation to proceedings in the Land and Environment Court in ***Diamond v Baulkham Hills Shire Council*** [1999] NSWCA 277.

204 The issue in contention is thus the considerations which should govern the exercise of a discretionary power in the present case. The statement of principle relied upon by the primary judge in the District Court was extracted from the joint judgment of Mason CJ and Deane J in ***Knight v FP Special Assets*** at 192-193 to the following effect: *"Obviously, the prima facie general principle is that an order for costs is only made against a party to the litigation.* …

For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party,

or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."

At 202, Dawson J referred to the principle in the following terms: *"The cases therefore establish a long-asserted jurisdiction to award costs in appropriate cases against a person who is not a party to the proceedings where that person is the effective litigant standing behind an actual party or where the has been a contempt or abuse of the process of the court. Even if the cases were confined to ejectment proceedings (and clearly they are not), the principle lying behind the ejectment cases is that the real litigant rather than the nominal party may be made liable for costs."*

Gaudron J agreed with the joint judgment and McHugh J dissented.

205 When the judgments in ***Knight v FP Special Assets*** are read in full, it is clear that there is no significant difference between the approach adopted by Dawson J and that expressed by the other Justices in the majority. The authorities upon which the joint judgment drew are replete with references to awards being made against the "real party". Reference was also made to the judgment of Brooking J in ***Burns Philp & Co Ltd v Bhagat*** [1993] 1 VR 203 at 212 referring to the power of the Courts to award costs "against someone who is not a party in the strict sense".

206 In the present case, it could not be said that FPM Constructions was merely a nominal party or that Mr Yazbek was the "real party" to the proceedings. No doubt it is true, as his Honour found, that Mr Yazbek was the driving force behind FPM Constructions and was its representative for the purposes of the litigation. That does not mean, however, that the benefit of the proceedings brought by FPM Constructions for progress payments, in law, flowed to anyone other than FPM Constructions, nor that the company was other than the proper defendant in proceedings brought by the Council. Nor is the fact that Mr Yazbek was the sole director and secretary of the company inconsistent with that conclusion. Were it otherwise, the corporate veil would, in effect, be nullified at the very point at which it provides protection against personal liability for the shareholders and directors. The carefully crafted exceptions to the principle would overtake the principle itself were that the case.

207 The primary judge found: *"Mr Yazbek had an important and integral role in these proceedings. He was frequently mentioned during the course of the hearing and he swore a number of affidavits. He was the sole witness called by FPM. Mr Yazbek certainly had an interest in these proceedings and I draw a comfortable inference from all of that, that the litigation was effectively run for his own benefit."*

The reference to Mr Yazbek's "role in these proceedings" is a reference to the earlier comment of his Honour that, from his observations of Mr Yazbek's participation in the proceedings, his Honour inferred that Mr Yazbek "had a specific role in instructing counsel to the extent that I observed". With respect, that consideration is neutral. Further, the fact that he was mentioned during the proceedings and swore affidavits merely reflects the fact that he was the guiding force behind the company and the individual responsible for its actions. Again, those factors are, on their face, neutral. The inferences sought to be drawn in the last sentence of the quotation set out above, that Mr Yazbek had "an interest" in the proceedings and that they were run "for his own benefit" would appear to use language ambiguously, so as to encompass indirect economic interests and benefits. Mr Yazbek was no stranger to FPM Constructions: he was, as already noted, its sole director and a 50% shareholder.

208 In ***Knight v FP Special Assets***, the order for costs, approved by the High Court, was made against the receiver and manager of a company which sought specific performance of a contract. A judgment was entered against the company by default. As noted in the joint judgment at 181: *"Special leave to appeal to this Court from the decision of the Full Court was specifically confined to the question whether the Supreme Court had jurisdiction to make the orders. This Court is not concerned therefore to examine the exercise of any discretion to make an order, that being the point on which there was a division of opinion in the Full Court."*

McHugh J dissented on the question of jurisdiction, noting that the companies were not nominal parties to the proceedings. Further he noted that, to the extent that the benefit of successful proceedings would pass through the companies to their creditors, they would not pass to the receivers, but to the banks which placed the receivers in control of the company. No costs order had been made against the banks. His Honour continued at 217: *"In instituting and defending the various proceedings, the appellants were the agents of the companies. In principle, the actions of the appellants cannot be distinguished from those of the directors of a company who bring or defend an action on its behalf. If, under the summary jurisdiction, the Supreme Court could order the appellants to pay the costs of this action, it must follow that the Supreme Court has jurisdiction to order the payment of costs by the directors of any company which commences or defends an action in that court.*

As a matter of policy, provision for security for costs is a better remedy for protecting persons involved in litigation with insolvent companies than ordering a receiver to pay the costs of litigation after verdict."

The importance of these comments, albeit in dissent, is that they give guidance as to the limited circumstances in which, as a matter of discretion, the power should be exercised.

209 One category of cases where the power may be exercised is where there is a class of persons, equally affected by a particular matter, any of whom may sue, and where the Court may properly infer that the actual plaintiff was a person of straw and that the real driving force behind the proceedings was a different person, with financial resources. ***Diamond v Baulkham Hills Shire Council*** [1999] NSWCA 277 fell into that category. However, that is not this case.

210 There may be other cases where such an order is appropriate including the circumstances of ***Knight v FP Special Assets*** itself, in which the company was in receivership. Again, that is not the present case, the primary judge expressly finding: *"There is nothing to indicate that FPM is in receivership."*

It is also true that the principle established in ***Knight v FP Special Assets*** cannot be limited to the specific circumstances of the case, the joint judgment having expressed a conclusion in more general terms. A further example, not encompassed by those identified to date, is illustrated by ***Gore v Justice Corporation Pty Ltd*** (2002) 119 FCR 429, a decision of the Full Court of the Federal Court in relation to an order sought against a litigation funder. The judgment contains an extensive analysis of the case law, including consideration of the judgment of Callinan J in ***Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation*** (2001) 179 ALR 406. It is clear that the categories of case which may attract the exercise of the power are by no means closed, nor should they be. Nevertheless, the requirements of justice should not be allowed to expand an exception to the general rule, so as to undermine the rule itself. What is significant from a survey of the cases in which orders have been made against non-parties is that they tend to satisfy at least some, if not a majority, of the following criteria:

(a) the unsuccessful party to the proceedings was the moving party and not the defendant;
(b) the source of funds for the litigation was the non-party or its principal;
(c) the conduct of the litigation was unreasonable or improper;
(d) the non-party, or its principal, had an interest (not necessarily financial) which was equal to or greater than that of the party or, if financial, was a substantial interest, and
(e) the unsuccessful party was insolvent or could otherwise be described as a person of straw.

211 Returning to the three criteria identified in the joint judgment in ***Knight v FP Special Assets***, the first is that the party is insolvent or a person of straw. FPM Constructions was not insolvent and the trial judge did not find that it was entirely without resources, although that may perhaps have been inferred from the evidence. If the first criterion were satisfied, that satisfaction was not expressly identified in the judgment below.

212 The second criterion was that the non-party have played an active part in the litigation. As the facts of ***Knight*** itself show, that role may be legitimate, as in the case of a receiver or manager. Nevertheless, in a proper exercise of discretion, something more should generally be found, although it may be sufficient that the third criterion is satisfied. In ***Knight*** itself, the proceedings were in effect abandoned, and in ***Arundel Chiropractic Centre***, Callinan J described the driving force behind the litigation as a company officer acting *"stubbornly and totally unreasonably"* (at [30]).

213 Thirdly, the non-party or its principal must have an interest in the subject of the litigation. The term "interest" in this context is of uncertain extent: as suggested by McHugh J in ***Knight***, the real beneficiary of that litigation, if successful, would have been the banks which appointed the receiver and manager. It may have been assumed that they would have indemnified the receiver and manager in any event. In *Gore*, the Full Court placed some weight upon the fact that the non-party, Justice Corporation, was an entire stranger to the subject matter of the litigation, but had, in effect, purchased an interest in its outcome by contracting to receive 8% of the judgment debt if the claimant had been successful: at [62] and [64]. The interest of Mr Diamond in the litigation involving the Baulkham Hills Shire Council appears to have been of a non-financial kind, but in a practical sense equal to or greater than that of the nominal party.

214 The criteria identified in ***Knight v FP Special Assets*** should not ultimately be treated as separate and independent factors. Each requires an evaluative assessment of factors which will clearly tend to interact. Nor should it be forgotten that the power is only to be exercised in exceptional cases. In many cases involving individuals in the superior courts the parties may lack the resources to meet the costs of the litigation if unsuccessful. Similarly, there will frequently be a non-party, be it a company officer or solicitor, who will be active in the conduct of the litigation and who will obtain some direct or indirect financial benefit from its success. The fact that it is entirely proper for legal practitioners to runs cases on a speculative basis, so long as satisfied that they have reasonable prospects of success, demonstrates that care must be taken not to apply the criteria mechanically. Careful attention is required to the conduct of the party said to be involved in the litigation and the nature of the "interest" in its outcome or subject-matter.

215 In the present case, in my view, the exercise of the discretion miscarried. First, as noted above, his Honour gave significant weight to factors which were, taken in isolation, neutral. Secondly, he treated the proceedings as having been run for the benefit of Mr Yazbek without identifying clearly what that benefit was. If it were simply the benefit of a shareholder of a company, that would not by itself be sufficient. Further, it is significant that his Honour made orders to the same effect in all three proceedings, although two of the three proceedings were instituted by FPM Constructions, whereas the third and major proceeding was instituted by the Council. There was no finding that Mr Yazbek had funded the litigation.

216 On the appeal, the Council sought to uphold the order primarily on the separate ground that Mr Yazbek was a guarantor of the obligations of FPM Constructions under the contract with the Council. A secondary ground relied upon was evidence referred to as steps taken to "quarantine assets" of the company so as to put them "out of reach of creditors".

217 As to the first matter, the Court's attention was not directed to the terms of the guarantee, nor was it suggested that the guarantee was in evidence in the Court below. Depending on those terms, the existence of such a guarantee might render an order against Mr Yazbek directly unnecessary. This is not a factor which would militate in favour of this Court making or confirming an order in the terms adopted by the primary judge.

218 In relation to the second matter, the first reference to material said to involve the divestment of assets was a summary by his Honour in his principal judgment of the letter from the original contractor, addressed to the Council, seeking assignment of its interest in the contract to the company which became FPM Constructions. This letter contains no evidence of the matters asserted. Secondly, the Court's attention was drawn to the cross-examination of Mr Yazbek suggesting that he was impecunious and had sought "to enter into transactions to divest himself of some assets" in June 2002. This material is, with respect, not directly relevant to the power to make a costs order against Mr Yazbek. In so far as it was suggested that he had been seeking to protect the assets of the company, that was denied and his Honour made no specific finding in that regard.

219 The best that the Council can do in the present circumstances was to rely on the findings made by Bryson J in the Equity Division in earlier proceedings between the same parties in relation to progress claim no. 7: ***FPM Constructions Pty Ltd v The Council of the City of Blue Mountains*** [2003] NSWSC 201. In declining to order that FPM Constructions give security for costs of the proceedings, his Honour held at [12]: *"The Contractor's evidence showed (a position not at all unusual in building contracts) that the Contractor was dependent on the flow of money from progress payments to maintain activity, and was unable to continue and to retain its relationship with subcontractors if it did not receive some such amount as was claimed or if it was left to pursue the lengthy course of dispute resolution pointed out by cl.47, with its stately 98-day progression from notice of dispute to reference to arbitration. Evidence showed that the Contractor was not in a position either to carry on with the work or indeed to give security for the Principal's costs in any large amount, or in any amount which might be significant, ... Evidence showed that the individuals who stand behind the Contractor are in no better position to give security. The financial position of the Contractor was precarious, it had taken over from the original contractor which had not been able to manage its finances, and it had encountered difficulties which led to a special arrangement under which consultants who were subcontractors were paid directly by the Principal."*

This material no doubt supports the proposition that FPM Constructions remained in a financially precarious state and might well, if unsuccessful in the litigation, be unable to meet an order for costs. Nevertheless, absent a finding that it was insolvent, this material is ambivalent for the Council. It provided the basis upon which Bryson J declined to order security for costs in the proceedings before him. We were told that an order for security was also refused in the District Court proceedings. Absent some other relevant consideration, it would be curious if, the company not being ordered to provide security, its active director could be made liable for the costs of the proceedings when it ultimately proved unsuccessful. If the proceedings were shown to be hopeless or their conduct was shown to be unreasonable, a different result might follow. In the present case this is not, in my view, sufficient to support the order made below against Mr Yazbek.

Conclusions

220 In the result, the Respondent has been successful on the substance of the appeal brought against it by FPM Constructions but has been unsuccessful in relation to the appeal brought by Mr Yazbek. This has consequences both for the costs order made below and for the costs of the appeal.

221 In relation to the costs in the District Court, the order made in relation to FPM Constructions should stand. However, to the extent that the application made by the Council on 24 August 2004 for costs against Mr Yazbek should have been rejected, the Council should properly pay his costs of that day. It is not possible to identify with any precision from the record what proportion of that day was spent in dealing with the application against Mr Yazbek: there may have been some discussion of the Council's entitlement to indemnity costs against FPM Constructions. It is also not clear whether Mr Yazbek and the company were jointly represented on that occasion. However, on the assumption that they were, the proper order should be that FPM Constructions pay its proportion of the costs of that day, on a party and party basis and that the Council pay Mr Yazbek his proportion of the costs of the day. It seems likely, from the judgment, that the bulk of the costs were involved in the application made with respect to Mr Yazbek personally. Nevertheless, it is a matter which cannot be satisfactorily resolved at this stage and I would grant leave to the parties to provide submissions to the Court as to an appropriate order, expressing a firm conviction that it should be the subject of agreement, given that it is likely to be a trivial amount in the overall scheme of the litigation. The costs order made by the primary judge should at least be varied so that it is restricted to orders against FPM Constructions alone.

222 In relation to the costs of the appeal, the Council has been successful in relation to all matters with the exception of Mr Yazbek's costs. That matter I would estimate took up 10% of the time of the appeal. Although Mr Yazbek and FPM Constructions had common representation, the costs should properly be apportioned. The appropriate orders would require FPM Constructions to pay the Council 90% of its costs of the appeal and the Council to pay Mr Yazbek his costs of the appeal, which should constitute 10% of the combined Appellants' costs. Again, it is appropriate to grant leave to the parties to bring in short minutes to reflect these proposed orders, and a note as to any proposed variation.

223 I would propose the following orders:

(1) The appeal by the First Appellant in relation to the costs order made against him personally be upheld and the orders made by the District Court on 24 August 2004 with respect to costs be varied so as to read:
    (1) in matter no. 1731/03, order that the plaintiff pay the defendant's costs of the proceedings, on a party and party basis up to and including 4 August 2004 and thereafter on an indemnity basis;
    (2) in matter no. 2130/03, order that the plaintiff pay the defendant's costs of the proceedings, on a party and party basis up to and including 4 August 2004 and thereafter on an indemnity basis;

(3) in matter no. 3916/03, order that the defendant pay the plaintiff's costs on a party and party basis up to and including 4 August 2004 and thereafter on an indemnity basis.

(2) Order that the Council of the City of Blue Mountains pay Mr Yazbek's costs of the application made by it against him personally for its costs in the District Court.

(3) Order that the appeal be otherwise dismissed.

(4) Order that the First Appellant pay 90% of the Respondents' costs of the appeal.

G. McVay (Appellants) instructed by McLachlan Chilton
S. Donaldson SC/M. Lee/A. Crossland (Respondent) instructed by Marsdens