JUDGMENT: HHJ Bergin : Supreme Court of New South Wales : 6th March 2006.

1 These are proceedings to have declared null and void an adjudicator's determination made under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) (the Act). The plaintiff, Shell Refining (Australia) Pty Limited, and the defendant, A J Mayr Engineering Pty Limited, are parties to a construction contract (the Contract) pursuant to which the defendant agreed to fabricate and pre-assemble modules for use in the plaintiff's refineries in Clyde, New South Wales and Geelong, Victoria. The plaintiff appointed Aker Kvaerner Australia (AKA) to administer the Contract.

2 The defendant served on the plaintiff a payment claim, dated 30 November 2005, under the Act in the amount of $11,137,998.30 which included items E5.1 to E5.7, identified as claims for "Reimbursement of Costs, Losses and Damages", totalling $6,286,182 (inclusive of GST) (previously $5,714,711 prior to adjustments). That claim also included an amount for costs incurred by the defendant in transporting the modules to Geelong in Victoria, in particular, those costs of the journey from the border to Geelong.

3 Under cover of a letter dated 21 December 2005 the plaintiff served on the defendant a payment schedule under the Act. On 12 January 2006 an adjudication application was made by the defendant. On 13 January 2006 Philip Davenport (the adjudicator) accepted an appointment offered by the nominating authority to serve as adjudicator. On 19 January 2006, the plaintiff lodged its adjudication response pursuant to s 20 of the Act.

4 On 26 January 2006 the adjudicator made his determination (the Determination), determining the adjudicated amount to be $11,085,693 as due and payable by the plaintiff to the defendant. That amount included the amounts claimed for items E5.1 to E5.7 and the transportation costs to Victoria.

5 The plaintiff commenced these proceedings by Summons filed on 3 February 2006 seeking a declaration that the Determination is null and void. The defendant filed an adjudication certificate and in separate proceedings sought the entry of judgment in its favour in the amount determined by the adjudicator. That application will await the outcome of these proceedings. These proceedings were heard by me on 15 February 2006 when Mr M Christie, of counsel, appeared for the plaintiff and Mr M Rudge SC, leading Mr F Hicks, of counsel, appeared for the defendant.

The adjudication material

6 The defendant's submission accompanying the adjudication application annexed a large volume of documents including a document entitled "Claim for Reimbursement of Costs, Losses and Damages" dated 8 August 2005 (the 8 August Claim).

7 The 8 August Claim included section 7.3, entitled "Substantiation of Costs, Losses and Damages Due to Delays and/or Disruptions". This section of the Claim referred to the various delays that the defendant claimed had occurred including: delays due to incomplete work by others; out of sequence working; inadequate and untimely access to areas and workforces; delays in the provision of necessary information and/or drawings; inadequate and inconsistent drawings; untimely and disruptive variations; acceleration of sections of the work and programming changes. After stating that the defendant had thereby incurred costs and suffered losses the Claim continued: *There is no precise way to compute the costs and losses incurred for both labour and equipment due to disruption to the original program. In AJ Mayr's claim, the quantification has been derived from specific events, specific circumstances, the consequences of those events and circumstances and a degree of subjective judgment.*

8 The 8 August Claim also included the following:

8 QUANTIFICATION OF COSTS, LOSSES AND DAMAGES

8.1 General

A J Mayr suffered additional costs, losses and damages during execution of the Contracted works. These costs, losses and damages are quantified in Appendix 13 of the claim.

As discussed in Section 6.0 of this document, A J Mayr is entitled to recover extra costs, losses and damages, partly as entitlement under the contract, and partly arising from breaches of the Contract by AKA.

As far as possible, A J Mayr has not attempted to assign specific costs to specific areas of this claim.

However, with the myriad of different factors causing disruptions, it is extremely difficult to accurately allocate costs, losses and damages to individual incidents. Accordingly, the quantification for these incidents has been prepared using the modified total costs method.

Under the modified total cost methodology, a contractor must prove the reasonableness of the assumptions that the contractor accurately computed its bid, the costs expended were reasonable and the contractor was not responsible for the increases.

Under these terms, A J Mayr has been able to demonstrate that it has been able to work efficiently as initially estimated and further refined in its work schedule and execution plan, and been able to reach and exceed the productivity factors required to complete the project in the required time. However, the ability for A J Mayr to achieve the required efficiency was totally reliant on AKA providing the free issue materials in accordance with agreed requirements including sequencing, tagging, labelling, sorting and tagging.

Details of costs, losses and damages are as follows.

8.2 Labour Efficiency

An assessment of labour efficiency and costs has been carried out and is summarised below.

Reference to the Cumulative Manhour Charts and the Manhour Histograms in Appendix 11 clearly shows the significant increase in direct labour manhours required to complete the project and the corresponding decrease in number of earned value hours over the period.

A J Mayr's actual spent labour manhours up to 30 May 2005 totals 73,898.80 hours which are exclusive of those consumed in the variations for which claims have already been presented to, and approved by AKA.

The total spent labour manhours above have been compared to the actual total corresponding earned hours of 44,070 manhours.

Without prejudice A J Mayr's claim and in the interests of reaching a speedy and amicable resolution of this matter, A J Mayr has elected to utilise the following formula for calculating its loss:
= (Total Project Spent Hours excluding variations) – (Total Project Earned Hours excluding variations)
= (73,898.80 hours) – (44,070.00 hours) = 29,828.80 Hours

Then A J Mayr claims the additional costs = 29,828.80 hrs x $55 hr = $1,640,584.00

A J Mayr also claims the incremental cost of labour obtained at increased rates from 20 April 2005, as proposed by A J Mayr in the email from Brett Arnold on 21 April 2005 and agreed by AKA in an email from Mark Butters on 26 April 2005. (Refer to Appendix 14).

8.3 Preparation of Claim
Had the circumstances encountered on this project not occurred (which were ultimately the responsibility of Shell), there would have been no need for A J Mayr to incur the costs involved in conducting a detailed analysis of the Contract and quantifying the costs, losses and damages due to the acts and/or omissions of the Company, or for those for whom it is responsible. The cost of preparation and of processing the claim to date is given below.

Group Financial Controller: 100 hrs x $85.66 = $ 8,570.00
Commercial Manager: 150 hrs x $96.25 = $ 14,437.50
Finance Manager: 25 hrs x $59.78 = $ 1,494.50
Consultants and Legal Fees: = $ 12,000.00
Travel & Expenses: = $ 1,500.00
TOTAL ***= $ 38,002.00***

A J Mayr reserves its right to claim further additional costs should this be necessary.

8.4 Financing Costs
Due to the circumstances outlined in items 8.2 and 8.3 above, A J Mayr incurred financing costs with respect to the costs associated with the ongoing inefficiencies previously detailed.

January $ 0.00
February $ 287.38
March $ 1,883.84
April $ 3,636.01
May $ 7,318.20
Total $ ***13,125.42***

The monthly financing costs detailed in this claim have been calculated on the following basis:

Monthly closing balance of claim for the preceding month x Financing Rate

Where:

Financing rate = Supreme Court of Australia interest rate of 9% (compounding)

The financing costs represent the cost to A J Mayr in funding the inefficiency as to the 30 May 2005 (refer Appendix 13).

9 SUMMARY & CONCLUSIONS
As detailed in this document, A J Mayr has experienced substantial financial costs, losses and damages in the execution of this contract.

These costs, losses and damages were due to factors caused by acts and/or omissions by the Company and which are necessarily the responsibility of the Company. In spite of significant delays and/or disruptions, A J Mayr continues to carry out its contractual obligations in a professional manner and always in the best interests of the Company, mitigating its costs wherever possible.

During the execution of the project, A J Mayr was consistently receptive to directions from AKA regarding the execution of the project (and for the benefit of Shell). At the same time, A J Mayr incurred significant costs, losses and damages on this project, caused not through any fault of its own, but due to the acts and/or omissions of the Company or of others for whom the Company was either directly or indirectly responsible.

An entitlement exists for the recovery of the costs, losses and damages incurred as follows:

Efficiency Claim $ 1,640,584.00
Incremental Labour Rate $ 188,369.98
Claim Preparation $ 38,002.00
Finance Costs $ 13,125.42
Total $ ***1,880,081.40***

Without prejudice, A J Mayr reserves the right to claim further additional costs, should it consider appropriate to do so in the future.

In conclusion, A J Mayr requires to be placed in the financial position with this contract in which it would have been had the project not experienced disruptions and now seeks compensation for such costs, losses and damages incurred.

9 The 8 August Claim was adjusted on 29 September 2005 and 7 December 2005. Each of those adjustments applied the same methodology to that outlined in the 8 August Claim. In support of its claim before the adjudicator the defendant included all of the records progressively submitted to the plaintiff in the weekly progress reports. Those reports recorded "work achieved, the spent manhours, and the earned manhours". The defendant's submission included an explanation in respect of the use of the labour rate of $55 per hour referred to in section 8.2 in relation to labour efficiency. In that regard the submission claimed:

Shell/AKA is readily able to verify the labour rate of $55.00 per hour used in the calculation of costs by dividing the total amount including in its tender for labour, by the total labour hours included in its tender. The rate is simply an average gang labour rate.

Shell/AKA is also able to verify the component of the claim for incremental labour from the calculation provided and correspondence referenced in the claim. A further explanation of the various incremental labour cost claims is attached.

10 One of the documents submitted to the adjudicator by the plaintiff was the AKA letter to the defendant dated 21 December 2005 in which the following appeared:

E5.1 to E5.7 Claim for Reimbursement of Costs, Losses & Damages

To date we have received several unsubstantiated global claims associated with delays. Our request to have the basis of claims substantiated ... has been ignored to date. Until we received (sic) adequate substantiation of the claim we are unable to assess the claims and consider whether we are able to make a determination of claims "outside the contract". On the information provided to date we are unable to assess the basis or quantification of these claims and have, as such, valued the claim as "0" in the Determination set out in ATTACHMENT 1.

We point out that during the course of the CONTRACT the COMPANY has paid the CONTRACTOR's claims associated with the following prolongation costs:

- *Additional Management Fee costs totalling $3,531,409 above the original sum of $2,304,407 included in the Management Fee for site management, administration and site supervision. This represents a 153% increase in Management Fee payments associated with management, administration and site supervision personnel whereas the increase schedule duration of 4 months over the original 8 months schedule represents a 50% increase.*
- *Standby costs associated with waiting time for delivery of materials, particularly pipe and fittings.*
- *Facility Costs associated with lease and hire of temporary buildings and facilities.*

The making and receiving payment for such claims seems to us to be inconsistent with your global claim. Hence, we are seeking clarification on the basis of these claims totalling $5,714,711.

The Determination

11 The Determination includes the following:

The submissions and accompanying documents submitted by the parties fill two boxes. I have considered all the material. The fact that I do not specifically refer to any submission or document must not be taken as any indication that I have not considered it. The reason why I have not specifically referred to any submission or document is that I have not considered it of sufficient relevance to warrant specific comment. ...

Currie & Brown Report

In the adjudication response the respondent includes an audit report [the Currie & Brown Report] dated 18 January 2006 commissioned by the respondent's consultant Aker Kvaerner Australia Pty Ltd. The respondent says [para 3.3 of the adjudication response] that the Currie & Brown Report concludes that the actual cost to the claimant of the project was $32,509,110. The respondent says that the claimant has been paid $35,806,889 and "has therefore been paid all the costs it incurred. In fact, (the claimant) has made a profit of over $3 million in respect of this project". ...

The stated aim of the report was to "assess the veracity or otherwise of the (claimant's) claimed amounts ... and to help assess the actual costs incurred by (the claimant) in total in undertaking the work". So far as I can glean from the Report, the claimant has keep (sic) thorough and detailed records of quantities, work done and costs. For example, I see in the Report's Findings on p.8, "Given that ... the review from Currie & Brown did not establish any anomalies it can be accepted that the final quantities provided by the remeasurement tables produced by A J Mayr is a true reflection of the actual work done and materials supplied for the structural steel element of the works" and in the report's Findings on p.10, "AJ Mayr provided detailed pipe pivot tables in electronic format referencing every weld and length of pipe back to drawings, invoices, dates, welders, etc. leaving a complete audit trail of the works carried out for this element of the project. ... We ... could find no anomalies with regard to calculations."

The respondent says [at para 3.1 of the adjudication response], "Currie & Brown was requested to gather all possible relevant information in order to establish the accuracy of claims made by AJ Mayr". Later I will deal with particular submissions made by the respondent with respect to the Report but, generally speaking, rather than supporting the respondent's case, the Currie & Brown Report supports the claimant's case. It shows what thorough records the claimant kept. The respondent draws my attention to Appendix 3 of the Report and the list of information not

submitted by the claimant to the auditors. I am not satisfied that the respondent was entitled to have that information. In any event, the absence of the information is not relevant to the assessment of the current progress payment.

The claimant has not had an opportunity to comment on the Currie & Brown Report. Under s.20(2B) of the Act, the respondent cannot include in the adjudication response any reasons that have not already been included in the payment schedule. In so far as the Currie & Brown Report might be said to be a new reason or contain new reasons, the respondent is not allowed to rely upon those reasons. ...

E5.1 to E5 to E5.7

These are claims for damages consequent upon alleged acts, defaults or omissions of the respondent. In the main, they are claims for alleged additional labour costs consequent upon delays allegedly caused by the respondent. At pp.5 and 6 of the adjudication application the claimant describes alleged causes of substantial delay. In the adjudication response, the respondent does not deal with this part of the claimant's submission. It is apparent to me that the claimant incurred considerable delay and disruption as a consequence of acts, defaults and omissions of the respondent. It seems to me that in so far as those delays were caused by acts, defaults or omissions of the respondent's agent AKA, for example, in delivery of design data and drawings and giving instructions, they are the acts defaults or omissions of the respondent. While not admitting the detail of the alleged delays and disruption, the respondent has not denied that he respondent was responsible for some delays and disruption.

In the adjudication application [p.11], the claimant refers to the fact that the respondent's payment schedule is based almost entirely on AKA's assessment of the payment claim. I accept that that is so. ...

The respondent says that these claims [E5.1 to E5 to E5.7] "must be assessed at nil" [para 14.3 of the payment schedule]. The first reason given by the respondent is that the claims are unsubstantiated. The respondent says [para 14.1], "The failure to provide any substantiation or refer to any documents in support of its claim are telling". At para 14.7 the respondent says, "As matters presently stand, AJ Mayr has not even attempted to explain the alleged relationship between any delay or disruption and the costs that are claimed (or provide supporting documentation in support of such costs)".

At para 14.8 the respondent says, "It is therefore impossible to attribute any value to claims E5.1 to 5.7. ... If AJ Mayr puts forward claims with appropriate verifiable supporting documentation, Shell will consider such documentation and respond accordingly".

... The claimant points to documentation supplied. It seems to me that the claimant has provided copious documentation in an attempt to substantiate the claim and to show the alleged relationship between alleged delay and disruption caused by the respondent and the alleged additional costs incurred by the claimant. The respondent's allegation at para 14.7 is simply wrong. For example, the claimant has provided a claim dated 8 August 2005 which takes up a large springback folder. As to that document, the respondent says [at para 14.4 of the payment schedule], "It is not possible to even begin to sensibly address these claims on the basis of the matters contained in this document". I don't agree. ...

Rather than addressing the claimant's contentions with respect to the alleged causes of delay and disruption and the alleged consequences (in terms of cost to the claimant) the respondent has given as to the reason for withholding payment that the claimant has failed to provide any substantiation and that it is not possible for the respondent to "begin to sensibly address these claims". The respondent's allegations have not been substantiated. I am not satisfied that the respondent has a valid reason for withholding payment.

I am satisfied that the respondent did cause delay and disruption and the respondent thereby breached the Contract and caused the claimant to incur some damages of the nature claimed. Had the respondent addressed the claims and come up with a different assessment, then I might have been able to determine an entitlement different to that claimed. As it is, the respondent has not provided information which would enable me to assess the claimant's damages at a lesser amount than the amount claimed. Consequently, for a payment on account, I am satisfied that the claimed amount should be included in the calculation.

The grounds for relief

12 The plaintiff claims that the adjudicator determined the amount payable in respect of the damages claims in E5.1 to E5.7 of the Payment Claim without considering and determining the merits of such claims (Failure to Address the Merits). The plaintiff also claims that the adjudicator allowed a claim for transportation of materials to Geelong in Victoria and that he did not have jurisdiction to do so (Transport Claim).

Principles

13 The object and scheme of the Act has been the subject of numerous decisions. In ***Brodyn Pty Ltd t/as Time Cost and Quality v Davenport & Anor*** (2004) 61 NSWLR 421 Hodgson JA said at 440-41, [51]: *The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: s 3(4) and s 32. The procedure contemplates a minimum of opportunity for Court involvement: s 3(3) and s 25(4).*

14 In ***Multiplex Constructions Pty Limited v Luikens & Anor*** [2003] NSWSC 1140 Palmer J at [96] described the scheme of the Act as requiring the respondent to "pay now argue later". It also appears that the motivation for the introduction of the scheme of the Act stemmed in part from an understanding that cash flow is considered the "lifeblood of the construction industry"; [Second Reading Speech, 12 November 2002, Hansard p 6541, as cited

in ***Amflo Constructions Pty Ltd v Anthony Jeffries*** [2003] NSWSC 856, per Campbell J at par [27]].

15 In **Coordinated Constructions Co Pty Limited v J M Hargreaves (NSW) Pty Limited** (2005) 21 BCL 390 Hodgson JA said:

> *51 That passage [referring to the first instance decision] could be read as asserting that, if a respondent to a payment claim does not raise any relevant grounds for denying or reducing the progress claim made by the claimant, then the adjudicator automatically determines the progress claim of the amount claimed by the claimant. My tentative view is that such an assertion would be incorrect.*
>
> *52 The adjudicator is to determine the amount of the progress payment to be paid by the respondent to the claimant; and in my opinion that requires determination, on the material available to the adjudicator and to the best of the adjudicator's ability, of the amount that is properly payable. Section 22(2) says that the adjudicator is to consider only the provisions of the Act and the contract, the payment claim and the claimant's submissions duly made, the payment schedule and the respondent's submissions duly made, and the results of any inspection; but that does not mean that the consideration of the provisions of the Act and the contract and the merits of the payment claimed is limited to issues actually raised by submissions duly made: see **Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd** [2005] NSWCA 142 at [33]-[36]. The adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim. The adjudicator may very readily find in favour of the claimant on the merits of the claim if no relevant material is put by the respondent; but the absence of such material does not mean that the adjudicator can simply award the amount of the claim without any addressing of its merits.*
>
> *53 Indeed, my tentative view is that, if an adjudicator determined the progress payment at the amount claimed simply because he or she rejected the relevance of the respondent's material, this could be such a failure to address the tasks set by the Act as to render the determination void.*

16 In ***Pacific General Securities v Soliman & Sons Pty Ltd*** [2006] NSWSC 13, Brereton J said:

> *82. I therefore respectfully agreed with the view tentatively expressed by Hodgson JA in Hargreaves: the adjudicator's duty is to come to a view as to what is properly payable, on what the adjudicator considers to be the true construction of the contract and the Act and the true merits of the claim, and while the adjudicator may very readily find in favour of the claimant on the merits of a claim in the absence of a payment schedule or adjudication response, or if no relevant material is advanced by the respondent, the absence of such material does not entitle the adjudicator simply to award the amount of the claim without addressing its merits, which as a minimum will involve determining whether the construction work identified in the payment claim has been carried out, and what is its value.*

17 A determination under the Act may be the subject of judicial review in limited circumstances, including where it is proved that an adjudicator has failed to comply with the basic and essential requirements prescribed in the Act: *Brodyn* at 441, [53]. Applying the abovementioned principles to the present case, it was necessary for the adjudicator to assess the merits of the defendant's claims and determine the value of the defendant's claims in items E5.1 to E5.7 to comply with the basic and essential requirements of the Act. The plaintiff claims that the adjudicator's Failure to Address the Merits and the allowance of the Transport Claim were failures to comply with the basic and essential requirements prescribed by the Act.

Failure to Address the Merits

18 The pivotal paragraph upon which the plaintiff relied in support of the claim that the adjudicator failed to address the merits of the claim is as follows: *I am satisfied that the respondent did cause delay and disruption and the respondent thereby breached the Contract and caused the claimant to incur some damages of the nature claimed. Had the respondent addressed the claims and come up with a different assessment, then I might have been able to determine an entitlement different to that claimed. As it is, the respondent has not provided information which would enable me to assess the claimant's damages at a lesser amount than the amount claimed. Consequently, for a payment on account, I am satisfied that the claimed amount should be included in the calculation.*

19 The plaintiff claims that from this paragraph it is clear that the adjudicator determined that: (a) the defendant incurred "some" damages of the nature claimed; and (b) the amount claimed by the defendant should be allowed because the plaintiff had not provided the adjudicator with a different assessment. It was submitted that the absence of any reference to the *merits* of the claim's value by the adjudicator reinforces this interpretation of the adjudicator's findings. It was submitted that the only reference to the merits of the claim in terms of value to be found in the Determination was the reference to the incursion of *some* damages of the nature claimed.

20 The defendant submitted that on a proper and reasonable reading of the Determination it can be seen that the adjudicator did consider the merits of the claim and that he valued the claim at the amount claimed by the defendant. It was submitted that the paragraph relied upon by the plaintiff should not be read as meaning that only some of the damages claimed were caused by the plaintiff but rather that there was some damages incurred by the defendant and they included those in E5.1 to E5.7.

21 In ***Brodyn*** Hodgson JA referred to what the adjudicator must do in fairly general terms, that is, that the adjudicator must "address the merits" of the claim. In *Pacific General Securities* Brereton J went further to suggest that "as a minimum" that would involve the adjudicator determining "whether the construction work identified in the payment claim had been carried out, and what is its value". The plaintiff submitted that amongst the matters relevant to addressing the merits of the claims and determining their value in this case are: (1) whether the

claimant had established a nexus between delays and costs said to have been incurred; (2) if so whether *all* delay costs were necessarily and reasonably incurred; (3) whether the claim included inter-state construction work or related goods and services; (4) whether all the rates claimed were reasonable; (5) whether the adjudicator agreed with the "subjective judgment" of the defendant as to its methodology; and (6) whether the plaintiff had already paid the defendant amounts referable to delay damages. The defendant did not demur to this submission, however, it submitted that the adjudicator did consider these matters and did address the merits of the claims. I will now consider each of these matters in turn except the third item, which I will consider later in relation to the Transport Claim.

22 The pivotal paragraph upon which the plaintiff relied needs to be considered in the context of the whole of the relevant parts of the Determination dealing with the matters the subject of the challenge and in the context of the various matters that the plaintiff claims the adjudicator failed to address.

Did the adjudicator fail to consider whether the plaintiff had established a nexus between delays and costs said to have been incurred?

23 The adjudicator referred to the claims made by the defendant at pages 5 and 6 of the adjudication application as "***alleged causes of substantial delay***". That reference is to paragraphs 2.8 to 2.10 of the application. They were:

2.8. During the progress of A J Mayr's scope of work and despite its best endeavours, A J Mayr was unable to complete work as required to meet the original project program end date of 6th July 2006, [See Volume 2 Section 5 tab no 2] due to substantial delays caused by AKA in the delivery of free issue of design information, construction materials, mechanical and electrical equipment. The cause of delays included:

- *Delayed delivery of design data;*
- *Delayed delivery of structural drawings;*
- *Delayed delivery of piping isometric drawings;*
- *Delayed delivery of pipe fittings and valves;*
- *Delayed delivery of pressure vessels;*
- *Delayed delivery of pumps, motors and other mechanical equipment; And*
- *Delayed delivery of electrical and instrumentation equipment;*

2.9 A J Mayr's ability to maintain the delivery dates of the contract program was further impacted by the:

- *Ongoing changes to design data;*
- *Ongoing changes to structural drawings;*
- *Ongoing changes to piping isometric drawings;*
- *Ongoing changes to pipe fittings and valves;*
- *Ongoing changes to pressure vessels;*
- *Ongoing changes to pumps, motors and other mechanical equipment;*
- *Ongoing changes to electrical and instrumentation equipment;*
- *Out of sequence work due to delays in delivery of free issue material;*
- *Insufficient laydown area caused by the need for increased work-fronts established under AKA's directions;*
- *Deficient design information;*
- *Inconsistent and inadequate information and drawings;*
- *Change orders in the field;*
- *Change of sequence of work; and*
- *Site instructions.*

2.10 These assertions are not new. These causes of delay and disruption are all recorded and those records, whether made by A J Mayr or AKA have been progressively communicated to Shell through the minutes of weekly progress meetings, in weekly progress reports and correspondence.

24 The adjudicator stated that it was "apparent" to him that the defendant "incurred considerable delay and disruptions as a consequence of acts, defaults and omissions of" the plaintiff. It is clear then, that the adjudicator considered whether the delays had been caused by the plaintiff. Indeed he went further to state that insofar as any delays were the delays caused by AKA, they were the delays caused by the plaintiff.

25 The defendant relied upon the statement by the adjudicator on the first page of the Determination that he had considered all the submissions and accompanying documents submitted by the parties and the fact that he had not specifically referred to any submission or document in the Determination, should not be taken as any indication that he had not considered it. The adjudicator qualified this generality by his statement that the reason that he had not referred to any submission or document was that he had not considered it of "sufficient relevance to warrant specific comment". Such a qualification is not really helpful. It suggests that anything that is not mentioned might be relevant but not of "sufficient relevance" to be mentioned.

26 Adjudicators are under pressure to produce their determinations within tight timeframes and in large and/or complex cases that pressure can be intense. It also seems that the development of the case law in relation to the Act has not made the adjudicator's task easier. Indeed Gleeson CJ, in refusing a grant of special leave, recently observed that certain provisions of the Act that had to be construed by the New South Wales Court of Appeal *"have occasioned some difficulty and some differences of opinion among judges"*: ***Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd & Ors; Coordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd & Ors*** [2006] HCATrans 9 (3 February 2006). Adjudicators are also under the pressure of knowing that their determinations may well be scrutinised by numerous lawyers and judges.

27 It is perhaps understandable that some adjudicators whose determinations have been the subject of administrative law challenge may regard it as appropriate to utilise a catch-all statement, similar to the one used in the Determination, to fend off an allegation that they have failed to consider a relevant matter. Notwithstanding the somewhat pressure cooker environment in which adjudicators provide their determinations, it seems to me that it would be unhelpful for adjudicators to develop such a practice. It is assumed that adjudicators will comply with their statutory duties under s 22(2) of the Act, which sets out the matters to which they are to give consideration. A consideration of whether they have so complied is made from the content of their determinations rather than from a statement or claim by the adjudicator in the determination that he/she has so complied. I am not persuaded that the defendant is able to obtain any assistance or support for its submissions from this statement by the adjudicator on the first page of the Determination.

28 The defendant submitted that the type of claim put forward by it in its application is not a novel one. It was submitted that it was an extremely common, simple way of putting forward a claim for loss and expense in circumstances where it is difficult to link each item to a particular breach. It was submitted that what the defendant did was to add up all the hours it had spent on the job; compare that total with the hours allowed in the tender; deduct the latter from the former to represent the unrecovered number of hours and multiply that figure by the contract rate to obtain the unrecovered cost. In this regard the defendant submitted that the Contract envisaged that in respect of such costs, what was required to be done was the making of an "estimate" (see clause 2.3(2)(e) of the General Conditions). It does not seem to me that such description can assist the defendant. That was an estimate to be provided in the Notice to the Company of a claim for an "eligible delay". What was claimed was not merely an estimate, but a figure that had been calculated pursuant to a specific methodology. In the claim made by the defendant the method used to calculate the amount or, perhaps put more accurately, to make a judgment of its worth, was clearly set out.

29 The adjudicator referred to the Currie & Brown report and noted the impeccable record keeping of the defendant. It seems to me that such observation is an indication that the adjudicator was of the view that the claims made by the defendant in respect of the hours that it did spend as a result of the delays incurred were properly documented and provided to the plaintiff. It also seems to me that the adjudicator considered that the delays were caused by the plaintiff and that he accepted that the way in which the defendant had valued its delay costs was a reasonable method of so doing, in the circumstances of the contractual relationship between the parties. The amount of $55 per hour as the multiplier was explained in the defendant's application and, although the adjudicator does not expressly refer to that figure, it is clear that he has considered the plaintiff's response in the payment schedule and AKA's assessment of the payment claim. Additionally the adjudicator referred to the 8 August Claim which contained the analysis and methodology of the defendant's claim and the subsequent adjustments to those figures.

30 The adjudicator went further and referred to the General Conditions of Contract and said: *It appears to me that clause 2.6 gives the claimant a contractual right to delay damages caused by acts or omissions of the respondent. This is just what the subject claims are alleged to be for. Whether the claims can be categorised as a "global claim" as alleged by the [plaintiff] is irrelevant. They are a claims for alleged costs which fall within the definition of Delay Costs.*

31 I am not satisfied that the adjudicator failed to consider whether the defendant had established a nexus between delays and costs said to have been incurred.

Did the adjudicator fail to consider whether all delay costs were necessarily and reasonably incurred?

32 The plaintiff referred to clause 2.6 of the General Conditions of the Contract which provides that, subject to certain matters, the plaintiff was obliged to pay the defendant Delay Costs that it had "necessarily and reasonably incurred", and submitted that it was significant that the adjudicator had said in his Determination (at 19): *Clause 2.6 of the General Conditions provides that subject to clauses 2.3(4) and 2.4(4)(a) (which are not relevant for present purposes) where the claimant [defendant] has necessarily and reasonably incurred Delay Costs the respondent [plaintiff] will pay the claimant such Delay Costs.*

33 The plaintiff submitted that the adjudicator then failed to consider and determine whether the claimed amounts had been necessarily and reasonably incurred. The plaintiff further submitted that the letters of 29 September 2005 and 7 December 2005 that adjusted the 8 August Claim should have been considered by the adjudicator to determine whether he agreed with the value of the claim (tr 15-16). I take that submission to also go to this issue of whether the costs were necessarily and reasonably incurred. There is no doubt that the adjudicator was aware of the contents of these documents. That much is plain from the following part of the Determination (at 17-18): *At para 14.4 the respondent says that the only explanation that the claimant has attempted to provide in respect of these claims is in the claim of 8 August 2005 which covers the period to 30 May 2005. Again, that is not true. For example, the claimant's letter of 29/9/05 behind tab 86 in folder 9 says, "Further to our Claim dated 8 August 2005 for reimbursement of costs, losses and damages for the period 30 May 2005, we submit a further claim for the following periods":*

(a) 01-Jun-05 to 30-Jun-05 $223,246.88

(b) 01-Jul-05 to 31-Jul-05 $1,147,184.10.

The letter contains a spreadsheet detailing how the amounts are calculated. Under tab 86 there follows a similar letter dated 7 December 2005 and spreadsheet for the claimant's alleged costs, losses and damages in August,

September and October 2005.

34 It is clear from the Determination that (1) the adjudicator was cognisant of the requirement that the costs had to be necessarily and reasonably incurred; and (2) that the adjudicator was well aware of the manner in which the claims were, as he put it, "calculated". The Determination then deals with the plaintiff's approach to the claims and includes the following paragraph: *Rather than addressing the claimant's contentions with respect to the alleged causes of delay and disruption and the alleged consequences (in terms of cost to the claimant) the respondent has given as the reason for withholding payment that the claimant has failed to provide any substantiation and that it is not possible for the respondent to "begin to sensibly address these claims". The respondent's allegations have not been substantiated. I am not satisfied that the respondent has a valid reason for withholding payment.*

35 It seems to me that these conclusions by the adjudicator amount to a finding that the defendant did provide "substantiation" of its claims, or in other words, the defendant had satisfied the adjudicator that the costs were necessarily and reasonably incurred.

36 I am not satisfied that the adjudicator failed to consider whether the delay costs were necessarily and reasonably incurred.

Did the adjudicator fail to consider whether all the claims were reasonable?

37 The submissions made in relation to this alleged failure were similar to those relied upon in respect of the previous alleged failure to consider whether the costs had been necessarily and reasonably incurred. It was submitted (tr 8) that there is no reference in the Determination to the "merits of the claim" and that the adjudicator did not say, "I think, based on my expertise and experience, this looks reasonable to me given the paucity of information".

38 It is true that the Determination does not contain a statement that the adjudicator regarded the claimed costs as "reasonable". However, it is clear that the adjudicator considered the method of calculation utilised in reaching the amounts claimed and concluded that such claims were substantiated, and further that the plaintiff did not have a "valid reason for withholding payment". I am satisfied that the adjudicator's findings that the claims were substantiated and that there was no valid reason for the plaintiff to withhold payment means that the adjudicator regarded the claims as reasonable.

39 I am not satisfied that the adjudicator failed to consider whether the claims were reasonable.

Whether the adjudicator agreed with the "subjective judgment" of the defendant as to its methodology.

40 It was submitted that because the methodology for the calculation of the claims set out in the 8 August Claim referred to the necessity for a certain amount of "subjective judgment", it was incumbent upon the adjudicator, in addressing the merits of the defendant's claim, to determine whether he accepted, or agreed with, that "subjective judgment".

41 This aspect does not appear to me to be a matter that is separate from the consideration of whether the claims were reasonable. It is true that the adjudicator did not say that he accepted that there was an amount of subjective judgment in the methodology for the calculation of the claim nor did he say that he agreed with the subjective judgment. However for the reasons I have given in relation to the two previous complaints, I am satisfied that the adjudicator was well aware of the inclusion within the methodology of an element of subjective judgment and that he accepted that such was a reasonable and acceptable method by which to calculate the amounts claimed.

Did the adjudicator fail to consider whether the plaintiff had already paid the defendant amounts referable to delay damages?

42 The plaintiff claimed that the adjudicator failed to consider the claim made in the AKA letter to the defendant dated 21 December 2005, which was in the materials submitted to the adjudicator. The plaintiff claimed, before the adjudicator, that the defendant had "already been paid substantial payments in relation to delay-related costs". The plaintiff's Payment Schedule annexed the AKA letter of 21 December 2005 extracted earlier in this judgment. The extract is set out below for ease of reference:

E5 to E5.7 Claim for Reimbursement of Costs, Losses & Damages

To date we have received several unsubstantiated global claims associated with delays. Our request to have the basis of claim substantiated ... has been ignored to date. Until we received (sic) adequate substantiation of the claim we are unable to assess the claims and consider whether we are able to make a determination of claims "outside the contract". On the information provided to date we are unable to assess the basis or quantification of these claims and have, as such, valued the claim as "0" in the Determination set out in ATTACHMENT 1.

We point out that during the course of the CONTRACT the COMPANY has paid the CONTRACTOR's claims associated with the following prolongation costs:

- *Additional Management Fee costs totalling $3,531,409 above the original sum of $2,304,407 included in the Management Fee for site management, administration and site supervision. This represents a 153% increase in Management Fee payments associated with management, administration and site supervision personnel whereas the increase in schedule duration of 4 months over the original 8 months schedule represents a 50% increase.*
- *Standby costs associated with waiting time for delivery of materials, particularly pipe and fittings.*
- *Facility Costs associated with lease and hire of temporary buildings and facilities.*

The making and receiving payment for such claims seems to us to be inconsistent with your global claim. Hence, we are seeking clarification on the basis of these claims totalling $5,714,711.

43 There is no doubt that AKA's letter of 21 December 2005 formed part of the materials before the adjudicator. However it is necessary to analyse what the plaintiff did by way of claims and submissions in respect of E5.1-

E5.7. The document attached to the payment schedule as annexure 2 was entitled "Shell's Detailed Response to A J Mayr's Contract Payment Claim Statement (summary sheet)" (the Response). The Response included the following:

3. Aker Kvaerner's Determination dated 21 December 2005

3.1 On 8 December 2005, AJ Mayr submitted its November 2005 progress claim to Aker Kvaerner for determination. The November 2005 Progress claim was received on 9 December 2005. AJ Mayr's progress claim is identical to AJ Mayr's November 2005 payment claim, except that it does not purport to be a payment claim made under the Act.

3.2 On 21 December 2005, Aker Kvaerner issued its determination in respect of AJ Mayr's November 2005 progress claim. A copy of the determination is attached to this document at annexure 4.

3.3 Aker Kvaerner's overall assessment of the progress claim is that A J Mayr owes Shell $1,308,007 plus GST. This is $301,722 more than the amount that Shell says is owed by AJ Mayr in Shell's Payment Summary Sheet. The difference is attributable to the fact that in its determination, Aker Kvaerner has revalued a number of variation claims and as a consequence, has identified several overpayments which have been made to AJ Mayr.

44 It is clear that the plaintiff was alleging that the defendant owed it $1,308,007 plus GST. The section of the 21 December 2005 letter from AKA, extracted earlier, referred specifically to the additional management fee costs above the original sum of $2,304,407. The adjudicator dealt specifically with this part of the claim on page 3 of the Determination under the heading "Set-off". The adjudicator found that the plaintiff was not entitled to make the claimed set-off. In this regard he relied upon clause 15.3 of the General Conditions of Contract and accepted the defendant's submission as to the construction of that clause.

45 It is clear from this section of the Determination that the adjudicator did consider the content of the AKA letter of 21 December 2005 and stated as follows: *What the respondent [plaintiff] is attempting to set off is not a debt or amount due. It is no more than a claim for an amount assessed by [AKA] who was appointed by the respondent "to administer, co-ordinate, manage, supervise and monitor the performance of the Contractor under the Contract" [Section 5, Special Condition 2 of the Contract]. The fact that AKA assesses that the claimant owes the respondent money does not mean that the claimant, in fact, owes the respondent the assessed amount. It does not mean that the assessed amount is a debt or money due from the claimant to the respondent. Until there is a final determination of the respective entitlements of the parties under the Contract, it cannot be said that there is a debt or money due from the claimant to the respondent or what is the amount of the debt or the money due.*

46 This statement by the adjudicator was made in the context of the construction that he placed on clause 15.3 of the General Conditions of Contract.

47 The Response dealt with the defendant's claims E5.1-E5.7 in section 14. It alleged that the claim was in the nature of a ***"global delay and disruption"*** claim. There was then the complaint that the defendant had failed to provide "verifiable documentation" (see par 14.1-14.3). The plaintiff then referred to the 8 August Claim and reiterated parts of it to suggest that the defendant's claim was both global and unsubstantiated (see par 14.4-14.6). The plaintiff then made the following relevant submissions relating to the claims:

14.7 As matters presently stand, A J Mayr has not even attempted to explain the alleged relationship between any delay or disruption and the costs that are claimed (or provide supporting documentation in support of such costs).

14.8 It is therefore not possible to attribute any value to claims E5.1 to E5.7. In the absence of any meaningful effort by A J Mayr to substantiate these claims, Shell has no way of determining whether A J Mayr has incurred any of the alleged costs or whether the costs have been claimed by A J Mayr elsewhere. As with all of its claims, A J Mayr must clearly articulate the basis of the claim and substantiate the costs that it claims. If A J Mayr puts forward claims with appropriate verifiable supporting documentation, Shell will consider such documentation and respond accordingly. However, in the absence of any such attempt to provide this information, the only available conclusion is that these claims are wholly without merit and no amounts are payable.

48 The plaintiff then went on to suggest that the claims may be time barred and claimed, inconsistently with the decisions of the Court of Appeal, that the claims were not permitted under the Act (pars 14.9 – 14.11).

49 The adjudicator dealt with each of the submissions in this section of the Response. This section of the Response did not refer to the AKA letter of 21 December 2005. However, it is clear that the adjudicator considered the material in the AKA letter of 21 December 2005 in relation to section 3 of the Response in which the AKA letter was relied upon. I am not satisfied that the adjudicator failed in his obligations under the Act to consider the matters placed before him in this regard.

The pivotal paragraph

50 I do not read the pivotal paragraph in the context of the Determination as a whole, to mean that the adjudicator did not value the defendant's claim and simply allowed it because there was no other assessment provided by the plaintiff. This matter is different to that with which Brereton J was dealing in ***Pacific General Securities v Soliman & Sons Pty Ltd***. In that case the adjudicator said that "in the absence of any valid submission from the respondent which refutes the claim" the claimant was entitled to the payment of the sum claimed. Here the adjudicator, as I have interpreted what he has said, has considered the claim made by the plaintiff that the defendant's claim was unsubstantiated. In other words he considered whether the defendant's claim was substantiated, to be in a position to reject the plaintiff's claim that it was not substantiated. There was a great deal more to the adjudicator's

assessment of the defendant's claim in this case than there appeared to be in determination under consideration in ***Pacific General Securities v Soliman & Sons Pty Ltd.***

51 I am of the view that in the pivotal paragraph read in context, the words "some damages of the nature claimed" do not mean that the defendant had proved *only* some of its claims. I am satisfied that the adjudicator found that the delays caused some damages and that they included the claims made in E5.1 to E5.7. I am also satisfied that the adjudicator did address the merits of the defendant's claim and concluded that it was substantiated and that the methodology used to calculate the claim was reasonable. In so deciding, the adjudicator placed a value on the claim in the amount as claimed in the 8 August Claim and adjusted by the two later letters to which he referred in the Determination. Having done that, the adjudicator observed that the plaintiff had not provided information that would enable him to assess the claim at less than that amount. In my view, that observation does not mean that the adjudicator did not address the merits of the defendant's claim. I am satisfied that the adjudicator did address the merits of the defendant's claim and placed a value on it equivalent to the amount claimed as adjusted.

Transport Claim

52 It is common ground that there were transport costs incurred and claimed for transporting the modules by road into Victoria to Geelong. It is also common ground that the adjudicator included such amounts in the Determination. The plaintiff initially submitted that the transport claims were excluded by s 7(4)(b) of the Act and that the inclusion in the Determination of the costs incurred for transporting the modules in Victoria was beyond the jurisdiction of the adjudicator.

53 Section 7(4) of the Act provides:

(4) This Act does not apply to a construction contract to the extent to which it deals with:

(a) construction work carried out outside New South Wales, and

(b) related goods and services supplied in respect of construction work carried out outside New South Wales.

54 Mr Rudge SC, leading Mr F Hicks, of counsel, for the defendant, submitted that all construction work under the construction contract was carried out in New South Wales and the fact that there was transport interstate in respect of that construction work does not enliven s 7(4) of the Act.

55 During submissions I indicated that it was my view that the transporting of the modules to Victoria could be characterised as the provision of goods and services in relation to construction work that was carried out in New South Wales, thus not offending s 7(4) of the Act. In a supplementary submission the plaintiff acknowledged the force of that view but submitted that it does not dispose of the question as to whether the Act applies to related goods and services supplied outside New South Wales. It was submitted that s 7(4)(b) has as its starting point construction work carried out outside New South Wales and that goods and services in respect of that construction work are excluded. However it was submitted that the Act is silent as to the specific application of the Act to related goods and services supplied outside New South Wales in respect of construction work carried out in New South Wales.

56 It was submitted that the existence of s 7(4) is insufficient to rebut the presumption summarised in *Halsbury's Laws of Australia* (volume 24, Statutes), paragraph [385-315] as follows:

Presumption not to give extra territorial effect. *It is always assumed as a common law rule of construction that a legislature must clearly show the necessary intention for a statute to have extra territorial effect. However, this does not mean that the legislature has the necessary authority to enact a statute with such effect.*

57 Section 12(1) of the *Interpretation Act* 1987 (NSW) relevantly provides:

(1) In any act or instrument: ...

(b) a reference to a locality, jurisdiction or other matter or thing is a reference to such a locality, jurisdiction or other matter or thing in and of New South Wales.

58 The plaintiff submitted that in the present case the reference in the Act to related goods and services is a reference to a "matter or thing", and that by reason of s 12(1)(b) of the *Interpretation Act* such is a reference to related goods and services in and of New South Wales. In support of this submission the plaintiff also relied upon the following statement in D. Pearce & R. S. Geddes, *Statutory Interpretation in Australia* (5th edn., 2001) at 135: *It can thus be seen that the presumption against legislation having extra territorial operation can be fairly readily rebutted if circumstances so demand. However, a court will probably need to be persuaded that the operation of the legislation would be rendered ineffective before the presumption will be set aside.*

59 Mr M Christie, counsel for the plaintiff, referred to the observations made by Kirby P in ***Goliath Portland Cement Co Limited v Bengtell and Anor*** (1994) 33 NSWLR 414 at 426D-429F which, he conceded, are perhaps inconsistent with the plaintiff's submissions. However he also submitted that the party invoking s 12(1)(b) of the *Interpretation Act* in *Goliath* was in a quite different position in an entirely different statutory context.

60 In ***Goliath*** the Court was dealing with two issues: (1) whether the Dust Diseases Tribunal had jurisdiction to deal with a claim under the *Dust Diseases Tribunal Act* 1989 (the DD Act), where the claims were for serious injury caused by exposure to asbestos dust whilst the worker was employed with Goliath in Tasmania; and (2) if it had jurisdiction, whether it should have declined to exercise jurisdiction upon the discretionary ground that it was an inappropriate forum. The worker sued Goliath, incorporated in Tasmania and operating in Tasmania, in tort for damages after contracting asbestosis. There was also a claim against CSR, incorporated in and operating in New South Wales, in respect of product liability as a manufacturer and supplier of asbestos.

61 Section 10 of the DD Act was headed, ***"Jurisdiction and functions of the Tribunal"***. Section 10(3) provided that, "*The Tribunal has, wherever sitting, jurisdiction throughout New South Wales*". Gleeson CJ said, at 417, that s 10(3) addressed the question of where the jurisdiction may be exercised and not the content of the jurisdiction. Kirby P said, at 430, that to urge the contrary view is to "*fall into the trap of thinking that an express provision providing positively for State-wide jurisdiction gives rise to a negative inference confining the exercise of jurisdiction to events and parties within the State*". His Honour found that the section does not require or even permit that conclusion.

62 Section 11 of the DD Act provided:

11.(1) If:

(a) a person is suffering, or has suffered, from a dust-related condition or a person who has died, was immediately before death, suffering from a death-related condition, and

(b) it is alleged that the dust-related condition was attributable or partly attributable to a breach of duty owed to the person by another person, and

(c) the person who is or was suffering from the dust-related condition or a person claiming through that person would, but for this Act, have been entitled to bring an action for the recovery of damages in respect of that dust-related condition or death,

proceedings for damages in respect of that dust-related condition or death may be brought before the Tribunal and may not be brought or entertained before any other court or tribunal.

63 In considering Goliath's submission that the Court should read into the provisions of the DD Act a limiting territorial connection so that only a person in New South Wales would be entitled to recover damages in the Tribunal, in particular for a breach in New South Wales of a duty owed in this State, Kirby P said at 426: *The ordinary principle of construction of statutes is that general words used in an Act are presumed to be used in a sense which will not cause the legislature enacting them to exceed its powers. As O'Connor J said in* ***Jumbunna Coal Mine, No Liability v Victorian Coal Miners' Association*** *(1908) 6 CLR 309 at 363: "... Most Statutes, if their general words were to be taken literally in their widest sense, would apply to the whole world, but they are always read as being prima facie restricted in their operation within territorial limits."*

64 In dealing with a number of other arguments in respect of the reach of the Tribunal's jurisdiction, Kirby P said at 427-428:

- First, the presumption of a territorial interpretation of the general language of State legislation provided by the common law, and by the provisions of the *Interpretation Act* 1987 cited, must not be taken too far. Some of the common law principles were stated in earlier times apt to the circumstances of colonial and recent colonial legislatures. Those principles will not, without modification, apply to the parliament of a State of Australia at this stage of the nation's development. Modern means of transport and other forms of communication make an excessively narrow approach to territorial connection inappropriate and likely to defeat the intended operation of at least some State statutes. It has often been said that it is inappropriate to treat the different jurisdictions of Australia as if they were foreign countries and to apply to them conflict of laws rules apt to separate nations: see *McKain v* ***R W Miller & Co (South Australia) Pty Ltd*** (1991) 174 CLR 1 at 36;

- Secondly, the principle of territorial interpretation competes with the more general rule that courts should give an ample construction to the language used by the legislature in order to achieve the purpose of parliament disclosed by that language. The purposive construction of legislation has helped to avoid the excessively narrow construction of earlier times which had the undesirable effect of promoting excessive detail of statutory language. Thus, in the present case, a statute designed to deal with workers with dust-related injuries is addressed to the problem of a working population, some of whom will be itinerant. A purely territorial construction of the legislation would risk defeating coverage of claims by such itinerant workers which the language of the Act and convenience would argue should indeed be within the jurisdiction of the Tribunal;

- Thirdly, the authority of this Court cautions against an unduly rigid application of a construction of statutes to require strict territorial connection: see, eg, ***O'Connor v Healey*** (1967) 69 SR (NSW) 111 at 114; 87 WN (Pt 2) (NSW) 111 at 113. As Jacobs JA there said: "... it is not every aspect of every sentence or clause of legislation which can be given the local New South Wales connotation." As in all tasks of statutory construction, the duty of the court is to seek faithfully to give meaning to the presumed purpose of parliament;

65 The situation in *Goliath* is distinguishable from the present case. A basis upon which the Court found that the Tribunal had jurisdiction to entertain the case was the fact that the DD Act transferred jurisdiction from the Supreme Court (and the District Court) to a specialist tribunal and "*[b]y hypothesis, the jurisdiction must, in the first place, have been capable of being exercised by the Supreme Court*": per Gleeson CJ at 418. Kirby P said, at 429, that s 11(1) of the DD Act should be "*construed as it would be if the same jurisdiction had been conferred on the Supreme Court.*"

66 In ***Wentworth Securities Ltd v Jones*** [1980] AC 74 at 105, Lord Diplock said: *I am not reluctant to adopt a purposive construction where to apply the literal meaning of the legislative language used would lead to results which would clearly defeat the purposes of the Act. But in doing so the task on which a court of justice is engaged remains one of construction; even when this involves reading into the Act words which are not expressly included in it.*

67 His Lordship continued, stipulating three conditions necessary to justify this approach, at 105-106: *First, it [must be] possible to determine from a consideration of the provisions of the Act read as a whole precisely what the mischief was that it was the purpose of the Act to remedy; secondly, it was apparent that the draftsman and*

Parliament had by inadvertence overlooked, and so omitted to deal with, an eventuality that required to be dealt with if the purpose of the Act was to be achieved; and thirdly, it was possible to state with certainty what were the additional words that would have been inserted by the draftsman and approved by Parliament had their attention been drawn to the omission ... Unless this third condition is fulfilled any attempt by a court of justice to repair the omission in the Act cannot be justified as an exercise of its jurisdiction to determine what is the meaning of a written law which Parliament has passed. Such an attempt crosses the boundary between construction and legislation.

68 In this context, in ***Kingston v Keprose Pty Ltd*** (1987) 11 NSWLR 404 at 423, McHugh JA said: *A purposive and not a literal approach is the method of statutory construction which now prevails: cf* ***Fothergill v Monarch Airlines Ltd*** *[1981] AC 251 at 272–273, 275, 280, 291. ...*

Purposive construction often requires a sophisticated analysis to determine the legislative purpose and a discriminating judgment as to where the boundary of construction ends and legislation begins. But it is the technique best calculated to give effect to the legislative intention and to deal with the detailed and diverse factual patterns which the legislature cannot always foresee but must have intended to deal with if the purpose of the legislation was to be achieved.

69 Although McHugh JA was the dissentient in ***Kingston v Keprose Pty Ltd***, his Honour's observations have been cited with approval on numerous occasions: see ***R v Young*** (1999) 46 NSWLR 681 per Spigelman CJ at 687 [10].

70 In ***R v PLV*** (2001) 51 NSWLR 736 Spigelman CJ, in dealing with an issue which turned on the proper construction of certain words in s 106(d) of the *Evidence Act* 1995 (NSW), said at 742-744:

[80] There is a line of authority which suggests that the Court may sometimes "read words into an Act". On my reading of the authorities, and I acknowledge that this is not the only possible reading, this is not an accurate description of what is involved in the process of interpretation that is sometimes so described: see my discussion of the authorities in R v Young (1999) 46 NSWLR 681 at 686 [5]–[32].

[81] It is no part of the function of a judge to supply words believed to have been omitted by the legislature per se. What a court does is to construe the words actually used by the legislature, with an effect as if certain words appeared in the statute. The words so 'included' reflect in express, and therefore more readily observable, form, the true construction of the words actually used.

[82] The task of the courts is to determine what Parliament meant by the words used, not to determine what Parliament intended to say (see the authorities collected in R v Young (at 686 [5])). The task is to interpret the words of the legislature, not to divine the intent of the legislature: see ***S v Zuma*** *[1995] 2 S Afr LR 642 at 653;* ***Matadeen v Pointu*** *[1999] 1 AC 98 at 108.*

[83] In a passage which has been frequently applied by Australian courts (see the authorities referred to in ***Young (****at 687 [10])), Lord Diplock formulated three conditions for the process of "reading" words into an Act:* ***Wentworth Securities Ltd v Jones*** *[1980] AC 74 at 105. However, the opening words of the frequently cited passage by Lord Diplock (at 105) include: "... the task on which a court of justice is engaged remains one of construction; even where this involves reading into the Act words which are not expressly included in it".*

[84] To similar effect are the references as to how a provision should be "read" in the course of adding or omitting words as part of an "interpretative function" or a process of "interpreting a statute", in the application of Lord Diplock's conditions by Lord Nicholls of Birkenhead delivering the judgment of the House of Lords in ***Inco Europe Ltd v First Choice Distribution (a firm)*** *[2000] 1 WLR 586 at 592; [2000] 2 All ER 109 at 115.*

[85] In ***Inco,*** *the court took words of general application, namely "any decision of the court under that Part" and found that the particular composite phrase did not extend to the full scope of the dictionary definition of the words used. As a matter of construction, the phrase "under that Part" was read down so that it applied only to some sections in the particular Part of the Act.*

[86] The most frequently cited authority on legislative inadvertence in Australia, ***Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation*** *(1981) 147 CLR 297 also involved a process of reading down words of general application, a recognised process of statutory construction: see* ***Young (****at 688 [17]–689 [22])).*

[87] The process remains one of construction if the words actually used by the Parliament are given an effect as if they contained additional words. That is not, however, to "introduce" words into the Act. It is to construe the words actually used. Interpretation must always be text based. The reformulation of a statutory provision by the addition or deletion of words should be understood as a means of expressing the court's conclusion with clarity, rather than as a precise description of the actual process which the court has conducted.

[88] The authorities which have expressed the process of construction in terms of "introducing" words to an Act or "adding" words have all, so far as I have been able to determine, been concerned to confine the sphere of operation of a statute more narrowly than the full scope of the dictionary definition of the words would suggest. I am unaware of any authority in which a court has "introduced" words to or "deleted" words from an Act, with the effect of expanding the sphere of operation that could be given to the words actually used. This was the actual issue in ***R v Young.*** *There are many cases in which words have been read down. I know of no case in which words have been read up.*

71 Applying the observations made by Kirby P in relation to s 10(3) of the DD Act in ***Goliath*** to the present case, it may be suggested that to urge the view that an express provision excluding certain construction work (and

related goods and services) from the operation of the Act, (s 7(4) of the Act), gives rise to the positive inference that related goods and services, that are not expressly excluded are included, is to "fall into a trap". However, this case is distinguishable from *Goliath* and, in my view, does not present the trap of the type to which Kirby P referred. In this case the provisions under consideration deal with the "content" of the jurisdiction as opposed to where the jurisdiction may be exercised, as was the case in *Goliath*. It seems to me that on a reading of the Act as a whole and, in particular, the provisions of s 7(4) of the Act, the legislative intention is that progress claims and payment for the provision of goods and services in Victoria in respect of construction work carried out in New South Wales are not excluded from the Act.

72 A matter that may be of some relevance is the *Building and Construction Industry Security of Payment Act* 2002 (Vic) which has an identical provision to the Act in relation to its object (s 3(1)). It also includes the following section:

7(4) This Act does not apply to a construction contract to the extent to which it deals with –

(a) construction work carried out outside Victoria; and

(b) related goods and services supplied in respect of construction work carried out outside Victoria.

73 The legislative scheme operates in a complementary manner as between New South Wales and Victoria. Those persons who provide the relevant related goods and services in respect of the construction work carried out in the respective states are able to recover progress payments for that provision, whether it is provided in the State where the construction work is carried out or elsewhere. So long as the "related goods and services" are in respect of construction work carried out within the State, the contractor who provides the related goods and services is able to recover progress payments under the respective Acts for those related goods and services whether or not they are provided in the State.

74 Section 33 of the *Interpretation Act* 1987 provides:

33 Regard to be had to purposes or objects of Acts and Statutory Rules

In the interpretation of a provision of an Act or statutory rule, a construction that would promote the purpose or object underlying the Act or statutory rule (whether or not that purpose or object is expressly stated in the Act or statutory rule or, in the case of a statutory rule, in the Act under which the rule was made) shall be preferred to a construction that would not promote that purpose or object.

75 The purpose or object of the Act is "to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services" (s 3(1)).

76 I will now consider whether the three prerequisites referred to by Lord Diplock in ***Wentworth Securities Ltd v Jones*** have been satisfied to enable a purposive construction of the Act. As to the first prerequisite; it is possible from a consideration of the provisions of the Act read as a whole to determine the mischief the Act was to remedy. The mischief to be remedied was the slow payment and/or non-payment of contractors who undertake to carry out construction work or to supply related goods and services under a construction contract. This can be gleaned from a consideration of the whole of the Act but in particular the following provisions: the Object of Act (s 3); the very tight timeframes within which to make claims and challenge those claims (s 13 & s 14); the serious consequences where no challenge (or payment schedule) is made (s 15); the very tight timeframe within which the adjudication process is to occur (ss 17 – 22); the consequences of not paying the adjudicated amount (s 24); and the preservation of the parties rights (s 32).

77 In respect of the second prerequisite; the eventuality that may be seen to have been overlooked is the provision outside New South Wales of related goods and services in respect of construction work carried out in New South Wales. The purpose is the intended prompt payment under the scheme of the Act of contractors who supply related goods and services in respect of construction work carried out in New South Wales. The eventuality needed to be dealt with to ensure the purpose of the Act was not defeated.

78 With regards to the third prerequisite; the additional words that Parliament would have approved had attention been drawn to the oversight are identifiable. Section 7(1) provides: *Subject to this section, this Act applies to any construction contract, whether written or oral, or partly written and partly oral, and so applies even if the contract is expressed to be governed by the law of a jurisdiction other than New South Wales.*

79 The definition of construction contract provides that it is a "contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party" (s 4). The identifiable words are "within New South Wales" after the words "construction work" and "within New South Wales or elsewhere" after the word "services".

80 The industry with which the Act deals includes professionals and tradespersons who provide services across the borders of the States and Territories of Australia. One of the purposes of the Act is to ensure that the person who provides related goods and services in respect of construction work in New South Wales is able to have the benefit of the Act for the prompt recovery of progress payments. It seems to me that the purpose of the Act would be defeated if persons who provide related goods and services outside New South Wales in respect of construction work carried out in New South Wales were excluded from the Act.

81 This outcome is a result of construing the words actually used by the legislature as if the words referred to earlier appeared in the Act, rather than introducing the additional words into the Act: ***R v PLV***, per Spigelman CJ at 743,

[81], [82] and [87]. I do not think that this outcome is to "read up" the provisions of the Act and so expand the operation of the Act. Rather it seems to me that the provisions of the Act anchor the jurisdiction to the construction contract and construction work carried out in New South Wales and related goods and services anchored to, or in respect of, that construction work, irrespective of whether they are provided within New South Wales.

82 I am not satisfied that the adjudicator committed a jurisdictional error in allowing the Transport Claim.

Orders

83 The Summons is dismissed. The plaintiff is to pay the defendant's costs of the proceedings.

M Christie (Plaintiff) instructed by Freehills
MG Rudge SC, F Hicks (Defendant) instructed by Mallesons Stephen Jaques