Daysea Pty Ltd v Watpac Australia Pty Ltd [2001] Adj.L.R. 01/23

Daysea P/L v Watpac Australia P/L [2001] QCA 49

ORDER:

1. Application for leave to appeal granted.
2. Appeal allowed and set aside the orders of the District Court.
3. Give judgment for the appellant against the respondent in the sum of $72,172.63.
4. Order that the respondent pay the appellant's costs of and incidental to the proceedings before the Queensland Building Tribunal, of the appeal to the District Court, and of this appeal to be assessed.
5. Certify the matter was sufficiently complex to justify the retainer of senior and junior counsel before the District Court.

CATCHWORDS:

Contracts – building, engineering & related contracts – The contract – Construction of particular contracts and implied conditions – other matters - where respondent engaged appellant to design and construct a residential development - where the building contract incorporated Australian Standards 4300-1995 general conditions of contract - where respondent issued progress claim - where principal's representative issued payment certificate after the specified 14 day period but within 28 days - whether appellant liable to pay balance in accordance with payment certificate - construction of clause 42.1 of AS 4300-1995 - the progress claim was validly issued - use of the term "shall" in clause 42 connotes a mandatory requirement - a payment certificate issued outside the 14 day period is a nullity

Procedure – Inferior Courts – Queensland – District Courts – Civil Jurisdiction – Practice – other matters - order of Queensland Building Tribunal to stay summary judgment application - order of District Court staying all proceedings before the Tribunal - District Court did not expressly identify an error in Tribunal's decision - whether District Court should have stayed proceedings in the Tribunal - District Court Judge did not have authority to exercise a supervisory jurisdiction over the Tribunal - stay set aside

CASES CITED

Queensland Building Services Authority Act 1991 (Qld), s 95
Commercial Arbitration Act 1990 (Qld)
Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd (1997) 14 BCL 215, applied
Concrete Constructions Group Pty Ltd, Re [1977] 1 Qd R 6, considered
Merritt Cairns Constructions Pty Ltd v Wulguru Heights Pty Ltd [1995] 2 Qd R 521, considered
Thiess Constructions Pty Ltd v Pavements & Excavations Pty Ltd (SC No 3709 of 1989; 2 February 1990, Williams J), considered

JUDGEMENT : Court of Appeal : Supreme Court of Queensland before Davies JA, Williams JA, Mackenzie J : 23rd February 2001. *(Separate reasons for judgment of each member of the Court, each concurring as to the orders made)*

[1] **DAVIES JA:** I have read the reasons for judgment of Williams JA. I agree with those reasons and with the orders he proposes.

[2] **WILLIAMS JA:** The appellant, Watpac Australia Pty Ltd, obtained summary judgment in the Queensland Building Tribunal against the respondent, Daysea Pty Ltd, for $590,335. That Tribunal also refused to stay further proceedings before it between the same parties. The respondent appealed by leave to the District Court from each of those orders. The order of that Court was that the summary judgment be set aside, the $590,335 with interest be refunded by the appellant to the respondent, and that there be a stay of further proceedings between the parties in the Tribunal. From those orders the appellant sought leave to appeal to this Court pursuant to s 118(3) of the *District Court Act* 1967.

[3] The parties prepared a record on the basis that the application for leave would be treated as the hearing of the appeal. Notwithstanding that there had been a change in circumstances (a Final Certificate was issued on 30 December 2000) this Court intimated at the outset that it would hear full argument on the issues identified below. Senior Counsel for the appellant formulated the questions raised in the following terms:

"1. Whether, on the proper construction of Clause 42.1 of the general conditions, the Principal is obliged to pay the Contractor the amount of a Contractor's claim for payment received by the Principal's Representative within 28 days of that receipt when the Principal's Representative did not issue any Payment Certificate within 14 days thereof but later issued a purported Payment Certificate within 28 days thereof.

2. Whether the District Court should have set aside the Tribunal's order of 9 June 2000 declining to stay the proceedings in the Tribunal without having identified (or expressly identified) any error in that decision."

[4] By contract executed 2 July 1998 the appellant agreed to design, construct and complete an apartment building for the respondent for the sum of $22,249,180. The General Conditions of Contract AS4300-1995, with variations set out in Special Conditions, formed part of the contract. Clause 42 thereof dealt with payment claims, certificates, calculations and time for payment. The Special Conditions made some minor amendments to that clause as it appeared in the General Conditions. Clause 42.1 is important for present purposes and it is necessary to set it out in full in the terms agreed upon by the parties. For convenience sake I will adopt the course followed by the learned District Court Judge of numbering in square brackets the various paragraphs of Clause 42.1:

"[1] At the times for payment claims or upon completion of the stages of the work under the Contract stated in Annexure Part A and upon the issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.5 the Contractor shall deliver to the Principal's Representative claims for payment supported by evidence of the amount due to the Contractor and such information as the Principal's Representative 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 including variations. The value of the work shall be based on the priced Trade Summaries for each building provided by the Contractor to the Principal's Representative under the Contract or, in the case of a variation, in accordance with the Contractor's detailed quotation under Clause 40.3 if applicable. Full supporting documentation must be provided to the Principal's Representative with each payment claimed.

[2] If the time for any payment under the proceeding paragraph falls due on a day which is a Saturday, Sunday, Statutory or Public Holiday the Contractor shall submit the claim either on the day before or next following that date which itself is not a Saturday, Sunday, Statutory or Public Holiday.

[3] If the Contractor submits a payment claim before the time for lodgment of that payment claim, such early lodgment shall not require the Principal's Representative to issue the Payment Certificate in respect of that payment claimed earlier than would have been the case had the Contractor submitted the Payment Claim in accordance with the Contract.

[4] Within 14 days of receipt of a claim for payment the Principal's Representative 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 Principal Representative's opinion, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Principal's Representative 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. The Principal's Representative shall also set out, as applicable, in any Payment Certificate issued pursuant to Clause 42, the allowances made for -
(a) the value of the work carried out by the Contractor and the performance of the contract to the date of the claim;
(b) amounts otherwise due from -
(i) the Principal to the Contractor; and
(ii) the Contractor to the Principal;
(c) amounts assessed under Clause 46.4 and not duly disputed;
(d) amounts paid previously under the Contract;
(e) amounts previously deducted for retention monies pursuant to Annexure A; and
(f) retention monies to be deducted pursuant to Annexure Part A.
arising out of the Contract resulting in the balance due to the Contractor or the Principal, as the case may be.

[5] If the Contractor fails to make a claim for payment under this Clause 42.1, the Principal's Representative may nevertheless issue a Payment Certificate and the Principal or the Contractor, as the case may be, shall pay the amount so certified within 14 days of that Certificate.

[6] Subject to the provisions of the Contract, within 28 days of receipt by the Principal's Representative of a claim for payment or within 14 days of issue by the Principal's Representative of the Principal's Representative's Payment Certificate, whichever is the earlier, and within 14 days of the issue of a Final Certificate, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the Certificate as due to the Contractor or to the Principal, as the case may be, or if no Payment Certificate has been issued, the Principal shall pay the amount of the Contractor's claim. A payment made pursuant to 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.

[7] The 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.

[8] In assessing for the purpose of any Payment Certificate the amounts to be included in that Certificate from the items listed in sub-paragraphs (a) - (f) above, the Principal's Representative shall not be bound by any amounts stated in any previous Payment Certificate but shall be entitled to state the proper amount for the item as assessed at the date of issuing the Payment Certificate."

[5] The Special Conditions provided that for purposes of Clause 42.1 the "times for payment" were the "28th day of each month".

[6] Clause 40 of the General Conditions dealt with "variations" but rather unusually the Special Conditions introduced the following provision: *"The Principal's Representative may direct the Contractor to execute a variation at any time until the expiration of the period for lodging a Final Payment Claim."*

[7] Though the work was close to the stage of practical completion by the end of 1999, the appellant received what was referred to in submissions as "a barrage of variations" between 6 September and 15 December 1999. The works were certified as being practically complete as at 30 November 1999, but the appellant was required to perform additional work after that time until at least 15 December 1999. On 4 November 1999 the appellant lodged progress claim no 16 for $560,188; that was deemed to be delivered on 28 November. Certificate for Payment no 16 issued in relation thereto on 23 December 1999; it certified the amount due to the Contractor as being $295,527. On 3 December 1999 the appellant lodged Progress Claim no 17 for $148,697. It related to some extent to work associated with variations. The Principal's Representative in a letter dated 2 March 2000 indicated that it regarded Claim number 17 as "redundant" because it was lodged before Claim number 16 had been finalised. There was no further adjudication on that claim. Then on 22 February 2000 the appellant lodged Progress Claim number 18 in the sum of $617,528. It seems to have repeated what was claimed in Claim number 17, detailed matters which had been claimed but not allowed in earlier claims and certificates, and finally made a claim for some work recently carried out with respect to variations. It was conceded that for purposes of Clause 42.1 that claim was deemed to have been lodged on 28 February 2000.

[8] No certificate was issued within 14 days of 28 February. By letter dated 15 March 2000 the appellant notified the Principal's Representative of that fact and asserted that the amount of the progress claimed was therefore due and payable by the respondent in accordance with paragraph [6] of Clause 42.1. That was followed by the Principal's Representative issuing a document styled Certificate no 17 dated 20 March 2000 purportedly certifying that an amount of $27,193 was due to the appellant pursuant to the claim lodged 22 February 2000.

[9] The difference between the amount claimed by the appellant and the amount certified was largely the consequence of a deduction being made for liquidated damages in the sum of $408,500.

[10] It was in those circumstances that proceedings were commenced by the appellant in the Building Tribunal. In those proceedings it ultimately sought summary judgment for $590,335, being the unpaid balance of Progress Claim number 18. (the respondent having paid the $27,193).

[11] Before the Tribunal the appellant contended that a certificate issued outside the 14 day period specified in paragraph [4] of Clause 42.1 was ineffectual and that it was entitled to payment on the basis that no Payment Certificate had been issued. The respondent's argument was that a certificate issued after the 14 day period, but before the 28 day period for payment specified in paragraph [6] of Clause 42.1, was effectual and its obligation to pay was only in accordance with such certificate. The reasoning of the Tribunal Member was summarised in the following passage from her reasons for judgment: *"I find that Clause 42*

of the Contract and its general scheme leads me to the view that the requirement that the Superintendent or the Principal's Representative issue a Payment Certificate within 14 days of the delivery of the claim is one requiring strict observance. Failure to comply with the requirements of the clause will cause any Payment Certificate so issued to be invalid. While no submissions were made to me about the effect of an invalid certificate, I am prepared to find that in a situation where the Payment Certificate has invalidity issued, the practical consequence is that there is no valid Payment Certificate in existence and therefore "no certificate" for the purpose of Clause 42. The result is that the Principal must pay the Contractor the amount of the claim."

[12] That argument was rejected in the District Court. There the learned Judge said: *"In my opinion, a court or tribunal ought not too readily regard as a nullity a matter deliberately undertaken for a serious purpose, such as a payment certificate. It seems to me odd that a court should proceed on the basis that that "no Payment Certificate has been issued" when it is known that one has issued, albeit later than it should have."*

[13] That learned Judge, consistently with the argument advanced by the respondent, considered that a Payment Certificate issued after the 28 day period had expired would have no useful effect because the date for payment of the claim had passed.

[14] The reasoning of the learned District Court Judge was influenced to a significant extent by the analogy he drew with the consequences of there being default in pleading within time. He referred to a number of cases where judgment in default of pleading had been refused where the pleading in question had been delivered prior to the hearing albeit out of time. In my respectful view the analogy is not a good one; indeed counsel for the respondent did not advance a submission along those lines.

[15] There is also a passage in the reasons which suggests that the learned District Court Judge was influenced by the consideration that the Principal's Representative was not a party to the contract and therefore "should not be held bound by it in the same way as the parties are." Such reasoning is in my view irrelevant. Primarily the court is concerned with the rights as between the parties and that issue is essentially answered by the construction of the clause in question. The respondent, as principal is bound to *"ensure that . . . in the exercise of the functions of the Superintendent under the Contract, the Superintendent . . . (b) acts within the time prescribed under the Contract."* (Clause 23 of the General Conditions.) The failure to issue a certificate in time is therefore a default for which the respondent is responsible.

[16] Further, the learned District Court Judge expressed the view that the Tribunal Member in holding that certificate in question was a nullity had "implied terms in the parties' Contract in a more far reaching way than if the late payment certificate had been attended to when the time came for payment." This Court **in *re Concrete Constructions Group Pty Ltd*** [1997] 1 Qd R 6, in dealing with a clause in virtually identical terms with Clause 42.1 here, said the process of implying terms was not to be undertaken except where the need or the context compelled it. That was because the clause contained extensive and detailed provisions regulating the rights of the parties as to progress payments which were ordinarily critical to the survival of the contractor and to the completion of the project. But in my view the reasoning of the Tribunal Member did not involve the implication of a term; it was simply a matter of correctly construing the contractual provisions. Contrary to what was said in the District Court, giving effect to a certificate issued out of time requires the implication of a term rather than drawing a conclusion from the words of the clause itself; such a certificate does not have the positive consequences provided for by the clause without the addition of words extending the scope of its operation.

[17] The matter must be resolved by construing paragraphs [4] and [6] in particular. In a sense the question largely boils down to whether or not the word "shall" which appears on four occasions in paragraph [4] is mandatory, and in consequence failure to comply with the requirements thereof renders a certificate ineffectual. If that clause is construed in that way then a certificate not complying with those requirements is not a Payment Certificate for purposes of paragraph [6]. If that was so then the position would be the same as if no certificate at all had issued.

[18] Paragraphs [4] and [6] are found in identical terms in the General Conditions AS4300-1995. Not surprisingly those provisions have been the subject of judicial consideration. As already noted in *re* ***Concrete Constructions Group Pty Ltd*** this Court held that those paragraphs constituted detailed provisions regulating the rights of the parties as to progress payments. It is also important to bear in mind, as was emphasised by McPherson JA and Helman J in that case at 12, that: "Such claims and payments are, in building contracts in the common form, always intended to be provisional only . . . That is to say, they await the day when a final certificate issues, in which the ultimate indebtedness by one party to the other is ascertained and fixed." The significance of the clause, recognised in that judgment, is that the progress payments are critical to the survival of the contractor and to the completion of the project.

[19] That point was emphasised in the reasoning of this Court in ***Merritt Cairns Constructions Pty Ltd v Wulguru Heights Pty Ltd*** [1995] 2 Qd R 521; that was another case dealing with a clause in virtually identical terms to Clause 42.1 here. Davies JA said at 523: *"Though the precise meaning of all that appears in those clauses is not completely clear, their general intention . . . appears to be that, notwithstanding that claims and counter claims may later be the subject of arbitration, a prima facie sum may be made payable by issue by the Superintendent of a payment certificate pursuant to Clause 42.1."* In that case, McPherson JA said at 524 that those provisions mean *"that the Principal is bound to pay the amount certified by the Superintendent as the payment which is to be made by the Principal"* regardless of claims the Principal may have which are not covered by the certificate. Such claims, as he pointed out at 527, are to be resolved at the stage of final resolution of any disputes between the parties. In making those observations he referred at 527 to a number of single Judge decisions indicating that a strict approach should be taken to the construction of Clause 42.1. One of the cases referred to was ***Thiess Constructions Pty Ltd v Pavements & Excavations Pty Ltd*** (SC No 3709 of 1989; 2 February 1990). That was a case where a certificate issued within the 14 day period, but subsequently the Superintendent sought to withdraw it and replace it with another certificate specifying a lower amount payable by the principal. It was held that the contractor was entitled to payment in accordance with the certificate issued within time; it could not be effectively withdrawn.

[20] Of more significance is the decision of Rolfe J in ***Algons Engineering Pty Ltd v Abigroup Contractors Pty Ltd*** (1997) 14 BCL 215. The clause in question there was in the same terms as Clause 42.1 here. The learned Judge found that the certificate issued by the Principal's Representative did not satisfy the requirements of paragraph (a) to (f) of paragraph [4]. In consequence he said that "*the Payment Certificate failed to comply with various contractual obligations as to its contents and that, accordingly, it was not a valid notice".* His reasoning for so concluding is set out in the following passage: *". . . the effect of a Payment Certificate is to require the recipient to pay the amount stated. Failure to do so could lead to summary judgment and there is no right to dispute the amounts payable until the dispute resolution procedures are activated. Accordingly, the recipient of the certificate is required to pay money during the course of the contract which, at the end of the day, it may be found it does not owe. The requirement to pay money*

may lead to financial difficulties for the payer, just as the failure to receive money during the course of the contract may cause financial difficulties to the payee. Also the payee may not be able, at the end of the day, to refund any overpayment. Considerations such as these lead me to the conclusion that a certificate must comply strictly with Clause 42.1 if it is to have the consequences specified."

[21] That reasoning is in my view compelling. As all of the cases I have just referred to establish, the consequences of issuing a certificate are serious. The proprietor is bound to pay the amount of the certificate notwithstanding that the amount is provisional only and subsequently may be found to be incorrect. Notwithstanding such considerations the proprietor must pay the amount specified in the certificate and take the chance that any excess can be recovered subsequently. Similarly, the contractor is not entitled to payment of anything more than the amount specified in the certificate though it may well be less than the progress claim made. Even though it may ultimately be found that the contractor was entitled to more, the recovery of any such amount must await the determination of disputes at the end of the contract.

[22] Because of the consequences which flow from the issuing of the certificate strict compliance with the provisions of Clause 42.1 is required. That, in any event, is the natural consequence of the use of the word "shall" in paragraphs [4] and [6] in particular. It is not necessary to imply any terms in order to arrive at that result. Interestingly all parties agree that the provision in relation to payment by the Principal consequent upon the issuing of a valid certificate is mandatory; in my view it would be odd if the provisions relating to the issuing of the certificate, though mandatory in terms, were held not to be so.

[23] An attempt was made by counsel for the respondent to support a construction that "shall" in paragraph [4] was not mandatory by referring to other provisions of the contract where, arguably, that term could not sensibly be construed as being mandatory. However, on closer examination, the provisions to which reference was made are distinguishable. In my view Clause 42 provides a code with respect to payments and its clear meaning ought not be affected by the consideration that the term "shall" in some other clause in the contract did not denote a mandatory requirement.

[24] Counsel for the respondent placed some emphasis on Clause 42.3 because it was in the same section of the contract as Clause 42.1. It deals with the issuing of a Certificate of Practical Completion. The Special Conditions modified the standard form Clause 42.3. The provision relied on by counsel for the respondent was that in the portion inserted by the Special Conditions which required the Principal's Representative within 14 days of receipt of a request for such a certificate to give to the contractor and the principal either a list of defects or a Certificate of Practical Completion. The argument was to the effect that if such a certificate could not issue outside the 14 day period specified then no such certificate could issue. But the answer to that is to be found in the last paragraph of the clause which provides: "When the Superintendent is of the opinion that Practical Completion has been reached, the Superintendent may issue a Certificate of Practical Completion, whether or not the Contractor has made a request for its issue." It follows that whilst there is in the first instance an obligation to respond to a request within 14 days, the contract itself recognises that such a certificate may issue at a later point in time once the Superintendent is satisfied that the stage has been reached.

[25] Reference was also made to the fifth paragraph of Clause 8.4 of the standard conditions as amended by the Special Conditions. There is there a requirement for the Superintendent to notify the contractor whether certain specified documents are suitable or not suitable within 14 days after their receipt. There is nothing said about the consequences of the Superintendent communicating such a decision after the expiration of the 14 days. The construction of that provision is not in issue here and the possibilities need not be explored further. It is sufficient to say that consideration of that clause is not helpful when it comes to construing Clause 42.1. The Superintendent's decision on documents pursuant to Clause 8.4 does not have the far reaching implications of a certificate issued pursuant to Clause 42.1. It is those consequences, demonstrated by the reasoning of Rolfe J in ***Algons,*** that compels a strict construction of the requirements of Clause 42.1.

[26] Counsel for the respondent contended as an alternative that Progress Claim no 18 was an invalid progress claim because it was submitted after the Certificate of Practical Completion had issued. In the District Court the learned Judge said that the argument had "a certain appeal" but he did not finally rule on it. Counsel for the respondent elaborated on the submission by drawing attention to the fact that the contract provided that the work was to be executed from the date of commencement to the date of Practical Completion; thereafter the defects liability period continued until the Certificate of Final Completion.

[27] As counsel for the appellant pointed out, Progress Claim no 16 (the last adjudicated upon by the Principal's Representative in a timely way) was delivered on 4 November 1999, approximately four weeks before the stage of Practical Completion was reached. Particularly given the fact that work had to be carried out at least on variations thereafter it was certainly not unreasonable to expect there would be at least one further Progress Claim lodged. That is particularly so in the light of the letters of 29 November and 3 December 1999 to the appellant from the Principal's Representative.

[28] In the circumstances I can see no justification for concluding that a Progress Claim could not be validly submitted after 30 November 1999. Paragraph [1] does not expressly require such a conclusion. No such point was taken by the Principal's Representative in dealing with Progress Claim no 18, albeit outside the 14 day period provided for by Clause 42.1.

[29] In the circumstances there is no substance in the submission that the Progress Claim no 18 was invalid.

[30] It follows in my view, for all the forgoing reasons, that the decision of the Tribunal Member was correct and the decision of the learned District Court Judge on appeal that the appellant was not entitled to summary judgment wrong.

[31] However, a Final Certificate has now issued stating that no money is payable by the respondent to the appellant. It reasserts that liquidated damages in the sum of $408,500 are payable to the Principal. If the amount paid pursuant to the Tribunal judgment was still in the hands of the appellant the Final Certificate would have provided that such sum be paid to the respondent, and that would be binding, at this stage, on the appellant. It follows that the summary judgment order cannot be restored. The position is that the appellant was entitled to the sum of $590,335 until the issue of the Final Certificate on 2 January 2001. In consequence the only relief that the appellant is now entitled to is judgment for interest on that sum over the relevant period.

[32] An interest calculation was placed before the Court by each side. I am satisfied that the appellant is entitled to interest at the contract rate namely 18 per cent. The only area of dispute between the parties was as to whether the appellant was entitled to interest from 19 June 2000 to 31 July 2000 (41 days) being the period from the date of the Tribunal judgment until payment by the respondent. In the circumstances the appellant should have interest for that period. On that basis interest totaled $72,172.63 and the appellant is now entitled to judgment in that sum.

[33] I now turn to the appeal in relation to the order of the District Court Judge granting a stay of proceedings before the Tribunal.

[34] The appellant commenced proceedings before the Tribunal by Claim dated 20 April 2000. It made various claims against the respondent. It sought payment of the balance of Progress Claim no 18 with interest, an extension of time with respect to the date for Practical Completion, a declaration that no liquidated damages were payable by the appellant to the respondent and other relief. The respondent applied by application lodged with the Tribunal on 16 May 2000 for a stay of proceedings. Effectively that was an application for a stay of all the proceedings commenced by the appellant before the Tribunal. The appellant then sought summary judgment with respect to the amount of the progress claimed. That is what came before the Tribunal on 9 June 2000. The issue of the stay application was raised with the Tribunal Member at the outset on that date. The stay application was primarily based on the premise that the respondent wished all issues in dispute to be resolved by arbitration. Because this was a "domestic building dispute" within section 95 of the *Queensland Building Services Authority* Act 1991 (Qld), the *Commercial Arbitration Act 1990 (Qld)* did not apply, but the Contract provided it was governed by the law of New South Wales.

[35] Counsel for the appellant drew the Tribunal's attention to Clause 47.4 which provided: *"Nothing herein shall prejudice the right of a party to institute proceedings to enforce payment due under the contract . . ."* Counsel for the respondent acknowledged that that provision effectively meant the respondent was not entitled to a stay of the application for summary judgment. In consequence the Tribunal member said: *"I am not prepared to grant a stay at this point."*

[36] The Tribunal then proceeded with the summary judgment application and gave the judgment referred to above on 19 June 2000. At the conclusion of the hearing with respect to summary judgment there was no application made by the respondent for a stay of the balance of the proceedings brought by the appellant; any such application would necessarily have involved consideration of New South Wales law. To the contrary the parties on 16 June 2000 agreed upon directions for the future conduct of the remaining proceedings before the Tribunal.

[37] It should be noted in passing that both in the Tribunal and subsequently in the District Court there were proceedings with respect to a stay of the order on the summary judgment application. That was not in issue before the District Court Judge hearing the appeal from the Tribunal's order on the summary judgment, nor is it in issue on the hearing of this appeal.

[38] What the respondent raised on the hearing of the appeal in the District Court was an appeal against the order of 9 June 2000 where the Tribunal Member refused to grant a stay "at this point".

[39] The learned District Court Judge expressed the view that it would be "*somewhat artificial not to bring the whole of the parties' dispute before this Court" and on that basis proceeded to consider whether or not there should be a stay of further proceedings before the Tribunal. Later he said it would "be wrong to be critical of the Tribunal Member's refusal to grant a stay"*. He appears to have said that because it was pointed out to him that the parties had agreed there was jurisdiction to entertain the summary judgment application. Relevantly he later went on to say: *"Whether the summary judgment order was set aside or not, there would remain for resolution disputes as to the parties' respective entitlements and obligations, bearing on typical "building dispute" issues such as whether Watpac should have been allowed further time for completion. While it is true that the Tribunal may be assumed to have valuable expertise in these matters, the situation remains that the parties agreed to an ADR procedure for resolution of such disputes. It is untenable nowadays to suggest that proceedings in the Tribunal or in a court are precluded by Clause 47, but I would assess present day attitudes of the courts in the community as being that ADR procedures ought to be encouraged, a fortiori where, as here, the parties to a dispute have agreed in advance to resort to them. Although a good deal of work has been done in preparation of materials filed in the Tribunal, I should be surprised if use could not be made of them in the ADR. In the circumstances, I would extend the leave to appeal granted in respect of the summary judgment to the Tribunal's order refusing a stay and, further, order that proceedings in the Tribunal be stayed on condition that Daysea take all appropriate steps to bring in to operation the ADR procedures set out in Clause 47 of the parties' contract and pursues the same expeditiously."*

[40] From that it can be seen that the learned District Court Judge was not dealing with an appeal from the stay order refused on 9 June, but was rather exercising a discretion to grant a stay in the exercise of some supposed supervisory jurisdiction of the District Court notwithstanding that the respondent had not sought a stay of further proceedings in the Tribunal after the summary judgment application had been determined. No consideration was given to the fact that its contract was subject to New South Wales law.

[41] In my respectful view the learned District Court Judge did not have jurisdiction to do what he purported to do. The only stay refused by the Tribunal was with respect to the summary judgment application. No wider application for a stay had been refused by the Tribunal. To the contrary, as noted above, the respondent has acquiesced in the Tribunal making directions with respect to the future conduct of proceedings before that Tribunal. There was no appeal to the District Court from the order embracing those directions.

[42] It follows that the order of the District Court imposing a stay should be set aside.

[43] It seems to me that there has been no formal determination by the Tribunal on the respondent's application for a stay filed 16 May 2000. Were it not for the fact that the respondent acquiesced in the order for further directions of 16 June 2000 there would probably be no bar to its now seeking to have that application determined. Given its subsequent conduct it appears likely that if it brought that application on, it would be doomed to fail.

[44] The orders of the court will therefore be:
1. Grant leave to appeal.
2. Allow the appeal and set aside the orders of the District Court.
3. Give judgment for the appellant against the respondent in the sum of $72,172.63.
4. Order that the respondent pay the appellant's costs of and incidental to the proceedings before the Queensland Building Tribunal, of the appeal to the District Court, and of this appeal to be assessed.
5. Certify the matter was sufficiently complex to justify the retainer of senior and junior counsel before the District Court.

[45] **MACKENZIE J:** I agree with the orders proposed by Williams JA for the reasons given by him.

H B Fraser QC, with M J Burnett for the appellant instructed by Barwicks Wisewoulds for the appellant
R H Holt SC, with E J Morzone for the respondent instructed by Baker & McKenzie (Sydney) for the respondent