SUPREME COURT OF QUEENSLAND

CITATION:	*John Holland Pty Ltd v Adani Abbot Point Terminal Pty Ltd* [2016] QSC 292
PARTIES:	**JOHN HOLLAND PTY LTD ABN 11 004 282 268** (applicant) v **ADANI ABBOT POINT TERMINAL PTY LTD ABN 93 149 298 206** (respondent)
FILE NO:	BS2604/16
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	12 December 2016
DELIVERED AT:	Brisbane
HEARING DATE:	19-20 May 2016
JUDGE:	Jackson J
ORDER:	**The order of the court is that:** **1. The application is dismissed.** **2. The parties are to be heard on the question of costs.**
CATCHWORDS:	ARBITRATION – THE AWARD – APPEAL OR JUDICIAL REVIEW – GROUNDS FOR REMITTING OR SETTING ASIDE – ERROR OF LAW – where the arbitrator rejected that contracts had been repudiated by breaches of an express term that the superintendent act honestly and fairly, and breaches of an implied term not to interfere with the superintendent in the performance of their functions – where the applicant applied for leave to appeal under s 38 of the *Commercial Arbitration Act* 1990 (Qld) – where the applicant argued that the arbitrator misconstrued the express term and failed to apply the legal principles to the facts – where the applicant argued that the arbitrator made findings without probative evidence – where the applicant raised arguments outside the scope of the case run before the arbitrator – whether any error in construing the express term was manifest on the face of the award or there was strong evidence the arbitrator made the error – whether the misapplication of the correct law to the facts is an error of law – whether an appeal on a no evidence ground would add or be likely to add to the certainty of commercial law – whether the

arbitrator failed to consider submissions or to give adequate reasons

Commercial Arbitration Act 1990 (Qld), s 38
Uniform Civil Procedure Rules 1999 (Qld), r 5

Batistatos v Roads and Traffic Authority of New South Wales (2006) 226 CLR 256; [2006] HCA 27, cited
Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd [2003] FCA 174, cited
Benaim (UK) Ltd v Davies Middleton & Davies Ltd [2005] EWHC 1370, approved
Canterbury Pipe Lines Ltd v Christchurch Drainage Board [1979] 2 NZLR 347, cited
D'Orta-Ekenaike v Victoria Legal Aid (2005) 223 CLR 1; [2005] HCA 12, cited
Devaugh Pty Ltd v Lamac Developments Pty Ltd (2000) 16 BCL 378; [1999] WASCA 280, distinguished
Dranichnikov v Minister for Immigration and Multicultural Affairs (2003) 197 ALR 389; [2003] HCA 26, cited
Ebner v Official Trustee in Bankruptcy (2000) 205 CLR 337; [2000] HCA 63, considered
Francis v Lyon (1907) 4 CLR 1023; [1907] HCA 12, cited
Francis v Lyon (1907) 4 CLR 1023; [1907] HCA 12, cited
Goldsbrough Mort & Co Ltd v Carter (1914) 19 CLR 429; [1914] HCA 80, cited
Howard v Gallagher (1989) 85 ALR 495, cited
Jaffarie v Quality Castings Pty Ltd [2015] NSWCA 335, cited
John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd (1996) 13 BCL 235, cited
Kane Constructions v Sopov (2006) 22 BCL 92; [2005] VSC 237, cited
Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd (2007) 233 CLR 115; [2007] HCA 61, applied
Nelson Carlton Construction Co (in liq) v AC Hatrick (NZ) Ltd [1965] NZLR 144, cited
O'Sullivan v Lunnon (1986) 163 CLR 545; [1986] HCA 57, cited
Peter Schwarz (Overseas) Pty Ltd v Morton (2004) 20 BCL 133; [2003] VSC 144, cited
Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal (2012) 246 CLR 379; [2012] HCA 36, cited
Steel Contracts Pty Ltd v Simons [2014] ACTSC 146, cited
Walter Construction Pty Ltd v Walker Corporation Pty Ltd [2001] NSWSC 283, considered
Westport Insurance Corporation v Gordian Runoff Ltd (2011) 244 CLR 239; [2011] HCA 37, distinguished

COUNSEL: F Corsaro SC with B Bradley for the applicant
M Stewart QC with D Piggott for the respondent

SOLICITORS: King & Wood Mallesons for the applicant
McCullough Robertson for the respondent

[1] **Jackson J**: This is an application for leave to appeal on a question of law arising out of an arbitral award. The application falls to be decided under s 38 of the now repealed *Commercial Arbitration Act* 1990 (Qld) ("the Act").

[2] Under s 38(2)(b), an appeal shall lie to this court "on any question of law arising out of an award", subject to the requirement that the court gives leave to appeal under s 38(4)(b). Section 38(5) provides that:

> "The Supreme Court shall not grant leave under subsection 4(b) unless it considers that—
> (a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of 1 or more parties to the arbitration agreement; and
> (b) there is—
> (i) a manifest error of law on the face of the award; or
> (ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law."

[3] If leave is granted on a question of law, on determination of the appeal the court may by order confirm, vary, set aside or remit the award for reconsideration under s 38(3) of the Act.

Contracts, disputes and arbitration

[4] In 2009, the applicant entered into two contracts with Ports Corporation of Queensland Ltd ("PCQ") for the supply, construction and commissioning of certain works at the Abbot Point Coal Terminal, being the Marine Works contract (Q08-004) and the Shiploader contract (Q08-005). In short, the contracts provided for the upgrading of the wharf and ship loading facilities for the Abbot Point Coal Terminal as part of the expansion of the capacity of the terminal.

[5] The interests of PCQ as to rights and obligations under each of the contracts has passed to the respondent.

[6] On 22 February 2012, disputes between the parties were referred to arbitration under an arbitration agreement.

[7] In June 2012, the Honourable DM Byrne QC was appointed arbitrator.

[8] In August 2012, a further arbitration agreement was made between the parties and the arbitrator. It was agreed that the disputes should be determined under the Act and in accordance with the terms of that agreement.

[9] The claims and cross-claims between the parties are being dealt with by a series of hearings and awards.

[10] In May 2014, the applicant added a claim that PCQ had repudiated each of the contracts and on 24 May 2014 the applicant elected to terminate each of the contracts ("repudiation claim").

[11] Simplified, the repudiation claim is that each of the contracts contained an express term under cl 23 of the general conditions of contract that PCQ would ensure that the superintendent would act honestly and fairly in the exercise of his functions under the contracts and an implied term that PCQ would not interfere with the superintendent in the performance of those functions. The applicant alleges that PCQ breached those terms and that the breaches are breaches of an essential term or go to the root of the contract, or amount to a repudiation of each of the contracts.

[12] On 12 February 2016, following a 16 day hearing of the repudiation claim, the arbitrator published an award entitled "Fourth Award (Repudiation)". The award was as follows:

> "1. PCQ has not breached the contracts or either of them as alleged in paragraph 30E of the Third Further Amended Points of Claim.
> 2. PCQ has not repudiated either of the contracts by its breaches of cl 23 or of any implied term of the contracts.
> 3. Accordingly, the contracts were not terminated by [the applicant] as it alleges in its Points of Claim.
> 4. I will hear the parties upon any questions of costs of this repudiation hearing and award."

Application for leave

[13] The application for leave to appeal was started by filing a document headed "Notice of Appeal Subject to Leave" ("application"). The applicant seeks leave to appeal against the whole of the award.

[14] So framed, the application does not conform to the basis for an appeal under the Act. Under s 38(2), subject to subsection (4), an appeal shall lie to the Supreme Court "on any question of law arising out of an award". The contemplated appeal is one on a question of law, not "from the award", whether in whole or part. Under s 38(3)(b), if the award is remitted, that is to be together with the court's "opinion on the question of law which was the subject of the appeal". And under s 38(5), there are two further references to "the question of law" and "the question".

[15] It follows that the application for leave to appeal and an order for leave to appeal must state the question of law to be the subject of the appeal, as well as any grounds. This was not done in the application.

[16] During the hearing of the application, the applicant handed up a draft order granting leave to appeal that identified the questions of law on which leave is sought. I will deal with the suggested questions of law in the context of the relevant grounds of appeal stated in the application, because neither the application nor the applicant's submissions were formulated by reference to the particular questions in the draft order.

[17] The application states that if leave is granted the appeal will be prosecuted on 11 grounds, and that the applicant will seek the following orders:

> "1. Appeal allowed.
> 2. Pursuant to section 38 of [the Act] the Fourth Interim Award of the Arbitrator be set aside and the subject matter of the Fourth Interim Award be remitted for consideration to a new arbitrator.
> 3. Pursuant to s 42 of [the Act] the Fourth Interim Award of the Arbitrator be set aside for technical misconduct.
> 4. Such further or other relief as [to] the Court seems just.
> 5. Costs."

[18] Paragraph 3 of those orders is not one that would be made under s 38(3) of the Act on the determination of an appeal on a question of law.

[19] Nominally, there are 11 grounds of the proposed appeal. In fact, there are internal alternatives and more than one subject matter contained in a number of the grounds.

[20] Overarching that, ground 11 states that as a result of the misapplications of legal principles identified in grounds 1 – 7 the arbitrator made findings that constituted errors of law as set out in part I of the schedule to the application. That part of the schedule identifies over 50 paragraphs of the award, each of which is said to have been affected by one or more of the errors contained in the numbered grounds of appeal.

[21] As well, ground 11 states that part II of the schedule to the application identifies submissions made by the applicant that were not considered by the arbitrator in the award. They seem to relate to grounds 5 to 7 that the arbitrator failed to give adequate reasons or properly engage with submissions and evidence. Part II of the schedule lists over 50 separate submissions said not to have been considered in that way.

[22] The evidence and submissions made in support of the application only added to the already apparent difficulties. The affidavits of the applicant, including exhibits, ran to over 2,000 pages plus an unpaginated arch lever folder full of the central communications relied upon in evidence before the arbitrator. The written submissions of the applicant on this application ("written submissions") comprised 35 pages together with a more detailed expansion of grounds 1 to 7 in an Annexure in 97 further pages. The written submissions in reply comprised 35 further pages.

[23] The number and width of the suggested grounds of the proposed appeal are unusual. The volume of permutations and combinations of supposed questions of law is unmanageable. The application so framed is tantamount to an abuse of process.[1]

[24] Notwithstanding the snow storm of material and points relied on by the applicant, I proceed to consider the main grounds that the applicant submits raise a question of law. But to embark on that exercise without any comment about the way in which the applicant presented the application for decision would be to acquiesce in an unacceptable method of proceeding, inconsistent with the obligation of a party under

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1 *Batistatos v Roads and Traffic Authority of New South Wales* (2006) 226 CLR 256, 265-268 [9]-[16].

r 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) to proceed in an expeditious way.[2]

Grounds 1 and 2

[25] Proposed ground 1 essentially contends that the arbitrator misconstrued cl 23 of each of the contracts and failed to apply the correct legal principles emerging from the decided cases. Clause 23 provided, in part:

> "23. The Principal shall ensure that at all times there is a Superintendent and that in the exercise of the functions of the Superintendent under the Contract, the Superintendent –
>
> (a) acts honestly and fairly;
> (b) …; and
> (c) arrives at a reasonable measure or value of work, quantities or time."

[26] By ground 1, the applicant submits that the arbitrator only had regard to whether undisclosed communications between PCQ, PCQ's lawyers and the superintendent subjectively and actually affected the superintendent's administration of the contract. The applicant submits that the arbitrator thereby incorrectly failed to consider whether the communications were material representations calculated to influence the superintendent's administration of the contracts, irrespective of whether or not they did have any effect.

[27] Proposed ground 2 contends that the arbitrator should have found that PCQ interfered in the superintendent's performance of his functions under the contracts and that in breach of the contracts PCQ failed to ensure that the superintendent acted honestly, fairly and independently because the undisclosed communications were objectively calculated to influence the superintendent's administration.

[28] There are thus three points the applicant seeks to ventilate. First, did the arbitrator misconstrue cl 23 in a way that excluded the question whether the undisclosed communications were material representations calculated to influence the superintendent's administration of the contracts? It is uncontentious that the proper construction of cl 23 is a question of law. Second, did the arbitrator fail to consider whether the undisclosed communications were material representations calculated to influence the superintendent's administration of the contracts? Third, should the arbitrator have found that PCQ interfered in the superintendent's performance of his functions?

[29] The arbitrator dealt with the subject matter of proposed grounds 1 and 2 of the appeal in Part 2 of the reasons for the award ("reasons"). In particular, in paras 60 to 68 he discussed case law that touches upon the obligations of a certifier as between a contractor and principal in relation to communications that he or she may have with a party. Before considering the terms of the particular contracts in this case, including cl 23, the arbitrator formulated a number of propositions about the relevant obligations at common law.

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[2] See also the comments of McHugh J in *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 48 [139] as to prolixity in litigation.

[30] At par 71 of the reasons, the arbitrator referred to the decision of Finkelstein J in *Baulderstone Hornibrook Pty Ltd v Qantas Airways Ltd*[3] where it was accepted that under a contract comparable to those in this case terms may be implied at common law that the principal will not interfere in the decision making of the certifier and that the principal will ensure that the certifier acts independently in the exercise of its powers under the contract.

[31] The arbitrator identified the dispute resolution procedure under cl 47 of the general conditions of contract, and noted in paras 77 and 78 of the reasons that the superintendent had a separate role as project manager on behalf of the principal, including in the dispute resolution procedure and in responding on behalf of the principal to any claim made by the contractor under the *Building and Construction Industry Payments Act* 2004 (Qld). The arbitrator then considered the operation of cl 23 in paras 79 to 82. It is unnecessary to set out those paragraphs or the later discussion of the alleged implied terms that appears through to par 87. The applicant does not complain about them.

[32] The applicant submits in par 52 of the written submissions that the arbitrator's error of law in construing cl 23 emerges from par 63 of the reasons. Having referred to the decisions of the New Zealand Court of Appeal in *Nelson Carlton Construction Co (in liq) v AC Hatrick (NZ) Ltd*[4] and *Canterbury Pipe Lines Ltd v Christchurch Drainage Board*,[5] in par 62 of the reasons, the arbitrator extracted a passage from the latter case as follows:

> "The relevance of the *Hatrick* judgments is that they show that the test regarding representations is not merely whether the mind of the certifier has in fact been influenced thereby. It extends to whether they were of a kind calculated to influence him. To that extent the test is objective."[6]

[33] The arbitrator continued in par 63:

> "I read the word 'calculated' in the *Hatrick* dictum, not as denoting the intent of the representor, but as denoting the likely impact of the representation on the mind of the certifier, assessed on an objective basis."

[34] This passage is challenged by the applicant as showing that the arbitrator erred in law in construing cl 23.

[35] By a footnote to par 63, the arbitrator referred to three cases as supporting the proposition in the challenged passage, namely, *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd*,[7] *O'Sullivan v Lunnon*[8] and *Howard v Gallagher*.[9]

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3 [2003] FCA 174.
4 [1965] NZLR 144.
5 [1979] 2 NZLR 347.
6 [1979] 2 NZLR 347, 357.
7 (1996) 13 BCL 235, 248-249.
8 (1986) 163 CLR 545, 549 and 552-553.
9 (1989) 85 ALR 495, 498.

[36] The arbitrator continued in par 64:

> "The requirement, that this must be determined on an objective basis, means that [the] question here is whether a fair-minded person in the position of the contractor, knowing the true facts, might reasonably apprehend that the superintendent has not brought an impartial mind to the performance of his contractual certifying functions."

[37] The arbitrator acknowledged that this test was adapted from *Ebner v Official Trustee in Bankruptcy*,[10] a leading case dealing with the principles relating to a finding of apparent bias on the part of a judge. The applicant describes par 64 as the "Ebner Standard" in paras 20 and 58 of the written submissions.

[38] The applicant submits in par 53 of the written submissions that the challenged passage shifts the enquiry from the characterisation of the nature and quality of the representation and its potential impact to one concerned with assessing the likelihood that a particular superintendent may be influenced by the communication and conduct.

[39] In my view, that contention is wrong. First, the arbitrator's language was not directed to the mind of a particular certifier or superintendent. That is clear from how par 63 appears in the context of the prior and subsequent paragraphs. Second, the words "assessed on an objective basis" in par 63 make it clear that the arbitrator was not concerned with the particular certifier or superintendent. Third, par 64 is further clear support for that conclusion. If the enquiry were confined to whether a particular certifier is subjectively affected, it would be irrelevant to ask whether a fair-minded person in the position of the contractor knowing the true facts might reasonably apprehend that the superintendent has not brought an impartial mind to the task. Fourth, the footnoted cases all support the reading of the challenged passage as directed to the generally objective nature of the inquiry.

[40] For the purposes of the leave application, I conclude that the suggested error of law as to the arbitrator's construction of cl 23 of the contract is not manifest on the face of the award and there is no strong evidence that the arbitrator made that error.

[41] The applicant submits that Annexure A to its written submissions ("Annexure A") sets out detailed submissions as to how the arbitrator was affected in the determination of the primary findings and inferences relevant to each of the undisclosed communications which it describes as the "Impugned Representations".

[42] The first paragraph of Annexure A states that the "Impugned Representations"[11] were identified in Annexure 23 to the Third Further Amended Points of Claim. Paragraph 2 states that the applicant challenges the parts of the award where the arbitrator rejected that the representations contravened cl 23. Paragraph 3 of Annexure 23 lists approximately 140 communications and meetings.

[43] Those Impugned Representations are, in effect, analysed or broken up into categories set out in par 2 of Annexure A by reference to the subject matter to which the conduct

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10 (2000) 205 CLR 337, 344.

11 Defined in par 12 of the written submissions to be "conduct and communications that were withheld" from the applicant.

or communications related. There were nine categories of that kind, representing claims made by the applicant under the contracts as follows:

(a) EOT (extension of time) 32;
(b) Walz Afternoon Shift;
(c) Strong Point Argument;
(d) EOT 111, 229 and 238: Loss of Productivity Claims;
(e) Re-assessment of Overhead and Profit Claim;
(f) Cable Variation Claims;
(g) IWC (inclement weather claim) -002 and CVO (contract variation order) 122;
(h) Shiploader Commissioning – Breach Notice, SL EOT 0001 and JH199; and
(i) Type 3 Costs.

[44] Generally speaking, the undisclosed communications comprised legal advice given to the superintendent by a member or employee of McCullough Robertson, who were PCQ's lawyers, but who also acted for the superintendent ("the lawyers"). As well, some of them involved representations made to the superintendent by PCQ's representative.

[45] The applicant's written submissions in Annexure A run to 299 paragraphs. I have spent many hours considering the materials referred to in them. Still, I reject that the court is required to scour through them to ascertain for itself what might be the content of the applicant's contention that there is a question of law under s 38 raised by the arbitrator's application of cl 23 or the implied term to the facts in answering the question whether each of the Impugned Representations was, or any permutation of those many communications collectively were, objectively calculated to influence the superintendent's administration.

EOT 32

[46] On 23 March 2009, the applicant submitted a claim for extension of time of six hours arising out of a weather event on 19 March 2009. This became EOT 32.

[47] On 22 July 2009, the superintendent refused or confirmed his refusal of the claim, stating there was a want of notification in accordance with the contract and issues whether the contractual requirements for an inclement weather event were satisfied.

[48] The applicant submits from par 13 of Annexure A that there was a manifest error of law in the findings by the arbitrator that he was not satisfied that there was any want of honesty or fairness on the part of the superintendent in dealing with EOT 32 and that the process of the superintendent satisfied the obligations of honesty and fairness required of him.

[49] In par 8 of Annexure A the applicant submits that its case before the arbitrator was that the lawyers provided advice that was not disclosed in accordance with the "Disclosure Standard" and that the advice was a material representation which was calculated to influence the superintendent.

[50] The Disclosure Standard referred to in Annexure A is defined in par 19 of the written submissions as:

(a) to provide full disclosure to the applicant of every communication from PCQ (its solicitors and engineers) to the superintendent, and from the superintendent to PCQ (its solicitors and engineers) or to provide the applicant with a fair opportunity to make representations about matters raised by PCQ (its solicitors and engineers) with the superintendent;

(b) not affording an equivalent opportunity to the applicant to make representations to the superintendent in respect of advice or the view the superintendent had obtained from PCQ and its lawyers.

[51] In par 13 of Annexure A the applicant submits that the arbitrator failed to apply the correct legal standard in his determination of the claim. It submits that the arbitrator determined that PCQ was not in breach of cl 23 because the applicant had an opportunity to be heard and the superintendent was not persuaded by the applicant's arguments. The applicant submits that does not answer whether an undisclosed representation contravened cl 23 because of non-compliance with the Disclosure Standard.

[52] The applicant submits in par 19 of the written submissions that the arbitrator made an error of law in failing to accept that the Disclosure Standard was included in the "legal principles, standards and content of PCQ's obligation to ensure the superintendent fulfilled his functions honestly and fairly, and impartially". In putting the matter this way, the applicant appears to characterise the Disclosure Standard as an implied term of the contracts. But that was not its pleaded case. The pleaded case was that the failures to disclose the particular communications (now named the Impugned Representations) and to afford the applicant an equivalent opportunity to make representations were on the facts breaches of the pleaded contractual terms or obligations to act honestly and fairly, or justly, or impartially and in a reasonable manner.[12]

[53] The distinction is potentially important. It appears that on the appeal the applicant would elevate what was pleaded as a breach of contract on the facts before the arbitrator to a contractual term or obligation in itself so as to recast it as an error of law for an appeal.

[54] The arbitrator referred to the Disclosure Standard (although not by that name) in par 16 of the reasons. Second, in paras 46 to 68 of the reasons, he dealt with the obligations of a superintendent in relation to communications with a party. In par 64 he formulated the proposition that the test regarding representations is whether a fair-minded person in the position of the applicant, knowing the true facts, might reasonably apprehend that the superintendent has not brought an impartial mind to the performance of the contractual certifying functions. Third, in par 105 of the reasons, the arbitrator rejected the existence of a requirement to disclose to the applicant all information and legal advice received that is relevant to the exercise of his functions, and found that "whether disclosure [was] required will depend upon the nature and significance of the information".

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12 Third Further Amended Points of Claim, par 30E(a).

[55] In my view, there is no manifest error of law or strong evidence of an error of law on the part of the arbitrator in failing to find that the superintendent was obliged to meet the Disclosure Standard in relation to each of the Impugned Representations.

[56] Whether any of the Impugned Representations had to be disclosed was a decision of fact to be arrived at by applying the law as articulated by the arbitrator in paras 46 to 68 of the reasons and in accordance with the issues submitted for determination by the parties at the hearing of the reference. That view is consistent with the way the applicant pleaded its case as to the breaches of contract comprised by non-disclosure of the particular communications. Conclusions on those points by the arbitrator were conclusions on questions of fact, not questions of law.

[57] Something more should be said about the applicant's submission that the arbitrator failed to make findings about whether the Disclosure Standard was met and its submission in par 20 of Annexure A that the arbitrator failed to determine that the relevant undisclosed representations were material representations that were calculated to influence the superintendent.

[58] The technique deployed by the applicant in its submissions in Annexure A starts with the express findings made by the arbitrator as to the actual honesty of the superintendent. The applicant then sets up a "straw man" argument, submitting that those findings are not relevant to the question whether each undisclosed representation contravened the Disclosure Standard contended for and are not relevant to whether each undisclosed representation was a material representation calculated to influence the superintendent, assessed as a purely objective matter.

[59] At paras 169 to 172 the arbitrator set out the effect of the submissions made to him by the applicant in relation to the communications relating to EOT 32, which may be summarised as a case of deliberate conduct by both the superintendent and the lawyers to advance the interests of PCQ amounting to a breach by PCQ of cl 23 or the implied term. The arbitrator rejected that case.

[60] The applicant's case on this application is that not only was the arbitrator obliged to consider the claim of actual deliberate breach of either cl 23(a) or the implied term, but also that for each of the Impugned Representations, he was obliged to consider whether failure to disclose it contravened the Disclosure Standard and whether it was a material representation that was calculated to influence the superintendent.

[61] As will be recalled, the applicant submits that its case before the arbitrator was that the lawyers provided advice that was not disclosed in accordance with the "Disclosure Standard" and that the advice was a material representation which was calculated to influence the superintendent, assessed objectively.

[62] The applicant sought to rely on par 2.2(g) of section 2 of its written submissions to the arbitrator as raising the requirement for the arbitrator to make those findings. That subparagraph stated that if the superintendent "hears from one party representations which are of such a nature as to be intended or calculated to influence him in arriving at his determination he is under a duty to afford the other party the opportunity of answering what is alleged against him. This includes the disclosure of all relevant facts to both parties, including correspondence".

[63] The scope of the case to be decided by the arbitrator was raised by him on day 16 of the hearing, after he had received the applicant's written submissions and browsed through them. Paragraph 93 of the reasons states that the arbitrator raised with counsel for the applicant that he had difficulties in extracting what issues they wanted him to address from their pleading. (I note that my own consideration of the Third Further Amended Points of Claim and brief review of the transcript of some of the 16 days of the hearing supports the arbitrator's difficulty.) The applicant's counsel responded that the applicant's position was that the arbitrator should "look at the submissions and deal with the submissions". The transcript shows that at the beginning of their oral address the respondent's counsel also submitted that the issues for determination were those set out in the parties' respective submissions.

[64] The applicant's written submissions to the arbitrator were 192 pages in length. Section 14, at pages 149 to 153, made the applicant's submissions about EOT 32. The arbitrator's reasons at pages 52 to 56, to a standard higher than required by the considerations set out in *Bremer Handelsgelleschaft mbH v Westzucker GmbH (No 2)*,[13] responded to the submissions that the applicant made in section 14.

[65] Notwithstanding that, the applicant now submits that the arbitrator ought to have addressed himself to two other questions, namely whether some particular group among the Impugned Representations met the Disclosure Standard or whether they were material representations that were calculated to influence the superintendent.[14]

[66] In the context of an appeal from a decision by a court at trial, the High Court in *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal*[15] said:

> "The importance of the general principle stated in *Coulton v Holcombe*, that "[i]t is fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at the trial", is evident. That is why, as was said in *University of Wollongong v Metwally [No 2]:*
>
> > 'It is elementary that a party is bound by the conduct of his case. Except in the most exceptional circumstances, it would be contrary to all principle to allow a party, after a case had been decided against him, to raise a new argument which, whether deliberately or by inadvertence, he failed to put during the hearing when he had an opportunity to do so.'" (footnotes omitted)

[67] For my part, even if the points advanced otherwise might have raised a question of law to be the subject of an appeal under s 38(2) of the Act, as a matter of discretion, an applicant should not be permitted to advance a different case on appeal to the one submitted for determination in the hearing below, at least without good reason.

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13 [1981] 2 Lloyd's Rep 130, 132-133. This statement was described as a "crisp summary" by Allsop P in *Gordian Runoff Ltd v Westport Insurance Corporation* (2010) 267 ALR 74, 114 [220] although in *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, 271 [54] the plurality stated that there was no "wholly satisfactory formula" to flesh out the requirement to give reasons.

14 This point is not confined to EOT 32. It is a pattern repeated in the applicant's lengthy submissions on this application at every turn. Not having submitted to the arbitrator that he was required to make express findings dealing with these suggested legal standards, the applicant submits that it should be permitted to raise those points on appeal on a questions of law.

15 (2012) 246 CLR 379, 398 [32].

[68] When the applicant's position was raised in argument before me the applicant's counsel submitted that the applicant had not abandoned any part of the case it had pleaded in the arbitration and the points advanced on this application were open on the pleadings. As well, in paras 6 and 7 of the applicant's reply submissions, the applicant refers to a number of places in the points of claim, written submissions to the arbitrator and oral submissions made on day 16 of the hearing in support of the submission that "on any fair reading … [its] case included the proposition that PCQ breached its obligation to ensure the superintendent acted fairly and honestly and impartially **because** there were various undisclosed communications between PCQ, PCQ's lawyers and the superintendent on various matters concerning the superintendent's administration of the contracts…" (emphasis added).

[69] It is unhelpful, in my view, to drag through the references made by the applicant in paras 6 and 7. The applicant cannot avoid the criticism that it now seeks to depart from what it said to the arbitrator as to how he should deal with the applicant's case and that it now seeks to criticise as appellable the absence of findings in the arbitrator's reasons that the applicant did not squarely submit he should make anywhere in 192 pages of written submissions.

[70] The respondent submits that the applicant's submissions to the arbitrator nowhere identified which of the pleaded communications were to be viewed as objectively characterised as calculated to influence the superintendent. The applicant submits in effect that all of the communications referred to in the written submissions should have been so considered. Some further insight on this issue may be gained from paras 5.3(c), 6.2(d) and 12.1(e) of the applicant's written submissions to the arbitrator. Each of those paragraphs made an express submission about failure to ensure transparency or failure to give the applicant an opportunity to respond. The arbitrator made findings in response to them in the reasons in paras 277 to 278, 481 to 483 and 566 to 568 respectively. So, where a specific submission was made, it was considered, consistently with the approach set out by the arbitrator at par 93 of the reasons that he was to consider the submissions.

[71] Once that point is reached, it becomes apparent that the applicant's remaining complaint under grounds 1 and 2 of the application is that submitted in par 20 of Annexure A that the arbitrator did not apply the legal standards articulated in his reasons because he did not determine whether each of the undisclosed communications was calculated to influence the superintendent's administration. This submission appears in Annexure A in relation to EOT 32 under a subheading that refers to s 38(5)(b)(i) of the Act. However, it would not generally be a manifest error of law for an arbitrator to misapply a correct legal standard to the facts of the case by failing to consider an alternative allegation in the points of claim not pressed in argument. In my view, there is a distinction between this case and the conclusion in *Westport Insurance Corporation v Gordian Runoff Ltd*[16] that an arbitrator's failure to explain succinctly why the various integers in the complex statutory provisions were satisfied was both a manifest error of law and strong evidence of an error of law.

[72] An error of the postulated kind would usually be an error of fact. An appeal from the error will not be an appeal on a question of law but on a question of fact. But even if the appeal on such a question were on a question of law, to determine that an arbitrator made an error of law in misapplying the law to the facts of the case will not add or be

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16 (2011) 244 CLR 239, 271 [57].

likely to add substantially to the certainty of commercial law. The certainty of commercial law would not be added to by a determination in a particular case that an arbitrator has made findings of fact by misapplying the law to the particular communications in the present case. The correction of such an error would do nothing more than redress the rights of the parties in this particular case.

Walz Afternoon Shift

[73] The Walz Afternoon Shift refers to a request by the applicant to the superintendent that a sub-contractor, Walz Construction Pty Ltd, be permitted to work an afternoon shift in addition to the day shift. The request was ultimately not determined. After discussions between senior personnel from the applicant and PCQ, the applicant did not pursue it.

[74] The applicant submits in par 44 of Annexure A that its case before the arbitrator was that the lawyers provided advice to the superintendent as to the operation of cl 32 of the general conditions of contract and as to draft correspondence the superintendent later sent to the applicant that were material representations calculated to influence the superintendent and were not disclosed to the applicant in accordance with the Disclosure Standard.

[75] This case did not appear in the applicant's written submissions to the arbitrator. Those submissions in section 4 at pages 28 to 38 do not state that the superintendent was obliged to send the correspondence to the applicant. They do not state that the correspondence was a material representation calculated to influence the superintendent. They set out a detailed submission that the superintendent participated in a partisan strategy aimed at securing for PCQ the benefit of the additional shift without PCQ being exposed to the agreed contractual risk for inclement weather events.

[76] It is not necessary to trail through the same points raised by the applicant's departure from the case it ran before the arbitrator in relation to the Walz Afternoon Shift as were raised in relation to EOT 32. Mutatis mutandis, they are dealt with in relation to EOT 32.

[77] In paras 76 and 77 of Annexure A the applicant seeks to cast the proposed appeal on grounds 1 and 2 in relation to the Walz Afternoon Shift as non-manifest errors of law of which there is strong evidence. However, in my view, determining grounds 1 and 2 for the Walz Afternoon Shift would not add or be likely to add substantially to the certainty of commercial law as required by s 38(5)(b)(ii).

Strong point argument

[78] The strong point section of the jetty had the function of receiving the new shiploader when it arrived for installation. The strong point argument concerned a series of claims for extension of time for inclement weather events relating to the strong point. The superintendent received advice from the lawyers about these extension of time claims.

[79] The applicant submits in par 82 of Annexure A that its case before the arbitrator was that the advices were material representations calculated to influence the

superintendent that were not disclosed to the applicant in accordance with the Disclosure Standard.

[80] The extent to which this case was made to the arbitrator appears in section 5 of the applicant's written submissions to the arbitrator at par 5.3(c) at page 39 and par 5.8(c) at page 41. The applicant stated that the superintendent and PCQ "failed to ensure transparency of communications between them" and give the applicant the opportunity to answer the premise, and stated that the superintendent "did not provide full disclose [sic] of communications between him and PCQ". The applicant's submissions about the strong point argument otherwise were made in section 5 at pages 39 to 74 of its written submissions to the arbitrator. They do not state that the advices were material representations calculated to influence the superintendent. They set out a detailed submission that the superintendent participated in a co-ordinated strategy aimed at securing a consistency of approach to extension of time claims.

[81] I have previously mentioned the arbitrator's findings at paras 277 and 278. Otherwise, similar considerations apply here to those discussed in relation to EOT 32.

EOT 111, 229 and 238: Loss of Productivity Claims

[82] On 1 September 2009, the applicant wrote to the superintendent stating that the definition of "Inclement Weather" in the contracts incorporates not only the event but also the effects, and that the applicant was reviewing extension of time claims.

[83] On 12 January 2010, the applicant made a claim for delay costs, EOT 111, for inclement weather. On 25 January 2010, the superintendent rejected the claim.

[84] On 19 August 2010, the applicant submitted a claim for delay and disruption costs, EOT 229. On 10 September 2010 (as the arbitrator found), the superintendent rejected the claim.

[85] On 28 September 2010, the applicant submitted a similarly based claim, EOT 238, claiming delay costs. On 29 November 2010 the applicant submitted a revised claim for EOT 238. On 22 December 2010, the superintendent rejected the claim.

[86] The applicant submits in par 118 of Annexure A that its case before the arbitrator was that PCQ made a representation to the superintendent as to how to assess these claims and the lawyers gave advice as to the applicant's entitlement to the loss of productivity claims. The applicant says it was part of its case that these were material representations calculated to influence the superintendent, viewed objectively, that were not disclosed in accordance with the Disclosure Standard.

[87] This case did not appear in the applicant's written submissions to the arbitrator. Section 15 of those submissions dealt with EOT 229 at pages 154 to 158. The arbitrator effectively summarised the thrust of the applicant's submissions on these claims at par 282 of the reasons as being that PCQ sought to influence the superintendent's response to the applicant's intended claims, that the superintendent's treatment of the claims reflected an attitude of bias or partiality, and that the lawyers and PCQ failed to ensure that the superintendent acted honestly and fairly.

The arbitrator dealt with that case in the reasons from par 280 to 324. He did not accept that PCQ deliberately sought to influence the mind of the superintendent against the loss of productivity claims for EOT 229 or EOT 238 and found no bias or partiality in favour of PCQ in the superintendent's treatment of these claims.[17]

Re-Assessment of Overhead and Profit Claims

[88] Sometime in late 2009, the superintendent formed the view that the applicant had claimed and been allowed amounts for overheads and profits on both positive and negative variations under the Marine Works contract that were undue.

[89] On 1 October 2009, the superintendent wrote to PCQ raising his belief that certain allowances had been mistakenly applied and advising his intention to reassess those variations.

[90] In par 159 of Annexure A the applicant submits that it was the applicant's case before the arbitrator that the lawyers provided advice to the superintendent as to the contractual provisions by which recovery may be made for overhead and profit claims and that advice was not disclosed to the applicant in accordance with the Disclosure Standard.

[91] This case did not appear in the applicant's written submissions to the arbitrator. The applicant's submissions to the arbitrator as to the Re-Assessment of Profit and Overhead were made in section 9 of the written submissions at pages 111 to 113. No mention is made on those pages of the Disclosure Standard.

Cable Variation Claims

[92] The cable variation claims comprised a series of variation claims made by the applicant based on changes to the cable schedule following commencement of the works under the Marine Works contract.

[93] In par 199 of Annexure A the applicant submits that the arbitrator failed to determine whether the undisclosed representations (including advices by the lawyers to the superintendent as to the merits of the claim, that the cabling claims were fraudulent and as to the content of correspondence to be sent to the applicant by the superintendent) were material representations that were calculated to influence the superintendent.

[94] Section 8 of the applicant's written submissions to the arbitrator dealt with the cable variation claims at pages 104 to 110. It is unnecessary to recount the detail. The submissions focussed on facts said to demonstrate "within the broader context … a co-ordinated strategy in play (as between the superintendent and PCQ) to ensure that PCQ's best interests would be served in relation to these claims" and that an allegation of fraud by PCQ in fact compromised the superintendent's independence and "attitude in subsequent communications".

[95] This was the case dealt with by the arbitrator in his reasons from par 348.

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17 See paras 321 and 322 of the reasons.

IWC-002 and CVO 122

[96] On 18 March 2010, the applicant submitted a claim, IWC-002, seeking delay costs under the Shiploader contract for a delay of one day in Brisbane on 25 February 2010 and one day at Abbot Point on 2 March 2010.

[97] On 19 July 2010, the superintendent rejected the claim.

[98] On the same day, the superintendent issued a negative variation under the Shiploader contact, CVO 122, for the deletion of the cost of road transport of bogies.

[99] In par 219 of Annexure A, the applicant submits that its case before the arbitrator was that PCQ made an undisclosed representation to the superintendent that the claim was fraudulent, that the lawyers provided advice to the superintendent as to the merits of the claim and the content of correspondence ultimately sent to the applicant that were material representations calculated to influence the superintendent that were not disclosed in breach of the Disclosure Standard.

[100] This case does not appear in the applicant's written submissions to the arbitrator. Section 11 of those submissions at pages 119 to 132 related to these claims. Although par 11.6 contains a number of propositions made by reference to Warren CJ's reasons in *Kane Constructions v Sopov*,[18] the findings sought at paras 11.38, 11.41 and 11.47 show the thrust of the submissions made.

[101] This case was dealt with by the arbitrator at paras 393 to 434 of the reasons. The arbitrator rejected the submission that the superintendent was not acting honestly and fairly, although he had an unfavourable view of IWC-002 from the outset. The arbitrator found that the superintendent ultimately decided the claim in accordance with the contractual requirements.[19] As to CVO 122, the superintendent's view that the negative variation was warranted was not impressed on him by the lawyers. The arbitrator found that it was not driven by want of impartiality or unfairness or by the influence of PCQ or its lawyers.[20]

Shiploader Commissioning – Breach Notice, SL EOT 001 and JH 199

[102] Obviously enough, the Marine Works and Shiploader contracts were interrelated, both as to the scope of work and as to timing. Under the Marine Works contract, the strong point had to be ready to receive the shiploader when it arrived by sea at Abbot Point. Under the Shiploader contract, the shiploader was required to achieve a state of commissioning to the maximum extent possible before going to site.

[103] On 9 March 2010, PCQ issued a notice to the applicant alleging a breach of cls 33.1 and 33.2 of the Shiploader contract. PCQ alleged that the commissioning of the shiploader, before it was shipped to the site, was incomplete. This was described in the arbitration as the "Breach Notice".

[104] On 12 March 2010, the applicant sent a notice of delay to the shiploader works by reason of the fact that the time for the Marine Works contract had been extended.

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18 (2006) 22 BCL 92.

19 See paras 421 to 425 of the reasons.

20 See paras 432 and 433 of the reasons.

This was described in the arbitration as "SL EOT 001". As subsequently dealt with, it included a claim for an adjustment of the contract sum.

[105] The claim for SL EOT 001 was rejected by the superintendent.

[106] The applicant presented the subject of SL EOT 001 again as variation claim JH 199, seeking an extension of time and delay costs. It too was rejected.

[107] In par 249 of Annexure A, the applicant submits that its case before the arbitrator was that the lawyers provided advice to the superintendent and made other representations as to the applicant's entitlement to these time and cost claims, the preparation of the draft Breach Notice and the content of the correspondence ultimately sent by the superintendent to the applicant in relation to these claims. The applicant submits that its case before the arbitrator was that the advice and representations were material representations calculated to influence the superintendent and were not disclosed, in breach of the Disclosure Standard.

[108] This case did not appear in the applicant's written submissions to the arbitrator. The relevant submissions were made in section 6 of the applicant's written submissions to the arbitrator at pages 75 to 92. Paragraph 6.2(d) on page 75 stated that the superintendent "failed to ensure transparency of communications … and therefore did not afford [the applicant] the opportunity to answer the premise upon which the strategy was based". The strategy mentioned was "to deny EOT and delay costs under the Shiploader contract".

[109] I have previously referred to the arbitrator's findings in paras 481 to 483 of the reasons. Otherwise, similar considerations apply here to those discussed in relation to EOT 32.

[110] From page 75 to their conclusion on page 93, the submissions made by the applicant to the arbitrator on these claims did not otherwise mention that the alleged representations were material representations calculated to influence the superintendent, viewed objectively, that were not disclosed in accordance with the Disclosure Standard. The principal findings sought by the applicant were stated in paras 6.16 and following, in particular paras 6.29, 6.31, 6.32, 6.36, 6.42, 6.49 and 6.53.

[111] This case was dealt with by the arbitrator in the reasons at paras 435 (where the arbitrator described these claim as "surprisingly complex") to 483.

Type 3 Costs

[112] On 3 August 2010, the applicant made a claim for delay costs, EOT 225, under the Marine Works contract. The claim included a component for costs, dealing with wages, described as Type 3 costs. The stipulated rate for Type 3 costs was $91.22 per hour. Another item in the matrix of costs items applied for third party labour costs to be charged at cost plus 15 per cent.

[113] On 4 August 2010, the superintendent wrote to the applicant challenging that the applicant had made a large number of claims for Type 3 costs for third party manpower and requiring invoices from third party personnel providers to correctly assess the amounts payable.

[114] On 3 February 2011, the applicant responded that as a consequence of recalculation in accordance with the superintendent's direction it claimed an additional sum.

[115] In par 276 of Annexure A the applicant submits that its case before the arbitrator was that the lawyers provided advice to the superintendent as to the proper assessment of Type 3 costs for third party labour, that was a material representation calculated to influence the superintendent and was not disclosed in accordance with the Disclosure Standard.

[116] This case did not appear in the applicant's written submissions to the arbitrator. Section 7 of the applicant's written submissions to the arbitrator dealt with the Type 3 Costs from pages 93 to 103. The thrust, as set out in par 7.1, was that the superintendent contacted the lawyers to request assistance in reassessing the applicant's claims for Type 3 Costs, using words suggestive of a high degree of bias against the applicant. The lawyers then provided a draft letter to the superintendent in accordance with the request, which the superintendent issued as a final letter to the applicant.

[117] This was the case dealt with by the arbitrator in the reasons from paras 484 to 498.

Questions 1 to 5

[118] The applicant's draft order states five separate questions of law said to be raised under grounds 1 and 2 of the application.

[119] Question 1, in effect, is whether the test for breach of the obligation to ensure honesty and fairness imposed by cl 23 where a representation is made by the principal to the superintendent and is not disclosed to the contractor is that set out in *Nelson Carlton Construction Co (in liq) v AC Hatrick (NZ) Ltd*[21] and *Canterbury Pipe Lines Ltd v Christchurch Drainage Board*.[22]

[120] From the foregoing discussion, it is apparent that the applicant does not submit that the arbitrator declined to follow those cases or misstated their effect, except for the attack made on par 63 of the reasons that I have rejected. I would not grant leave to appeal on question 1.

[121] Question 2 is whether the word "calculated" in the dictum from *Hatrick* set out in par 61 of the reasons should be read as being directed not to the state of mind of the representor but rather to the characterisation of the representation as material to the task of the certifier, as per *John Holland Construction & Engineering Pty Ltd v Majorca Projects Pty Ltd*.[23] I would not grant leave to appeal on this question either. I have found that the applicant's attack upon the arbitrator's reasoning in par 63 must fail. The arbitrator did not misapprehend the answer to this proposed question of law.

[122] Question 3 is whether at par 63 of the reasons the arbitrator misconstrued the test for determining whether a representation is material. I have previously found that the applicant's attack on the arbitrator's reasoning in par 63 must fail. I would not grant leave to appeal on this question.

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21 [1965] NZLR 144.
22 [1979] 2 NZLR 347.
23 (1996) 13 BCL 235.

[123] Question 4 is a particular restatement of the same subject matter as that raised by question 3. It does not need to be separately considered.

[124] Question 5, in effect, is whether the findings the subject of challenge under grounds 1 and 2 of the application constituted a failure by the arbitrator to apply the correct test as formulated in question 1.

[125] The misapplication of the correct law to the facts to arrive at an erroneous conclusion as to an ultimate fact or a mixed question of law and fact is not a question of law, per se. The point was succinctly put in *Benaim (UK) Ltd v Davies Middleton & Davies Ltd*:[24]

> "… the learned editors express the view that, for the purpose of the [*Arbitration Act* 1996 (UK)] an error of law arises where the arbitrator errs in ascertaining the legal principle which is to be applied to the factual issues in the dispute, and does not arise if the arbitrator, having identified the correct legal principle, goes on to apply it incorrectly. The decision in *Northern Elevator Manufacturing v United Engineers (Singapore)* [2004] 2 SLR 494 is cited in support of that proposition. I respectfully agree with and adopt that analysis."[25]

[126] The distinctions between an error of law and an error of fact and a question of law and a question of fact are sometimes elusive. For myself, it seems that a useful tool in drawing the distinction is whether on a civil jury trial the question would be one answered by a judge as a question of law (so that the judge may direct the jury on the law for the jury to answer the questions of fact or mixed law and fact to give rise to the appropriate verdict). It is the jury, not the judge, who answers the question whether there has been a breach of contract.[26]

[127] I would not grant leave to appeal on question 5 because as formulated it is not a question of law.

[128] As well, there is an underlying objection to an appeal on question 5 upon the findings challenged under grounds 1 and 2, namely that the applicant's case before the arbitrator was not that the Disclosure Standard should be applied to the facts of the case irrespective of whether or not the superintendent did not in fact act honestly or fairly.

Ground 3

[129] Proposed ground 3 of the application is expressed in a confusing manner. It turns on par 64 of the reasons. As previously mentioned, this was described as the "Ebner Standard" in paras 20 and 58 of the written submissions. There are some confusing contradictions in those submissions. Paragraph 60 states that the applicant "does not take issue that conduct that gives rise to an apprehension of bias would impugn the obligation of fairness, honesty and independence within the context of the obligations in [cl 23]." On the other hand, par 4 of Annexure A submits that "assuming against [the applicant's] position … that the arbitrator was correct to adopt the Ebner

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24 [2005] EWHC 1370.

25 [2005] EWHC 1370, [107].

26 For example, *Goldsbrough Mort & Co Ltd v Carter* (1914) 19 CLR 429.

Standard", the arbitrator did not apply the Ebner Standard to the facts as found, admitted or agreed.[27] For present purposes, I proceed on the basis that the applicant does not challenge the arbitrator's finding as to the Ebner standard.

[130] The substance of par 60 of the written submissions is that the arbitrator incorrectly failed to apply his own formulation of PCQ's obligations under cl 23 by failing to consider whether the undisclosed communications could create an apprehension of partiality in a fair-minded person. In support of this ground, par 61 of the applicant's written submissions referred to par 107 of the reasons where the arbitrator said:

> "The superintendent's requirement of honesty and fairness is not breached by his becoming aware of the attitude of the principal to the determination which he is to make, unless the circumstances indicate that he has or will himself adopt that attitude without forming his own view, or in preference to his own view of the subject matter of the determination."

[131] The applicant submits in par 61 of the written submissions that this passage illustrates the point that the arbitrator's assessment did not focus on whether a reasonable contractor in the position of the applicant would apprehend that "the superintendent had not brought an impartial mind to bear on the performance of his certifying functions by reason of the undisclosed representations".

[132] In my view, the applicant has not read par 107 in context. In par 102 of the reasons the arbitrator said that he approached the particular allegations comprising the nine categories of complaint advanced by the applicant from "the following positions". In paras 103 to 110, he set out a number of propositions about his approach to deciding the case. Among them, par 105 stated that "the superintendent's requirement of honesty and fairness does not require the superintendent … to disclose to [the applicant] all information and legal advice received that is relevant to the exercise of his functions" before his determination is made, cross-referring to par 60 and following of the reasons. The arbitrator stated that "[w]hether disclosure is required will depend upon the nature and significance of the information." In that context, properly understood, par 107 means nothing more than that a communication by the principal to the superintendent of the attitude of the principal is not a per se breach of contract.

[133] In my view, that is an unexceptionable statement. By it, the arbitrator was not conveying that he was backpedalling from his prior analysis. The applicant submits that the paragraph extracted is such as "[t]o require [the applicant] to prove actual influence, or actual bias, in respect of the conduct and communications constituting the Impugned Representations …". In my view, it does no such thing.

[134] In relation to EOT 32, paras 17 and 21 of Annexure A submit that the arbitrator did not apply the Ebner Standard in assessing the superintendent's exercise of his contractual certifying functions.

[135] In relation to the Walz Afternoon Shift, paras 46(b) and 75(c) of Annexure A submit that the arbitrator failed to apply the Ebner Standard.

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[27] See also par 10(b) of Annexure A which begins "[i]n the alternative, if the arbitrator was correct in finding that the Ebner Standard was the appropriate standard…"

[136] In relation to the strong point argument paras 84(b), 96 and 112(c) of Annexure A submit that the arbitrator failed to apply the Ebner Standard.

[137] In relation to EOT 111, 229 and 238: Loss of Productivity Claims, paras 120(b), 125, 140 and 153(c) of Annexure A submit that the arbitrator failed to apply the Ebner Standard.

[138] In relation to the Re-Assessment of Overhead and Profit Claims, paras 161(b), 167, 171 and 181(c) of Annexure A submit that the arbitrator failed to apply the Ebner Standard.

[139] In relation to the Cable Variation Claims, paras 191(b), 196, 201 and 211(c) of Annexure A submit that the arbitrator failed to apply the Ebner Standard.

[140] In relation to IWC-002 and CVO 122, paras 221(b), 226, 230 and 241(c) of Annexure A submit that the arbitrator failed to apply the Ebner Standard.

[141] In relation to the Shiploader Commissioning – Breach Notice, SL EOT 0001 and JH199 Claims, paras 251(b), 256, 260 and 269(c) of Annexure A submit that the arbitrator failed to apply the Ebner Standard.

[142] In relation to the Type 3 Costs Claim, paras 278(b), 283, 287 and 295(c) of Annexure A submit that the arbitrator failed to apply the Ebner Standard.

[143] Ground 3 of the application corresponds to the alleged questions of law identified in questions 6 and 7 of the draft order.

Questions 6 and 7

[144] Question 6 of the draft order is whether par 64 of the reasons correctly states the criteria to be applied by the arbitrator "in determining whether a representation made by a principal to a superintendent was 'material', in the sense that impeaches the obligation of honesty and fairness imposed by [cl 23], if not disclosed to the contractor".

[145] From the foregoing discussion, it appears that the applicant does not submit that the arbitrator erred in par 64 in stating the Ebner Standard (as the applicant describes it). I would not grant leave to appeal on this question because the applicant does not submit that a standard more onerous then the Ebner Standard was applicable.

[146] Question 7 of the draft order is whether the arbitrator failed to apply the correct test in making the findings challenged under ground 3 of the application. I would not grant leave to appeal on this question because, as formulated, it is not a question of law. The misapplication of the correct law to the facts to arrive at an erroneous conclusion as to an ultimate fact or a mixed question of law and fact is not a question of law, per se.

[147] As well, the same underlying objection to an appeal on a question of law raised by grounds 1 and 2 of the application applies to a question of law under ground 3, namely the applicant's case before the arbitrator was not that the Ebner Standard should be applied to the facts of the case irrespective of whether or not the superintendent did not in fact act honestly or fairly.

Ground 4

[148] Proposed ground 4 is that the arbitrator made errors of law "in making findings of fact without any probative … evidence to support those findings or by drawing inferences that were not capable of being drawn from the primary facts".

[149] The applicant has identified the specific findings challenged under ground 4 in part I of the schedule to the application. That part of the schedule identifies eight paragraphs or parts of paragraphs of the reasons. The applicant also submits that the relevant submissions are set out in Annexure A. However, there is no explicit list or table of cross-references in Annexure A.

[150] Paragraph 5(d) of Annexure A states generally that the arbitrator made "particular" findings of fact in the absence of probative evidence, but the findings are not identified.

[151] In relation to EOT 32, par 38 of Annexure A states that there was no probative evidence to support the finding in par 179 of the reasons that it appeared that the superintendent had considered and rejected whether to grant an ex gratia extension of time.

[152] In relation to the EOT 111, 229 and 238 Loss of Productivity claims, par 151 of Annexure A submits that there was no probative evidence to support the finding in par 294 of the reasons that the applicant could select an adjudicator which might not be overly critical of the claims.

[153] In relation to the Re-Assessment of Overhead and Profit Claims, par 175 of Annexure A states that the arbitrator found in par 356 of the reasons that it was not suggested in evidence that the advice of Mr White (who was a lawyer) on 20 October 2009 was designed to favour the interests of PCQ or that he was motivated by that objective. That paragraph appears under a heading that it was made in the absence of probative evidence, but it is not among the paragraphs identified in part I of the schedule to the application as the subject of ground 4.

[154] In relation to IWC-002 and CVO 122, par 240 of Annexure A states that the arbitrator found in par 396 of the reasons that cl 36.2 of the contract was negotiated prior to contract on a particular basis and there was no probative evidence of the bases or content of the negotiations.

[155] Paragraphs 162 to 193 of the respondent's written submissions on this application ("respondent's submissions") deal specifically with each of the other findings of fact identified in part I of the schedule to the application. It is unnecessary for me to add to the length of these reasons by considering those detailed submissions further.

[156] At a directions hearing for this application, I raised a concern as to whether a question of law under ground 4 could be the subject of a grant of leave to appeal under s 38(4)(b) of the Act.

[157] The question of law or error of law relied upon is not one that would be manifest on the face of the award including the reasons for the award under s 38(5)(b)(i). That is in the nature of a "no evidence" ground. Therefore "strong evidence" of the error is required.

[158] The applicant's response in par 66 of its written submissions was to submit that it is "for the respondent to identify the evidence it says is probative on those points" raised by the applicant. I reject that approach as misconceived. In my view, the suggested onus reversal should not be accepted so as to create the strong evidence required under s 38(5)(b)(ii). In order to show that there is strong evidence of the error of law an applicant would have to prove the absence of the evidence contended for.

[159] In any event, the applicant's approach in relation to ground 4 ignored the requirement under s 38(5)(b)(ii) of the Act that the determination of the question of law "may add, or may be likely to add, substantially to the certainty of commercial law."

[160] Ordinarily, to determine an appeal on whether an arbitrator made an error of law in finding a fact in the absence of any evidence will not add or be likely to add substantially to the certainty of commercial law. The correction of such an error does nothing more than redress the rights of the parties in the particular case. There is nothing in this case to suggest that reasoning does not apply to ground 4. In the end, the applicant did not press a submission that the requirement of adding or being likely to add to the certainty of the commercial law was met.

[161] The draft order did not propose any question of law under ground 4. Accordingly, in my view, it is unnecessary to consider ground 4 further.

Grounds 5 to 7

[162] Proposed ground 5 is that the arbitrator made errors of law "in failing to give adequate reasons for the determinations made on substantial matters in dispute as between the parties and in not dealing with submissions properly made on the evidence."

[163] Proposed ground 6 is that the arbitrator's duty to give reasons under s 29(1)(c) of the Act required reasons of a quality that reflected the large commercial subject matter, the status of the arbitrator as a retired senior judicial officer, the representation by senior counsel and large commercial firms of solicitors, the formality of the pre-hearing procedures followed and the requirement of detailed written and oral submissions.

[164] Proposed ground 7 is that the arbitrator engaged in "technical" misconduct by "failing to deal with submissions and to consider and examine [relevant] evidence". The relevance of misconduct is that under s 42 of the Act, the court may set aside an award where there has been misconduct on the part of an arbitrator. Also, under s 44 of the Act where the court is satisfied there has been misconduct on the part of an arbitrator the court may remove the arbitrator. The applicant did not seek to press any question of misconduct on the hearing of the application for leave to appeal.

[165] The interrelationship of grounds 5 and 6 is apparent. However, the findings for which the applicant submits there was a failure to give adequate reasons were not identified in the application, other than by listing ten paragraphs or parts of paragraphs in part I of the schedule to the application. Ground 11 and part II of the schedule to the application identified the submissions that the applicant contends were not considered.

[166] Before going further, it is appropriate to say something of the applicant's submissions of a constructive failure to exercise jurisdiction. That ground does not appear in the

application, in relation to any of grounds 5, 6 or 7. It was first raised by the applicant in par 16 of the written submissions. It is repeated as a ground in an alternative formulation of the failure to deal with submissions in paras 68 to 70 of the applicant's submissions. It is raised in numerous places in Annexure A but it is more convenient to deal with the point without going to those paragraphs as well.

[167] The applicant relies in par 70 of the written submissions on references to a constructive failure to exercise jurisdiction in *Dranichnikov v Minister for Immigration and Multicultural Affairs*,[28] including by a mistake in understanding the facts, and in applying the law or reasoning to a conclusion.[29] This is not a taxonomy that has been applied generally to assess whether there is an error of law which can be the subject of an appeal on a question of law under the Act. Perhaps, the applicant was encouraged to rely on it by a passage that appears in *Jaffarie v Quality Castings Pty Ltd*,[30] but neither that case nor *Dranichnokov* was concerned with the obligations of an arbitrator under the Act.

[168] In my view, the concept of constructive refusal to exercise jurisdiction that applies in judicial review of administrative decisions should not be imported into the present field of discourse. *Gordian Runoff* stands as authority for the proposition that a failure by an arbitrator to address contentions made at the hearing may constitute a failure to give adequate reasons and an error of law.[31]

[169] Other earlier cases support the conclusion that the failure to deal with a submission worthy of serious consideration may be an error of law. As it was put in *Peter Schwarz (Overseas) Pty Ltd v Morton*:[32]

> "This has led the Court to stipulate that Arbitrators must deal with every 'submission worthy of serious consideration'. In *Fletcher Construction Australia Ltd v Lines MacFarlane and Marshall Pty Ltd* the Court of Appeal in this State said that a reasoned judgment of a court must 'deal with the central contentions advanced by the parties'. However the test is expressed, the minimum requirement is not that the Arbitrators deal with every contention. Precisely where the line is to be drawn in a given case will depend upon the circumstances, including the relevance of the contention to the Arbitrators' conclusions. The decision to deal in the reasons with a particular rejected submission may also depend upon an assessment of its weight, particularly in a case where the arbitrating parties are not legally represented. Putting it bluntly, some points are so obviously bad that no good purpose is served by dealing with them in any detail. I need hardly add that the prudent Arbitrator will prefer to err on the side of comprehensiveness in order that the award should be of benefit to the parties."[33] (footnotes omitted)

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28 (2003) 197 ALR 389.
29 (2003) 197 ALR 389, 407 [88].
30 [2015] NSWCA 335, [49].
31 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, 271 [56]-[57]; *Steel Contracts Pty Ltd v Simons* [2014] ACTSC 146, [37].
32 (2004) 20 BCL 133.
33 (2004) 20 BCL 133, [34].

[170] It is unnecessary and confusing, in my view, to construct a parallel taxonomy of error of law based on the concept of a constructive failure to exercise jurisdiction. I proceed on the basis that failure to consider contentions pressed at the hearing may constitute a failure to give adequate reasons and an error of law.

[171] The applicant submits in par 77 of its written submissions that Annexure A shows where the arbitrator's reasons contain no mention of the applicant's submissions and that the court cannot be confident that the arbitrator "was even aware of the submission".

[172] Paragraph 5(b) of Annexure A states that the arbitrator "failed to deal with, or constructively rejected without reasons" the applicant's submissions on substantial matters.

[173] As to EOT 32, part II of the schedule to the application refers to paras 14.5, 14.13 and 14.18 of the applicant's submissions to the arbitrator.

[174] Paragraph 28 of Annexure A submits that the arbitrator did not acknowledge the applicant's submissions contrary to the finding that the superintendent was aware that he had a general discretion under cl 35.5.5 to extend time for any reason, or provide a brief statement of his reasons for rejecting the applicant's submissions on that question of fact. After making further submissions as to the evidence, the applicant submits in par 32 of Annexure A that the arbitrator failed to give reasons "to the minimum standard required".

[175] Paragraph 33 of Annexure A states that the applicant's detailed submissions on the evidence were set out in section 14 of its written submissions to the arbitrator. As mentioned previously, those submissions on EOT 32 were made in five pages comprising 21 paragraphs as part of the total 192 pages of the applicant's written submissions to the arbitrator.

[176] Paragraphs 34 and 35 of Annexure A submit that there were seven submissions as to factual matters concerning the superintendent's knowledge and Mr White's conversations with the superintendent about cl 35.5.2.2 that the arbitrator did not refer to in the reasons. The thrust of the points made is that Mr White knew things about the operation of cl 35.5.5 that he did not inform the superintendent about, and that was a material matter.

[177] In my view, these points are not well made in support of an inadequate reasons ground. In par 173 of the reasons the arbitrator found that the superintendent was aware that he had a general discretion to extend time for any reason under cl 35.5.5. In par 172 of the reasons, the arbitrator found that the applicant's case was that the failure by Mr White to inform the superintendent of the discretionary power to grant an extension caused the superintendent to fail to deal with the claim honestly and fairly. The arbitrator dealt with this subject matter of evidence in some detail in paras 166 to 168 and 171 to 180 of the reasons.

[178] The true nature of the complaint made is that the arbitrator did not make the factual findings for which the applicant contends. In paras 26 to 40 of Annexure A the applicant makes a detailed attack upon the findings of fact that were made. Those paragraphs do not acknowledge most of the relevant findings of fact made by the

arbitrator. In my view, the applicant's submissions should be recognised as an attempt to dress up a question of fact as a question of law.

[179] But even if there were a question of law as to inadequate reasons in these submissions, in the circumstances of this case it is not a manifest error of law on the face of the record. Even if it could be said that there is strong evidence of the error of law, determining an appeal concerning the arbitrator's failure to deal with a submission as to the facts in this particular case will not add or be likely to add substantially to the certainty of commercial law. The correction of such an error would do nothing more than redress the rights of the parties in the particular case.

[180] It is not necessary to deal further with the submissions of a similar kind made by the applicant under the other categories in Annexure A as to the arbitrator's findings that the applicant would seek to challenge on grounds 5 or 6.

Question 8

[181] Question 8 of the draft order is stated to be whether the arbitrator failed "to comply with the duty imposed by s 29(1)(c) of [the Act] … by not disclosing on the face of the award adequate reasons for rejecting submissions made [by the applicant] on evidence before him constituting serious matters in dispute between the parties".

[182] For the reasons previously given, I would not grant leave to appeal on this question.

Ground 8

[183] Proposed ground 8 relates to EOT 32. The ground starts from the proposition that the applicant's case before the arbitrator was that the superintendent knew that he had a discretion to extend the date for practical completion even though the notice requirements for an extension in time under the contracts had not been complied with by the applicant (under cl 35.5.5 of the general conditions of contract),

[184] From that point, the ground contends that the superintendent "failed to apply" the discretion and that was a breach by PCQ of the obligation to ensure that the superintendent acted honestly and fairly. The ground continues that the arbitrator found that the superintendent had the discretion but "[did] not otherwise refer to this part of the applicant's case." The ground concludes that the alleged failure by the arbitrator constituted a failure to accord procedural fairness or a dismissal of this part of the applicant's case without adequate reasons.

[185] Paragraph 78 of the written submissions characterises ground 8 as based on three alternatives, namely a constructive failure to exercise jurisdiction, a lack of procedural fairness or a failure to provide adequate reasons. It thereby adds the contention of failure to exercise jurisdiction.

[186] I have dealt above with the characterisation of a failure by an arbitrator to address contentions as a constructive failure to exercise jurisdiction in the context of ground 5 and 6 and need not repeat that discussion For similar reasons, I do not propose to separately consider failure to accord procedural fairness as an error of law under this ground or otherwise. Although "misconduct" is defined in the Act to include a breach of the rules of natural justice, nothing of substance is added by advancing a failure to address contentions made at the hearing that may constitute a failure to give adequate reasons (and an error of law) as also a failure to accord procedural fairness.

[187] The relationship between ground 8 and EOT 32 may be seen in paras 83 to 85 of the applicant's written submissions and paras 34, 35 and 37 of Annexure A.

[188] In respect of EOT 32, the arbitrator dealt with the superintendent's power to extend time under cl 35.5.5 in paras 169 to 173 and 179 of the reasons.[34] He concluded in par 179 as follows:

> "**I am not satisfied that there is here any want of honesty or fairness on the part of the superintendent in dealing with EOT 32**. There was an abundant opportunity for [the applicant] to argue its case that the notification requirements were satisfied and it availed itself of this opportunity. The superintendent was not persuaded by its arguments. I am not concerned whether he was correct; the process satisfied the obligations of honesty and fairness imposed upon him. **Insofar as it was suggested that he ought to have considered whether to grant an ex gratia time extension, again it appears that he considered and rejected this course**." (emphasis added)

[189] The applicant did not deal with those findings in the written submissions, except to criticise the finding made by the arbitrator in par 173 that the superintendent was aware that he had a general discretion under cl 35.5.5 to extend time for any reason, by reference to evidence given about his awareness or actions. That criticism is irrelevant since the finding in par 173 is not challenged. That is made clear by ground 8 itself. In any event, that would be an appeal on a question of fact.

[190] The applicant submits that having made that finding it was incumbent upon the arbitrator to determine whether there had been a breach of contract by failing to ensure that the superintendent exercised that discretion honestly and fairly.

[191] In paras 208 to 215 of the respondent's submissions the findings and footnotes mentioned above are identified. The respondent submits that the applicant's attack on this ground wrongly states that the award did not deal with the applicant's submission to the arbitrator that the superintendent did not consider whether to exercise the power, relying on paras 169, 173 and 179 of the reasons.

[192] In paras 90 to 96 of the applicant's reply submissions, the applicant makes numerous points, although some are not properly made in reply. First, in par 91 the applicant submits that it "maintains" that there was no evidence that that the superintendent in fact exercised his discretion as the respondent contends. Previously, that was not the subject of the ground of appeal or the applicant's submissions in chief. I reject that the respondent should be permitted to raise a new ground. In any event, it would be a challenge to a finding of fact.

[193] Second, in par 91 the applicant submits that the arbitrator did not make a finding of fact that the exercise of discretion was "reasonable and consistent with the obligation to act honestly and fairly, and impartially." In the following paragraphs the applicant develops an argument based on facts and assertions about the evidence leading to the submission in par 95 that the superintendent failed to determine the extension of time claim honestly and fairly in breach of cl 23.

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[34] See particularly paras 169 and 173, as well as footnotes 166 and 167.

[194] But, in my view, the paragraphs of the arbitrator's reasons that I have mentioned previously, including par 179, do amount to such a finding. The applicant has not identified why they do not.

Questions 9 and 10

[195] Question 9 of the draft order contains two proposed questions:

> "(a) What is the legal standard to be applied for the purpose of determining whether the superintendent exercised that discretion [to extend the date for practical completion] honestly and fairly…?
> (b) Is the refusal to exercise that discretion limited only in circumstances where the exercise of that discretion has been fettered by the passing of time (see *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (2002) 18 BCL 322 at [79])?"

[196] I confess to not understanding the purpose of the proposed questions. As to question 9(a), the applicant did not make any particular submissions about some different legal test of honesty or fairness applying when the subject of the superintendent's power was the power to extend time under cl 35.5.5. The relevant part of its case before the arbitrator was that as a matter of fact the superintendent did not act honestly and fairly in refusing to extend time. I would refuse leave to appeal on question 9(a).

[197] As to question 9(b), the passage at par [79] of *Peninsula Balmain* is not about a legal limit or fetter upon the power to extend time arising from the passing of time. The arbitrator did not suggest that there was a legal limit of that kind on the scope of the power. I suspect that the applicant wants to contend that the superintendent misapplied cl 35.5.5 because he gave some or too much weight to the passing of time, even if he was aware that he had the power to extend time. In my view, that is not a question of law and leave to appeal should not be granted on that question.

[198] Question 10 of the draft order is whether the matters found by the arbitrator at par 174 of the reasons satisfy the standard for determining whether the superintendent acted honestly and fairly in either not exercising that discretion, or to the extent that the superintendent did exercise the discretion in not extending the time.

[199] But that is not a question of law. The arbitrator found in par 173 that the superintendent was aware of the general discretion to extend time under cl 35.5.5 and that his reason for not exercising the power for EOT 32 was that he didn't want the applicant saying that there was some sort of estoppel or waiver or inconsistency. Paragraph 174 continued:

> "The matter did not rest there. It seems that the claim was rejected by the superintendent for failure to comply with the notification requirements. It next appears as the subject of a letter from Mr Barrett to Mr Eiszele dated 7 July 2009, in which he sets out [the applicant's] chronology of events and concludes by stating "We trust that the above is sufficient for PCQ [sic] to approve EOT 32." Mr Barrett in this letter does not, in terms, invite the superintendent to exercise his cl 35.5.5 power."

[200] Whether those findings are right or wrong is a question of fact. There is no real question of law whether they "satisfy the standard" for determining whether the superintendent acted honestly and fairly.

[201] I would not grant leave to appeal on question 10.

Ground 9

[202] There are significant differences between proposed ground 9 as it is stated in the application and the articulation of ground 9 in paras 87 to 104 of the applicant's written submissions on this application.

[203] The starting point is that in par 120 of the reasons the arbitrator found that there was no "Chinese wall" within the firm of the lawyers and in par 465 of the reasons that a "surprising laxity" characterised the lawyers' implementation of an agreement regarding the "quarantining of communications with the superintendent". As stated in the application, ground 9 relies on the fact that despite these findings the arbitrator did not find the respondent was in breach of cl 23 and contends that thereby either the arbitrator failed to deal with an important part of the applicant's case or dismissed it without any or any adequate reasons.

[204] Paragraphs 87 to 104 of the written submissions expand ground 9 into three separate contentions of errors of law. First, in par 92, the applicant submits that the finding in par 165 of the reasons that "as a general rule" there were separate lines of communication between the superintendent and the lawyers and PCQ and the lawyers is so inconsistent with a series of further findings set out in par 91 of the written submissions that the arbitrator was required to explain the inconsistency. I observe that looking at the matter that way may simply be a way of dressing up a challenge to the finding of fact at par 165 as a question of law.

[205] Second, in par 95 of the written submissions the applicant submits that, having found that there was no effective information barrier in place, "the issue" for the arbitrator was whether a fair-minded person in the position of the contractor may form the view that advice provided by the lawyers was calculated to influence the task of the superintendent, whether or not it did so in fact, or whether a fair-minded person in the position of the contractor, knowing the true facts, might reasonably apprehend that the superintendent has not brought an impartial mind to the performance of his contractual certifying function. The applicant submits further in par 97 to 100 that the failure by arbitrator to address either of those standards was an error of law.

[206] Third, in par 101 of the written submissions the applicant submits that its case before the arbitrator was that the "mere fact that PCQ had appointed [the lawyers] to advise the superintendent … without "Chinese Walls" was a conflict of interest which compromised the independence of the superintendent" and was calculated to influence the superintendent's functions. In par 102, the applicant submits that the arbitrator failed to deal with this submission and in par 103 the applicant submits that the failure to do so was also a constructive failure to exercise jurisdiction or an implied rejection without explanation or acknowledgement of the submission and was an error of law "on both accounts".

[207] In my view, the applicant should not be permitted to expand upon ground 9 as stated in the application in this way. The court is not available to hear an unlimited range

of submissions not properly raised as questions of law in the application, in circumstances where already an excessive burden has been created by the manner of conducting the application. However, the respondent did not take that point and dealt with the substance of the applicant's submissions, so I will do so as well, albeit briefly.

[208] As to par 88 of the applicant's submissions, from a point relatively early in the hearing the respondent's defence was not that it had a Chinese wall in place but was that there were separate lawyers advising the superintendent and PCQ.[35]

[209] As to par 92 of the applicant's submissions, there is no clear inconsistency between the finding that as a general rule the lines of communications were kept separate and the findings referred to in par 91. But even if there was, the findings are findings of fact and not a failure to give reasons to the required standard.

[210] As to par 95 of the applicant's submissions, in my view this is simply a re-hash of grounds 1 to 3 of the application. Nothing more need be said about them in this specific context beyond what appears below.

[211] As to paras 101 to 104 of the applicant's submissions, it is wrong to say that the arbitrator failed to deal with the point that for the lawyers to act for the superintendent without more was a conflict of interest that compromised the superintendent. As to this, see paras 114 to 119 of the reasons.

Questions 11 and 12

[212] Question 11 of the draft order, in effect, is what are the criteria for determining whether the provision of advice that the superintendent requires as to the proper construction and operation of the provisions of the contract constitutes a "material" representation?

[213] In my view, this is not a question of law. The purpose of asking the question is to determine whether particular undisclosed advice required and received is a breach of the principal's promise in cl 23 to ensure that the superintendent acts honestly and fairly. In my view, there is no question of law as to the criteria that must be observed in relation to advice about the proper construction or operation of the contract before it may or may not be decided on the facts that there has been a breach. I would not grant leave to appeal on question 11.

[214] Question 12 of the draft order is whether if the superintendent "obtains legal advice as to the proper construction and operation of … the contract from a solicitor acting for the principal and in the principal's interest, is the superintendent obliged to disclose that advice to the contractor?"

[215] This question is a variant of question 11. It adds the fact that the lawyer is the principal's lawyer. As to that, see the reasons in paras 117 and 118. I would not grant leave to appeal on this question, having regard to those reasons and otherwise for the same reasons as question 11.

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[35] See paras 120 and 121 of the reasons and paras 120 to 126 and 142 of the respondent's written submissions to the arbitrator.

Ground 10

[216] Proposed ground 10 is that the arbitrator made an error of law in determining that cl 23 of each of the contracts was an intermediate term and not an essential term.

[217] Absent a finding of breach of cl 23, it is immaterial whether any breach of that clause or only a breach that is also serious enough to go to the root of the contract would entitle the applicant to terminate the contract.[36]

[218] Nevertheless, the question is a matter of some significance in deciding this application. It is a condition of the grant of leave that the determination of the question of law could substantially affect the rights of one or more of the parties to the arbitration agreement.[37]

[219] On any appeal, the applicant will not be able to succeed on its repudiation claim unless the arbitrator wrongly failed to find a relevant breach or breaches of contract and the breach or breaches entitled the applicant to terminate the contract.

[220] If cl 23 was an essential term, the applicant would only have to establish a single breach under each contract to justify its termination of the contracts. It is relevant, therefore, to consider the strength of the proposed question of law that cl 23 is an essential term.

[221] In par 619 of the reasons the arbitrator referred to *Kane Constructions*[38] and said that the judge in that case "appeared to treat the breaches of cl 23 as breaches of an intermediate term", an approach which he accepted.

[222] The applicant submits that the passage referred to in *Kane Constructions* did not determine the question of whether cl 23 is an intermediate as opposed to an essential term. In addition, it relies on *Devaugh Pty Ltd v Lamac Developments Pty Ltd*[39] and *Walter Construction Pty Ltd v Walker Corporation Pty Ltd*[40] as supporting the conclusion that cl 23 is an essential term. The applicant submits that the arbitrator failed to consider those authorities and that he failed to give adequate reasons.

[223] I reject the proposition that the arbitrator was required to discuss *Devaugh* and *Walter Construction* in his reasons at the risk of failing to give adequate reasons. First, the conclusion whether cl 23 is an intermediate or essential term was not necessary for the award he made. How can it have been required in law for him to give reasons on an unnecessary matter for his decision?

[224] Second, in any event, *Devaugh* is not on point. The breach in question was failure to appoint a superintendent, not failure of the principal to ensure that the superintendent acted honestly and fairly. One member of the Full Court of the Supreme Court of Western Australia held that failure to appoint a superintendent under cl 23 on the facts of that case was "a substantial breach of contract".[41]

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36 The same is true of the implied term not to interfere with the superintendent's functions, but for present purposes discussion may be confined to cl 23.

37 *Commercial Arbitration Act* 1990 (Qld), s 38(5)(a).

38 (2006) 22 BCL 92, [808]-[809].

39 (2000) 16 BCL 378.

40 [2001] NSWSC 283.

41 (2000) 16 BCL 378, [47].

[225] The phrase "substantial breach" is not the language of breach of an essential term. It does not assist the applicant. This is made clear by the context in which the phrase appeared as follows:

> "… I agree with Parker J that AS 2545, when read as a whole and standing on its own, had the result that the failure by Devaugh to appoint an MCR was a breach of cl23, by which MCR was required to 'ensure that at all times there was a Main Contractor's Representative ...'. Failure to appoint an MCR would constitute a substantial breach of contract by the Main Contractor. This would justify the sub-contractor suspending the work under cl44.9. If an MCR was not then appointed, the contract could then be terminated and damages for breach as in repudiation recovered pursuant to cl44.10."[42]

[226] The references to cl 44 were to the process under the contract for giving notice to the opposite party to remedy a substantial breach. That appears even more clearly from the relevant passage in the reasons of Parker J as follows:

> "Under AS2545 1993, read as a complete document and in isolation, it would appear that the failure of Devaugh to appoint an MCR was a clear breach of cl23 by which it was expressly required to 'ensure that at all times there was a Main Contractor's Representative ...'. Cl44.7 - substantial breaches of contract by the Main Contractor - and cl44.9 - notice of subcontractor of suspension of work, followed by notice of termination with an entitlement to recover damages (as in repudiation at common law, see cl44.10) would appear to be available as remedies to a subcontractor where there was a failure to appoint an MCR."[43]

[227] Clause 44.7 in *Devaugh* appears to be the equivalent to cl 44.7 of the general conditions of contract in the present case as follows:

> "If the Principal commits a substantial breach of contract and the Contractor considers that damages may not be an adequate remedy, the contractor may give the Principal a written notice to show cause.
>
> Substantial breaches include but are not limited to –
>
> (a) failing to make a payment, in breach of Clause 42.1;
> (b) failure by the Superintendent to either issue a Certificate of Practical Completion or give the Contractor, in writing, the reasons for not issuing the Certificate within 14 days of receipt of a request by the Contractor to issue the Certificate, in breach of Clause 42.5…"

[228] Clauses 44.8 and 44.9 of the general conditions of contract in the present case provide for the show cause process to be followed in the event of a substantial breach notice. That process gives PCQ at least seven clear days to show cause why the contractor should not exercise a right to terminate under cl 44.9.

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42 (2000) 16 BCL 378, [47].
43 (2000) 16 BCL 378, [101].

[229] It is obvious that a breach of cl 42.5 falling within cl 44.7(b) is also a breach of cl 23(b) which requires the superintendent to perform his functions on time.

[230] In my view, it is not reasonably arguable that every breach of any promise made under cl 23 is a breach of an essential term. That would include every failure, no matter how trivial, of the principal's promise in cl 23(b) that the superintendent act within the time prescribed under the contract and every failure, no matter how trivial, of the principal's promise in cl 23(c) that the superintendent arrive at a reasonable measure or value of work, quantities or time.

[231] However, the present case is particularly about the promise by the principal in cl 23(a) to ensure that the superintendent acts honestly and fairly. Even so, in my view, the applicant's contention that the promise is an essential term, so that any breach of it entitles the contractor to terminate peremptorily, is not strongly arguable.

[232] Let it be assumed that there is a substantial breach of the standard of honesty and fairness required of the superintendent in the exercise of a function under the contract. That will be a breach of the principal's contractual promise under cl 23(a) to ensure that the superintendent acts honestly and fairly. Still, there does not seem to be any obvious reason why the contractor should not give the principal the opportunity to show cause under cl 44.8, for example, by removing and replacing the superintendent. It is not to be assumed that in every case the principal will be a willing or knowing party to the superintendent's conduct.

[233] This likely construction is supported by the context provided in cl 44.1 of the general conditions of contract. It provides in part that if a party repudiates the contract, nothing in cl 44 shall prejudice the right of the other party to exercise any other right. In other words, where the principal's conduct amounts to a repudiation that the same conduct would also come within the process provided for under cl 44.7 to 44.9 will not prevent the contractor from terminating peremptorily for the repudiation.

[234] Similarly, *Walter Construction* is of no assistance to the applicant. The passage from the judgment in that case relied upon by the applicant was:

> "The plaintiff's allegation that Walkers interfered with the independent functions of the Administration Manager in relation to certification and assessment is established, as is the allegation that from 4 May 1998, WCL took over and exercised for itself those functions. As a result of this improper interference, CCG did not receive the independent assessment to which it was entitled under the Agreement, and on the basis of which it contracted. Depriving a contractor of the independence of an assessor at the critical time towards the end of a construction contract goes to the heart of the contract because it deprives the contractor of the independent assessment of a certifier on whose impartiality and independence of mind it relies to determine its contractual rights and obligations in relation to the performance of the contract, payment, liquidated damages and release of performance bonds. It constitutes repudiatory conduct."[44]

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[44] [2001] NSWSC 283, [267].

[235] First, the applicant relied on that statement as one made by Hunter J as part of his reasons. It was not. It was a passage his Honour quoted from the report of the referee in that case, giving the referee's reasons.

[236] Second, the phrase "repudiatory conduct" is not the language of a breach of an essential term, although these concepts are not always kept separate. Repudiation is a common law doctrine primarily engaged when the conduct of a party in breach evinces an intention not to be bound by the terms of a contract as a whole. It is not the concept or principle according to which contractual terms are classified as being essential on the one hand or intermediate on the other hand.

[237] The concept of repudiation and the uses of the term were discussed in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd*,[45] in part as follows:

> "The term repudiation is used in different senses. First, it may refer to conduct which evinces an unwillingness or an inability to render substantial performance of the contract. This is sometimes described as conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations … The test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it … Secondly, it may refer to any breach of contract which justifies termination by the other party. It will be necessary to return to the matter of classifying such breaches. Campbell J said this was the sense in which he would use the word 'repudiation' in his reasons. There may be cases where a failure to perform, even if not a breach of an essential term (as to which more will be said), manifests unwillingness or inability to perform in such circumstances that the other party is entitled to conclude that the contract will not be performed substantially according to its requirements. This overlapping between renunciation and failure of performance may appear conceptually untidy, but unwillingness or inability to perform a contract often is manifested most clearly by the conduct of a party when the time for performance arrives. In contractual renunciation, actions may speak louder than words."[46] (footnotes omitted)

[238] In my view, the point was accurately made in the respondent's written submissions that under cl 23 the superintendent may fail to observe the required standards of honesty and fairness in a minor respect in circumstances where no reasonable objective observer would come to the conclusion that the parties must have intended that such a breach would entitle the contractor to peremptorily terminate the whole contract.

[239] As well, the context in which cl 23 appears includes cls 44.7 to 44.9. No more needs to be canvassed in order to conclude that it is much more likely than not that cl 23(a) is not an essential term.

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45 (2007) 233 CLR 115.

46 (2007) 233 CLR 115, 135-136 [44].

Questions 13 and 14

[240] Question 13 of the draft order, in effect, is whether the arbitrator made an error of law in finding that cl 23(a) and the implied term were not essential terms of the contracts.

[241] I would reject that question 13 as expanded by ground 10 is a question of law on which leave to appeal should be granted. The reason is that the applicant does not have sufficient prospects of succeeding on this question of law on appeal.

[242] Question 14 of the draft order, in effect, is whether the arbitrator's reasons for finding that cl 23 was not an essential term or condition were inadequate. I would not grant leave to appeal on that question because the arbitrator was not required to give full reasons for a finding that cl 23 was not an essential term when that finding was not necessary for the award that he made.

Another discretionary consideration

[243] That would leave the applicant to establish on an appeal on any other question of law or on remitter following such an appeal that any breach of contract or breaches of contract it can prove are breaches that "go to the root of the contract" in the sense recently restated by the High Court in *Koompahtoo*.[47]

[244] Paragraph 104 of the respondent's submissions states that the applicant cannot hope to do so if on the appeal the appellant would only establish a "technical" breach of the alleged Disclosure Standard or Ebner Standard, or a failure to determine that some of the relevant undisclosed representations were material representations calculated to influence the superintendent. As well, the respondent submits in par 108 that the applicant did not identify for the arbitrator the breach of contract or combination of breaches it contends were sufficiently serious to justify termination.

[245] The applicant submits in par 25 of its reply submissions that given the number of individual allegations of impugned conduct it is fanciful to suggest that the applicant ought to have produced to the arbitrator the combination of findings that would amount to a substantial breach justifying termination. I reject that submission. It amounts to saying that the applicant was not required to identify the substance of its case as to what were breaches going to the root of the contract, but was entitled to leave it to the arbitrator to sift through all possible permutations and combinations. If the applicant views the question as one that is too difficult for it to answer, how is the arbitrator to know what case he should consider? And how is the respondent to know what it should address?

[246] The applicant further submits in par 27 of its reply submissions that given the number and nature of the withheld communications there ought to be no doubt that the relevant breaches of cl 23 as an innominate term would sound as a breach going to the root of the contract.

[247] In another passage not necessary to decide the reference, the arbitrator said at par 621 of the reasons that whether there was a breach going to the root of the contract depends on "the number and nature of the breaches that have been established". He

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47 (2007) 233 CLR 115, 140 [54]-[55]. The expression has a long history in the High Court, starting with the adoption in *Francis v Lyon* (1907) 4 CLR 1023, 1035 and 1040 of Lord Blackburn's famous reasoning from *Mersey Steel and Iron Co v Naylor Benzon & Co* (1884) 9 App Cas 434, 443.

continued that "[i]f all or a substantial number of the complaints [of the applicant] had been made out, there can be no doubt that the conclusion must be that the superintendent would have lost his independence and, possibly, be a party to the suggested strategy."

[248] The applicant relies on this passage, in paras 22 and 23 of its reply submissions, as an acceptance of the applicant's case that "the cumulative effect of even a handful of breaches would be sufficient." In my view, the arbitrator's statements were not directed to the case that the applicant now advances. It would be misleading to treat the arbitrator's statement in par 621 of the reasons as though it was made with a view to the questions of law proposed for the appeal.

[249] The plethora of points taken by the applicant on this application makes it exceedingly difficult to meaningfully analyse the likelihood of the applicant's success in being able to terminate the contracts if the applicant were given leave to appeal and were successful on appeal. Consider, by way of example, if leave to appeal were granted on a question whether the arbitrator made an error of law in failing to consider whether the undisclosed communications were material representations calculated to influence the superintendent's administration of the contracts. If the applicant were then successful on appeal it would be necessary to make findings about each of the Impugned Representations and the circumstances in which it was made to ascertain whether there was a breach going to the root of the contract.

[250] In these circumstances, in my view, it is not possible to assess in any practical way the likelihood that the applicant would or would not be able to make out a breach of contract justifying termination.

Disposition

[251] As it has transpired I would not grant leave to appeal on any of the questions of law proposed by the draft order or any other questions advanced by the application or the written submissions (including Annexure A).

[252] It follows that the application must be dismissed.

[253] I will hear the parties on the question of costs.