SUPREME COURT OF QUEENSLAND

CITATION:	*ACN 060 559 971 Pty Ltd v O'Brien & Anor* [2007] QSC 91
PARTIES:	**ACN 060 559 971 PTY LTD (ACN 060 559 971) (formerly ABEL POINT MARINA (WHITSUNDAYS) PTY LTD) (applicant)** **v** **JOHN O'BRIEN** **(first respondent)** **and** **SEA-SLIP MARINAS (AUST) PTY LTD (ACN 103 644 640)** **(second respondent)**
FILE NO/S:	BS51 of 2007
DIVISION:	Trial
PROCEEDING:	Application for statutory order of review and application for review
DELIVERED ON:	19 April 2007
DELIVERED AT:	Brisbane
HEARING DATE:	1-2 March 2007
JUDGE:	Mullins J
ORDER:	**Orders to be determined after further submissions from the parties.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – application for judicial review of decision of adjudicator made under *Building and Construction Industry Payments Act* 2004 (Qld) – where contractor's claim for costs of delay or disruption allowed by adjudicator – where claim made under clause of the building contract – where liability of principal for delay or disruption costs necessarily incurred by contractor by reason of the delay was expressed in the relevant clause as dependent on the grant of an extension of time for delay or disruption caused by the principal, the superintendent, or those under the control of the principal or the superintendent – where adjudicator construed the relevant clause in such a way that did not require a determination of what extensions of time for the principal's delay should have been granted under the building contract – where adjudicator erred in construction of relevant clause of the building contract CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – THE CONTRACT –

CONSTRUCTION OF PARTICULAR CONTRACTS AND IMPLIED CONDITIONS – OTHER MATTERS – construction of clause in building contract making principal liable for delay or disruption costs incurred by contractor – where the principal's liability for delay or disruption costs was expressed in the relevant clause as dependent on the grant of an extension of time for delay or disruption caused by the principal, the superintendent, or those under the control of the principal or the superintendent – where liability of principal for delay or disruption costs required determination of what extensions of time for the principal's delay should have been granted under the building contract

Building and Construction Industry Payments Act 2004, s 13, s 17, s 21, s 25, s 26, s 27, s 99
Judicial Review Act 1991, s 4, s 30

Abacus Funds Management Ltd v Davenport [2003] NSWSC 1027, considered
Abel Point Marina (*Whitsundays) Pty Ltd v Uher* [2006] QSC 295, considered
Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321, considered
Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd (2005) 63 NSWLR 385, followed
John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd [2006] NSWSC 798, followed
Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd [2004] NSWSC 1151, followed
State of Queensland v Epoca Constructions Pty Ltd [2006] QSC 324, followed
Thiess Watkins White Construction Ltd v Commonwealth of Australia (1992) 14 BCL 61, considered

COUNSEL: RA Holt SC and SA McLeod for the applicant
G Inatey SC and DT Miller for the second respondent

SOLICITORS: Allens Arthur Robinson for the applicant
McMahons National Lawyers for the second respondent

[1] **MULLINS J**: The applicant applies for a statutory order of review and review of the adjudication of the first respondent dated 20 December 2006 under the *Building and Construction Industry Payments Act* 2004 ("the Act"). The first respondent determined that the applicant pay as the progress payment an amount of $2,628,364.74 (including GST) to the second respondent ("SSM").

The contract and the claim

[2] The applicant and SSM entered into a contract in December 2004 for the design and construction by SSM for the applicant of stages 2 and 3 berths and ancillary works at the Abel Point Marina, Airlie Beach. The contract incorporated General

Conditions of Contract AS4300-1995. The date for practical completion was shown as 1 December 2005. By late 2005 the parties were in dispute and, after negotiations, entered into a document described as "Agreement for Completion of Works" dated 14 December 2005 which has been referred to by the parties as the December Variation Agreement ("DVA"). Clause 8.0 of the DVA stated:

> "[The applicant] shall accept completion by the 31st March 2006, however earlier completion is encouraged."

[3] SSM served a voluminous payment claim progress claim number 15 in the amount of $3,425,854.53 (including GST) on the applicant on 31 October 2006. The applicant served a detailed payment schedule in response on 14 November 2006 together with the superintendent's payment certificate number 14 that was responsive to SSM's progress claim number 15. The amount that the applicant proposed to pay to SSM in respect of the payment claim was nil. SSM lodged an application for adjudication on 28 November 2006 with an authorised nominating authority and the first respondent accepted an appointment as adjudicator on 30 November 2006. The payment claim together with supporting material and submissions and the payment schedule were contained in six large folders that SSM provided to the first respondent. The applicant's adjudication response was lodged on 6 December 2006. As required by s 25(3) of the Act, the first respondent decided the adjudication application by making his decision and giving the reasons for the decision by 20 December 2006. The first respondent's decision and reasons comprises 20 pages. I will refer to this decision and reasons by using the page numbers of the document as prepared by the first respondent.

The first respondent's decision

[4] The payment claim contained 24 items. Items 1 to 13 and 15 to 18 were claims dealt with by another adjudicator, Mr Uher, in a previous adjudication dated 17 August 2006. He had decided that SSM was entitled to payment of $435,431.84 of the amount claimed in payment claim number 11 served on 30 June 2006. Mr Uher's adjudication was the subject of an application for statutory order for review that was dismissed by Wilson J: *Abel Point Marina* (*Whitsundays) Pty Ltd v Uher* [2006] QSC 295 ("*Abel Point No 1*"). SSM submitted to the first respondent that Mr Uher's decision could not be reviewed, as the value of the items decided by him had not changed since he made his decision. The first respondent accepted this submission (at p 9) and decided not to review or revalue Mr Uher's valuation of the claims before him, but stated (at p 9) that if he were wrong and the amount adjudicated by Mr Uher was able to be reviewed, he was "satisfied that Mr Uher's Decision in respect of the deductions made by the [applicant], including his findings as to practical completion and liquidated damages, was correct in the light of the matters he was then dealing with."

[5] The primary focus of the first respondent's decision was item 23 of the payment claim which was the claim for delay and disruption costs in the amount of $1,993,575.36 (plus GST). SSM claimed that dredging carried out on behalf of the applicant caused SSM to be delayed from the original date for practical completion of 1 December 2005 through to 6 September 2006. Both parties made submissions to the first respondent based on the decision of the New South Wales Court of Appeal in *Coordinated Construction Co Pty Ltd v JM Hargreaves (NSW) Pty Ltd* (2005) 63 NSWLR 385 ("*Hargreaves*"). The applicant submitted to the first respondent that SSM was not entitled to claim under the Act any amount for "delay

and disruption" where such claim was in reality damages for alleged breach of contract and not an amount due for construction work. The first respondent applied (at p 12) the statement made by Hodgson JA in *Hargreaves* at 397 [41]:

> "… any amount that a construction contract requires to be paid as part of the total price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as 'damages' or 'interest' … ."

and concluded (at p 12) that SSM's claim for delay and disruption did fall within the description of an amount that was due for construction work.

[6] Although the first respondent observed (at p 12) that "delay costs are only payable if there is an entitlement to an extension of time (EOT) as a result of some general act or omission of the [applicant] or its agents", he also stated (at p 12):

> "I do not think that a claim by a contractor under clause 36 is sustainable only where the Superintendent has granted an EOT under clause 35.5 and that granted EOT qualifies in some way the 'costs as are necessarily incurred by the Contractor by reason of the delay'. Certainly, there is no such constraint under the Act and, if the Contract restricts the operation of the Act in so far as restricting the [SSM's] rights to make claims for construction work, then section 99 operates to render such provisions void."

[7] The first respondent dealt with the issue of whether the applicant caused any delay or disruption to SSM and concluded (at p 13) that SSM "did suffer delay and disruption as a result of, in particular, dredging activities in its work area which continued throughout construction as a result of dredging processes and procedures proving ineffective" for which SSM was not responsible. The first respondent did not expressly identify the period of delay or disruption that was suffered by SSM and was caused by the applicant or those under the control of the applicant.

[8] The next issue considered by the first respondent was whether SSM incurred the costs it claimed as a result of the delay and disruption. The first respondent was satisfied (at p 14) "that the delay and disruption caused to [SSM] would have led to it incurring significant costs" and that "the cost items listed by [SSM] in the Payment Claim are consistent with the type of expenses and costs one would expect to find there". The first respondent noted (at p 14) that, while the applicant attempted to discredit SSM's listed costs and their valuations, it did not provide an alternative valuation, but maintained that SSM had no entitlement whatsoever.

[9] The first respondent accepted (at p 15) that the superintendent under the contract failed to exercise his obligations to value claims as required by the contract and that he did not exercise his obligations impartially so as to meet the requirements imposed on him by clause 23 of the contract. The first respondent then referred (at p 15) to the applicant's assertion that the DVA was intended to preclude any entitlement to delay costs prior to 14 December 2005 and that no extensions of time have been granted since then for any delay or disruption caused by any of the events referred to in clause 35.5(b)(i) of the contract. The first respondent stated at (at p 15):

> "…I am satisfied that the [applicant] did grant an EOT at some point for delay and disruption caused by the [applicant], whatever it says about this now. As is clear from the submissions, what is in dispute

> is not what EOTs were granted or whether they were reasonable but whether they were granted at all."

[10] The first respondent referred (at p 16) to the fact that the DVA did not use the expression "Practical Completion" and that it stated that "[the applicant] shall accept completion by 31st March 2006". The first respondent noted again (at p 16) that Mr Uher decided that there was insufficient evidence that the date in the DVA referred to the date for practical completion and that Mr Uher "was entitled to come to that decision". The first respondent then expressly accepted (at p 16) the submissions made by SSM in the adjudication application that stated:

> "There is nothing in the DVA about Practical Completion. The term is not used. There is no mention of a Date for Practical Completion…It does not say that [SSM] must bring the Works or any portion to the stage of Practical Completion by 31 March 2006."

The first respondent concluded (at p 18) that there was nothing in the DVA which barred a claim for delay or disruption based on events which occurred prior to 15 December 2005 or required clause 36 of the contract to be read subject to the DVA.

[11] The first respondent then repeated (at p 18) that he was "satisfied that delay and disruption and extra costs resulting from these have been incurred by [SSM] and that the responsibility for such delay and disruption lies with the [applicant]."

[12] The first respondent dealt with the parties' submissions on the operation of clause 36 of the contract as follows (at p 18):

> "[SSM] further submits that it is not a matter for me as Adjudicator to consider 'what extensions of time the Superintendent granted or even should have granted. The important issue is to determine what delay and disruption was caused by the [applicant]. The measure of delay or disruption is not the same as the measure of extensions of time'. I have read the [applicant's] submissions in respect of this and do not accept that [SSM's] submission is tantamount to asking me to disregard both the Act and the Contract. The submission merely points out that whatever extensions of time were or were not granted by the Superintendent, that is not material to and does not directly govern actual delay and disruption caused or the actual costs of that delay and disruption."

[13] The first respondent then dealt with the cost of the delay and disruption caused by the applicant (in respect of which he was satisfied that SSM was entitled to claim) on the evidence that was put before him by the parties. The first respondent noted (at p 19) that he was obliged under the Act to assess the value of the claim and that he was "placed in a position of accepting the assessment of [SSM] or that of the [applicant]; all or nothing so to speak". The first respondent accepted (at p19) SSM's assessment of costs arising from the delay and disruption to the works.

[14] The adjudicated amount decided by the first respondent pursuant to s 26(1)(a) of the Act of $2,628,364.74 was calculated as follows:

Amount of progress payment decided by Mr Uher	$435,431.84
Item 23 delay and disruption costs	$1,993,575.36
GST on the item 23 amount	$199,357.54
Total	**$2,628,364.74**

[15] The applicant has paid the amount that was the subject of the adjudication by Mr Uher. Instead of paying the balance of the adjudicated amount decided by the first respondent, the applicant commenced this application and paid the sum of $2,275,974.39 into court on 19 January 2007 to abide the order of the court. On 19 January 2007 the court made an order with the consent of the parties restraining SSM until the final determination of this application or further order of the court from taking any step to recover the moneys the subject of the first respondent's adjudication. That order was subsequently substituted with an undertaking by SSM to the same effect.

Whether decision reviewable

[16] The applicant submits that the decision of the first respondent is reviewable under the *Judicial Review Act* 1991 ("*JRA*") as it satisfies the tests set out in paragraph (a) of the definition of "decision to which this Act applies" in s 4 of the *JRA*. The applicant submits that is consistent with the conclusion reached in other judgments in the Trial Division of this Court including *State of Queensland v Epoca Constructions Pty Ltd* [2006] QSC 324 ("*Epoca*") at paragraphs [16] to [35] and *JJ McDonald & Sons Engineering Pty Ltd v Gall* [2005] QSC 305 (*cf Vis Constructions Pty Ltd v Cockburn* [2006] QSC 416 at [42]). Although SSM argued the application on the assumption that the first respondent's decision was reviewable under the *JRA* as a decision of an administrative character made under an enactment, it expressly preserved its position to argue otherwise on an appeal. For the reasons given in *Epoca*, I consider that the first respondent's decision is one to which Part 3 of the *JRA* applies.

Nature of the first respondent's decision

[17] The application must be considered in the context of the nature and purpose of the decision making undertaken by the first respondent. The adjudication of disputes under Division 2 of Part 3 of the Act occurs after a claimant under a construction contract claims to be entitled to a progress payment and has served a payment claim under s 17 of the Act. The conditions that must be satisfied before the claimant makes an adjudication application as set out in s 21 of the Act. The adjudication application must contain the submissions of the applicant. The relevant respondent to the payment claim must give any response to the claimant's adjudication application at any time within the later of five business days after that respondent has received a copy of the application or two business days after that respondent has received notice of the adjudicator's acceptance of the application. Under s 25(3) of the Act an adjudicator is required to decide an adjudication application "as quickly as possible" and within 10 business days after the earlier of the date on which the adjudicator received the adjudication response or the date on which the adjudicator should have received the adjudication response or within the further time the claimant and the respondent may agree, whether before or after the end of the 10 business days. Under s 26(2) of the Act the adjudicator is restricted to considering the matters that are specified in that provision in deciding an adjudication application.

[18] The object of the Act and how the object is to be achieved are set out in ss 7 and 8 of the Act. The object of the Act was summarised in the Explanatory Notes for the

relevant Bill as "to entitle certain persons who carry out construction work (or who supply related goods or services) to a timely payment for the work they carry out and the goods and services they supply" by "establishing a procedure for securing progress payments to which a person becomes entitled … ". Under s 99 of the Act, the provisions of the Act are given effect despite any attempt to contract out of the provisions. Section 100 of the Act makes it clear that nothing in Part 3 of the Act affects any right that a party to a construction contract may have under or in relation to that contract and that nothing done under or for Part 3 of the Act affects any civil proceedings arising under a construction contract (except to take into account any payment made under Part 3).

[19] The Act was modelled on the New South Wales *Building and Construction Industry Security of Payment Act* 1999 ("the *NSW Act*"). There have been numerous decisions on the *NSW Act* in which observations have been made about the scheme of the *NSW Act* and the role of the adjudicator which are equally applicable to the Act. Bergin J referred to the "somewhat pressure cooker environment in which adjudicators provide their determinations" in *Shell Refining (Australia) Pty Ltd v A J Mayr Engineering Pty Ltd* [2006] NSWSC 94 at paragraph [27] and note paragraph [26]. Einstein J observed in *Lucas Stuart Pty Ltd v Council of the City of Sydney* [2005] NSWSC 840 at paragraph [13]:

> "… the Act provides those who carry out construction work [or the supply of related goods and services] under a construction contract to access to a 'fast track' adjudication procedure whereby the amount of such payments can be determined on an interim basis and enforced immediately without prejudice to the right of the parties to have disputes ultimately determined in accordance with ordinary litigious procedures … ."

Similar observations on the Act were made by Wilson J in *Abel Point No 1* at paragraph [11]:

> "The Act provides for progress payments to contractors whether or not the relevant contract makes provision for progress payments and establishes a procedure for the making and recovery of such claims and their speedy adjudication where they are disputed. However, an adjudication does not finally determine the rights of the parties in the sense that a party may "claw back" progress payments which it is forced to make through the adjudication process in subsequent civil proceedings." (*footnotes omitted*)

Grounds of review

[20] The applicant asserts that the first respondent erred in failing to review Mr Uher's decision and thereby erred:

(a) in determining that the applicant was not entitled to deduct the amount of $250,000 (plus GST) for liquidated damages from any progress payment due to SSM; and

(b) in failing to determine that the date for practical completion under the contract was not 31 March 2006 as provided for in the DVA.

[21] The applicant also asserts that the first respondent erred in determining that the amount of $1,993,575.36 (exclusive of GST) was all claimable as delay and disruption costs under the contract.

[22] In respect of each aspect of the first respondent's decision that is the subject of this application, the applicant relies upon the grounds of review of error of law, contrary to law, improper exercise of power by failing to take into account relevant considerations and unreasonableness.

The applicant's claim for liquidated damages and the date for practical completion

[23] Clause 35 of the contract covers practical completion. Clause 35.6 provides:

> "If the Contractor fails to reach Practical Completion by the Date for Practical Completion, the Contractor shall be indebted to the Principal for liquidated damages at the rate stated in Annexure Part A for every day after the Date for Practical Completion to and including the Date of Practical Completion or the date that the Contract is terminated pursuant to Clause 44, whichever first occurs."

Clause 35.7 of the contract specifies that the contractor's liability under clause 35.6 is limited to the amount stated in Annexure Part A. The relevant amount is $250,000.

[24] Clause 36 of the contract provides:

> "Where the Contractor has been granted an extension of time under Clause 35.5 for any delay or disruption caused by any of the events referred to in Clause 35.5(b)(i), the Principal shall pay to the Contractor such extra costs as are necessarily incurred by the Contractor by reason of the delay.
>
> Where the Contract has been granted an extension of time under Clause 35.5 for any delay caused by any other event for which payment of extra costs for delay or disruption is provided for in Annexure Part A or elsewhere in the Contract, the Principal shall pay to the Contractor such extra costs as are necessarily incurred by the Contractor by reason of the delay.
>
> Nothing in this Clause 36 shall—
>
> (a) oblige the Principal to pay extra costs for delay or disruption which have already been included in the value of a variation or any other payment under the Contract;
> or
> (b) limit the Principal's liability for damages for breach of contract.

Clause 35.5(b)(i) of the contract covers delay or disruption caused by the principal, the superintendent or an employee, consultant, other contractor or agent of the principal or the superintendent.

[25] On this issue the applicant submits that the first respondent erred in relying on s 27 of the Act. The applicant submits that the set off that it sought to make for liquidated damages could not be characterised as valuing construction work (within

the meaning of s 27(1)(a) of the Act) and that therefore s 27(2) of the Act did not apply to Mr Uher's findings as to the date of practical completion and liquidated damages. The first respondent did not limit his refusal to depart from Mr Uher's decision on the applicant's claim to liquidated damages to the application of s 27 of the Act. To the extent that the first respondent relied on the alternative reason that Mr Uher's decision was correct, the applicant submitted that the first respondent misconstrued Mr Uher's reasons. The applicant argues that it was plain that Mr Uher formed the opinion on the material before him that he was unable to determine the date for practical completion and, consequently, the applicant's claim for liquidated damages and therefore he did not determine those issues. The applicant argues that because the first respondent characterised Mr Uher's reasons on these issues as findings, he failed properly to consider the applicant's claim for liquidated damages and erred in failing to take into account the applicant's submissions in its adjudication response as to why its claim for liquidated damages should be allowed.

[26] The applicant argues that the restriction found in s 27(2) of the Act which prevents another adjudicator from departing from the value of any construction work carried out under a construction contract as decided for the purpose of an earlier adjudication applies only to that part of the earlier adjudicator's decision that is concerned with valuing the relevant construction work and does not extend to that part of the earlier adjudicator's decision that might involve determining whether there should be any deductions from the valuation made by the earlier adjudicator of the relevant construction work.

[27] SSM seeks to support the first respondent's application of s 27 of the Act to Mr Uher's decision not to allow the applicant's deduction for liquidated damages. SSM argues that Mr Uher did undertake a valuation exercise that dealt with, but rejected, the applicant's liquidated damages claim of $250,000. It is put that Mr Uher carried out this valuation in accordance with the applicant's submission to him that the contract required the amount payable to SSM to be a net amount after the deduction of any amount due for liquidated damages. Because the deduction claims were rejected by Mr Uher, SSM submits that Mr Uher valued that claim at $Nil and that s 27(2) of the Act operated in respect of that valuation for the purpose of the adjudication application before the first respondent, unless the applicant could satisfy the first respondent that the value of the work had changed since Mr Uher's decision.

[28] SSM also claims that the first respondent did reconsider the claim for liquidated damages himself, but came to the same conclusion as Mr Uher. SSM argues that the first respondent's reasons disclose that he found as a matter of fact that there had been delays and that those delays to the works required of SSM were a consequence of acts or omissions of the applicant which had the necessary consequence that the applicant could not make out its claim for liquidated damages.

[29] On this aspect of the first respondent's decision, the submissions of the parties made on this application require the following matters to be considered:

(a) did the first respondent err in relying on s 27 of the Act? and

(b) if so, did the first respondent consider the applicant's claim for liquidated damages and the related claim as to the date for practical completion on the material that was before the first respondent?

[30] Section 27 of the Act provides:

> "**27 Valuation of work etc. in later adjudication application**
>
> (1) Subsection (2) applies if, in deciding an adjudication application, an adjudicator has, under section 14, decided—
> (a) the value of any construction work carried out under a construction contract; or
> (b) the value of any related goods and services supplied under a construction contract.
>
> (2) The adjudicator or another adjudicator must, in any later adjudication application that involves the working out of the value of that work or of those goods and services, give the work, or the goods and services, the same value as that previously decided unless the claimant or respondent satisfies the adjudicator concerned that the value of the work, or the goods and services, has changed since the previous decision."

[31] *Rothnere Pty Ltd v Quasar Constructions NSW Pty Ltd* [2004] NSWSC 1151 ("*Rothnere*") and *John Goss Projects Pty Ltd v Leighton Contractors Pty Ltd* [2006] NSWSC 798 ("*Goss Projects*") considered s 22(4) of the *NSW Act* which is the provision equivalent to s 27 of the Act.

[32] In *Rothnere* McDougall J noted at paragraph [43] that a determination under the *NSW Act* may involve both questions of quantification and questions of entitlement or it may involve one or the other. McDougall J then stated at paragraph [44]:

> "In my judgment, s 22(4) itself makes it clear that an adjudication determination need not necessarily include the valuation of construction work: the use of the introductory word "If" makes this clear. Subsection (4) therefore only applies where a component of a determination - that is to say, in terms of s 22(1)(a), of the determination of the amount of the progress payment (if any) to be paid - includes a determination of the value of construction work. Where it does, then subs (4) applies. Where it does not (either because the work has not at all been valued before or because the value of the work has changed) then s 10(1) applies. But there is nothing in these considerations that indicates that the phase "construction work" when used in s 22(4) should be construed in any way other than the way that it is used throughout the Act."

[33] The issue of whether McDougall J's construction of s 22(4) of the *NSW Act* was correct arose in *Goss Projects*. As a matter of construction of the *NSW Act*, McDougall J determined at paragraph [40] in *Goss Projects* that it was clear "that there is a distinction between the calculation of the amount of a progress payment (which is, ultimately, what the adjudicator is required to do) and the valuation of construction work".

[34] I respectfully agree with the approach to construction of s 22(4) of the *NSW Act* of McDougall J in *Rothnere* and *Goss Projects*. The right under clause 35.6 of the contract for the applicant to claim liquidated damages at the rate stated in Annexure Part A of the contract is not referable to any particular item of construction work

under the contract, but affects the calculation of the amount due by the principal to the contractor (or the amount due by the contractor to the principal). Under clauses 35.6 and 42.1 of the contract liquidated damages can be deducted from any payment otherwise due by the principal to the contractor. Relevantly, clause 42.1 of the contract treats an amount due by the contractor to the principal, such as a deduction for liquidated damages, as distinct from the value of work carried out by the contractor in the performance of the contract. The claim by the applicant to liquidated damages on the adjudication application before Mr Uher was relevant to the entitlement of SSM to the quantum of the progress payment that was determined by Mr Uher, but not the value of any construction work carried out under the contract that was determined by Mr Uher. The first respondent erred in law in relying on s 27 of the Act as a reason for not departing from Mr Uher's decision on the applicant's claim to liquidated damages.

[35] It is therefore necessary to decide whether the first respondent did, in fact, consider the applicant's submissions on its claim to deduct liquidated damages in reaching his conclusion that he would not depart from Mr Uher's decision. The superintendent's deduction for liquidated damages in payment certificate number 14 was based on identical reasons to those which the superintendent had advanced in making the deduction in respect of the claim made by SSM in its payment certificate that was before Mr Uher.

[36] Mr Uher rejected the deduction for liquidated damages on the basis that there was insufficient evidence before him to allow him to reach that conclusion. The materials and submissions before the first respondent were not limited to those that were before Mr Uher. It was for the first respondent to decide that issue on the basis of the materials and submissions before him. He has not done so to the extent that his reasons merely endorsed Mr Uher's conclusion that there was insufficient material before Mr Uher to allow the deduction for liquidated damages.

[37] This does not dispose of the argument of SSM that the first respondent could not reach the conclusion that he did on the entitlement of SSM to costs for delay or disruption, unless he impliedly rejected the applicant's deduction for liquidated damages, as according to counsel of SSM they were "inextricably related" and "mutually exclusive". As it was expressed during oral submissions (at Transcript p 48), counsel for SSM stated that the first respondent "determined the entitlement to extensions of time from the 1st of December 2005 until 6 September 2006, and as a necessary consequence of that would not deduct any liquidated damages in respect of any claim for liquidated damages within that period." It is necessary to analyse the first respondent's decision on SSM's claim for costs for delay or disruption, before considering whether that part of the first respondent's decision addressed the applicant's submissions on the date for practical completion and the deduction for liquidated damages.

SSM's claim for delay and disruption

[38] The applicant submits that the first respondent erred in deciding the question of delay and disruption without regard to clauses 35.5 and 36 of the contract. The parties differed markedly in their submissions on the significance of clause 36 and their respective constructions of clause 36 that were advanced to the first respondent on the extent and nature of the satisfaction of the pre-condition expressed in clause 36 that gives rise to a claim for delay or disruption costs under clause 36. The

applicant submits that the first respondent adopted the construction of clause 36 of the contract put forward by SSM and that was an error of law. The applicant contends that the reference by the first respondent (at pp 12 and 18 of his reasons) to an entitlement of SSM under the Act to claim the costs of delay and disruption, without making reference to the contract, was also an error of law.

[39] The applicant argues that the first respondent failed to make any assessment of an entitlement of SSM to extensions of time for the period in respect of which costs for delay or disruption were claimed by SSM. The applicant argues that as the first respondent was satisfied that the superintendent had abrogated his role under the contract, the first respondent should have undertaken the task of the superintendent of determining what extensions of time should have been granted under clause 35.5(b)(i): *Abacus Funds Management Ltd v Davenport* [2003] NSWSC 1027 at paragraphs [35]-[39]. The applicant also argues that in the acceptance by the first respondent of SSM's assessment of its costs arising from the delay and disruption to the works, the first respondent failed to address the amount claimed on its merits, notwithstanding that the applicant had not put forward an alternative valuation.

[40] SSM argues that the only question that was before the first respondent, because of the way that the applicant had framed its adjudication response, was whether the DVA had resulted in the waiver of any right by SSM to bring claims based on events which occurred prior to 14 December 2005. SSM argues that the applicant did not frame the issue before the first respondent on costs for delay or disruption in the manner that it now contends which is based on the construction of clause 36.

[41] Although in its adjudication application SSM relied on clause 42.1 of the contract as entitling SSM to pursue by way of progress payment its claim against the applicant for costs of delay and disruption, SSM did not avoid clause 36 and made submissions to the first respondent on the application and construction of clause 36. On the hearing of this application, SSM's submissions (both written and oral) accepted that clause 36 of the contract was relevant to the determination of SSM's claim for costs of delay or disruption. Consistent with that approach, SSM argues that, in any case, what the first respondent did, in effect, was decide that the superintendent had not exercised his powers fairly and that the first respondent would determine the entitlement of SSM to extensions of time for delays caused by events within clause 35.5(b)(i). SSM therefore submits (at Transcript p 67) that the adjudicator did find an entitlement of SSM to an extension of time from 1 December 2005 to 6 September 2006. The interpretation given by counsel for SSM to the first respondent's reasons reflects this submission. Counsel for SSM refers to the first respondent's statement (at p 15 of his reasons) that "what is in dispute is not what EOTs were granted or whether they were reasonable but whether they were granted at all" and submits (at Transcript p 68) that what the first respondent was saying was that whether the superintendent granted 10 days or 15 days did not matter, because the first respondent was now dealing with that issue.

[42] SSM provided particulars in its payment claim of the calculation of the claim of $1,993,575.36 for delay or disruption costs. This amount was broken down into four components in the payment claim: extended contract preliminaries of $1,090,300, disruption costs of $97,537.50, barge and crane downtime of $174,352.21 and loss of recovery of overheads and profit during prolongation period of $631,385.65. The loss of overheads and profit claim was calculated by applying the Hudson formula (see *Hudson's Building and Engineering Contracts*,

11th ed, paragraph 8.182), based on the contract period being prolonged by a further 40 weeks from the original date for practical completion claimed by SSM as 1 December 2005 until the estimated revised date for practical completion claimed by SSM as 6 September 2006. The rationale for this claim was that SSM had to maintain its supervision, labour and site establishment resources on the project and was unable to reallocate those same resources to more profitable work elsewhere. SSM therefore claimed that it had been denied the head office overhead and profit recovery of 7.4% that would have accrued over such period, but for the delay.

Construction of clause 36 of the contract

[43] It was a fundamental step in the process of determining SSM's claim for delay or disruption costs that the first respondent had to consider the terms of clause 36 of the contract. This was mandatory under s 26(2)(b) of the Act. It was also in accordance with *Hargreaves* that SSM had to rely on the relevant provision of the contract that allowed it to pursue in its payment claim the costs of delay or disruption attributable to the applicant as part of the calculation of the value of construction work carried out under the contract.

[44] The construction for which the applicant contended before the first respondent (and also on this application) was unequivocally articulated in a number of places in the adjudication response (such as p 573 of the affidavit of AJ Ritchie filed 3 January 2007) as follows:

> "Before [SSM] is entitled to be paid delay and disruption costs under the first paragraph of cl 36, [SSM] must have an entitlement under the contract to an extension of time under cl 35.5. There would be little point in having this pre-condition unless it was to circumscribe the amount of the delay and disruption costs payable. This is made clear by the fact that [SSM] is to be paid the 'costs as are necessarily incurred by the Contractor by reason of the delay', the delay referred to is the delay for which the extension of time was granted."

The arguments that the applicant put forward to the first respondent as to why SSM was not entitled to any costs for delay or disruption under clause 36 of the contract (ie the claim was in reality damages for alleged breach of contract and all delays had been resolved as a result of the DVA) were predicated on the application of the construction of clause 36 of the contract put forward by the applicant to the first respondent.

[45] SSM's construction was that provided any extension of time for delay or disruption caused by an event referred to in clause 35.5(b)(i) of the contract had been granted, then SSM was entitled to costs that it incurred by reason of delay that could be attributed to events referred to in clause 35.5(b)(i), even if the extension of time had not been granted for all that delay. This was articulated in SSM's submissions in support of the adjudication application as follows (at p 10):

> "If [SSM] was granted an extension of time to the end of March 2006 then [SSM] was granted an extension of time for any delay or disruption caused by the events referred to in Clause 35.5(b)(i). The number of days extension on account of the delay or disruption is irrelevant for purposes of clause 36. The entitlement under clause 36 is not proportional to the number of days extension granted."

and also as follows (at p 12):

> "[SSM] respectfully submits that there is no purpose to be served by considering what extensions of time the Superintendent granted or even should have granted. The important issue is to determine what delay and disruption was caused by the respondent. The measure of the delay or disruption is not the same as the measure of extensions of time."

[46] The first respondent's determination of the claim for costs for delay or disruption was based on the first respondent's acceptance of SSM's construction of clause 36 of the contract. That was reflected by the paraphrasing by the first respondent (at p 18 of his reasons) of the submissions made by SSM (including that last quoted in the preceding paragraph) when rejecting the applicant's criticism of these submissions and the express rejection by the first respondent (at p 12 of his reasons) of the construction advanced by the applicant that required as a pre-condition to the claim for delay or disruption costs under clause 36 that SSM was granted an extension of time under clause 35.5.

[47] The construction contended for by the applicant of clause 36 of the contract before the first respondent and on this application must be correct. The condition within the first paragraph of clause 36 that makes the principal liable to pay to the contractor "such extra costs as are necessarily incurred…by reason of the delay" is that delay or disruption has been caused by the principal or the superintendent or any of their employees, agents or other contractors for which an extension of time has been granted under the contract. The delay for which the principal becomes liable to the contractor to pay costs is the same delay that is the subject of the extension of time that must be granted as a pre-condition for the principal's liability for the costs of the delay. It is a literal construction, which lacks logic, to suggest that any extension of time for delay caused by an event referred to in clause 35.5(b)(i) gives rise to a liability on the part of the principal for costs incurred by the contractor as a result of all delays caused by the principal (whether an extension of time has been granted or not).

[48] It cannot be concluded that the first respondent impliedly identified the period of delay caused by the applicant, the superintendent or those under their control for which the superintendent should have granted extensions of time under clause 35.5(b)(i). Although the first respondent did accept (at p 15 of his reasons) that the superintendent had not exercised his powers fairly under clause 23.1 of the contract, the first respondent did not undertake the exercise of deciding what extensions of time the superintendent should have granted for delay caused by events under clause 35.5(b)(i). It is not surprising that the first respondent did not do that in the light of his acceptance of the submission made by SSM that it did not matter what period of extension of time had been granted for delay in respect of the costs sought under clause 36 as long as there had been the grant of an extension of time for delay caused by the applicant.

[49] SSM's submissions to the first respondent caused him to err in the construction and application of clause 36 of the contract in a most significant way. It had the result that the first respondent did not engage in the essential step in the process of determining what extensions of time the superintendent should have granted under clause 35.5 for delay or disruption caused by any of the events referred to in clause 35.5(b)(i). It also had the consequence that the first respondent did not assess the

costs for delay or disruption in accordance with clause 36 of the contract, as the assessment depended on the determination of the period of the delay or disruption which was caused by the principal, the superintendent or those under the control of the principal or the superintendent for which SSM was entitled to be granted an extension of time under clause 35.5(b)(i).

[50] In view of the conclusion that I have reached about the first respondent's error in the construction and application of clause 36 of the contract, it is not necessary to deal with the applicant's claim that the first respondent erred in law in treating SSM as having an entitlement under the Act to claim the costs of delay or disruption, without reference to the mechanism contained in the contract for the assessment of delay and disruption costs. I will, however, make brief observations on this argument which is connected with the first respondent's error in respect of clause 36. The applicant pointed to the first respondent's statement (at p 12 of his reasons) which was to the effect that the pre-condition in the first paragraph of clause 36 relied on by the applicant amounted to a constraint on SSM's right under the Act to make claims for construction work and that s 99 of the Act rendered such pre-condition void. The decision in *Hargreaves* does not give a contractor the right to include in its payment claim under the Act a claim for costs of delay or disruption caused by the principal as part of the value of construction work carried out under the contract, in the absence of a contractual right for the contractor to pursue such claim for costs of delay or disruption caused by the principal. The first respondent erred in stating that s 99 of the Act rendered the pre-condition in clause 36 of the contract void.

[51] SSM seeks a favourable exercise of the discretion that the court has under s 30 of the *JRA* whether to grant relief on an application for a statutory order of review, when a ground of review is established. Although an adjudicator's decision is made as part of a process that is intended to determine the quantum of progress payments paid under a contract for construction work in a timely and cost effective way, pending any ultimate determination between the parties of their legal rights, the error of law on the construction of clause 36 was of such significance in the first respondent's decision making that it is appropriate to exercise the discretion to set aside at least that part of the first respondent's decision that resulted in the inclusion of item 23 delay and disruption costs and GST on the item 23 amount (in total the sum of $2,192,932.90) in the adjudicated amount: *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 353.

Other matters

[52] It follows from the error of law made by the first respondent in the construction and application of clause 36 of the contract and that the first respondent's decision on that aspect must be set aside, that it is unnecessary to dispose of the arguments addressed to the assessment of the costs of delay or disruption. I will make some observations, however, on the applicant's submission on the component of SSM's delay or disruption costs attributed to loss of recovery of overheads and profit during the period between 1 December 2005 and 6 September 2006 of $631,385.65 that was calculated by applying the Hudson formula. The submission made by the applicant was that damages calculated according to the Hudson formula are not "costs" within the meaning of that word in clause 36 of the contract and can therefore not be included in a progress payment adjudicated under the Act, applying *Hargreaves*.

[53] *Hargreaves* concerned clause 34.9 of the subcontract that was an amended version of AS4903-2000 which stated:

> "For every day the subject of an EOT for a Compensable Cause and for which the Subcontractor gives the Subcontract Superintendent a claim for delay damages pursuant to sub clause 41.1, damages certified by the Subcontract Superintendent under sub clause 41.4 shall be due and payable to the Subcontractor."

Hodgson JA at paragraph [42] in *Hargreaves* found that under that provision delay damages were payable only if an EOT is for a compensable cause and they were not of their nature damages for breach, but rather additional amounts which may become due and payable under the contract. Hodgson JA then stated at paragraph [44]:

> "If they represent off-site costs (such as office overheads) or other on-site costs, it may be a question of fact and degree whether they are for construction work carried out or for related goods and services supplied. They would in my opinion properly be regarded at least as part of the price for the totality of the construction work when completed. And it would seem artificial to say that they are excluded from the Act if they are not referable to work that has already been carried out, particularly when s 9(b) refers to the value of construction work undertaken to be carried out and related goods and services undertaken to be supplied."

[54] There is a distinct difference between clause 36 of the contract and the provision that was considered in *Hargreaves* in that clause 36 makes the principal liable to pay to the contractor "such extra costs as are necessarily incurred" by the contractor by reason of the delay for which the contractor has been granted an extension of time for any event referred to in clause 35.5(b)(i).

[55] Clause 36 of the contract is concerned with payment by the principal during the course of the contract to compensate the contractor for costs incurred as a result of the delay, where the conditions specified in clause 36 have been satisfied. Clause 36 does not close off rights that the contractor may have to sue the principal for damages for breach of contract. The quantum of the progress payment that can be determined by an adjudicator under the Act is limited by s 13 of the Act. The use of the expression "such other costs as are necessarily incurred…by reason of the delay" suggests that the payment for which the principal may be liable under clause 36 of the contract does not extend to recovery of a contribution to off site overheads (which would have been incurred by the contractor in any case) and loss of profits from other opportunities that are unable to be utilised because of the delay. This is consistent with the observation made by Giles J in *Thiess Watkins White Construction Ltd v Commonwealth of Australia* (1992) 14 BCL 61, 77 that "loss suffered by reason of delay is not the same as extra costs incurred by reason of delay". The provision that was considered in that case was "extra costs incurred…by reason of or as a result of or arising from the exercise by the superintendent of the power to grant or allow any extension of time".

[56] If it had been necessary to consider the reliance on the Hudson formula in calculating one of the components of the delay and disruption costs, I would have accepted the applicant's submissions on that component because of the terms of clause 36.

Conclusion on claim for liquidated damages and date for practical completion

[57] Subject to SSM's arguments that the applicant's claim for liquidated damages was taken care of by the first respondent's determination on the costs of delay and disruption, I was satisfied that the first respondent failed to consider the applicant's claim for liquidated damages (and the related claim as to the date for practical completion) on the material that was before the first respondent and had therefore made an error of law. My conclusion on the error of law made by the first respondent in the construction and application of clause 36 of the contract has the result that SSM cannot rely on the first respondent's determination of the costs for delay or disruption as resolving the issue of liquidated damages in favour of SSM.

[58] The applicant's claim for liquidated damages in the payment schedule was sought in general terms, in the sense that the applicant claimed that in the event that any moneys were found by the first respondent to be owing by the applicant to SSM under the contract, the applicant claimed an entitlement to deduct from such moneys the amount of $250,000 which the applicant claimed as liquidated damages under clause 35.6 of the contract, as a result of the claimant's delay in achieving practical completion. The claim of liquidated damages cannot be resolved without the determination of the date for practical completion. As the applicant has paid the adjudicated amount decided by Mr Uher, the claim for liquidated damages (and the date for practical completion) will remain relevant in relation to the finalisation of SSM's claim that was before the first respondent.

Orders

[59] The applicant seeks an order setting aside the first respondent's adjudication decision. The only two components of the adjudicated amount determined by the first respondent were the adjudicated amount decided by Mr Uher and the costs for delay and disruption. There is no utility in setting aside that part of the decision that relates to Mr Uher's adjudicated amount, because it has been paid.

[60] Subject to any further submissions that the parties make on the terms of the orders, I consider that the first respondent's decision dated 20 December 2006 on item 23 delay and disruption costs (including GST) should be set aside. I will hear the parties as to the terms of the orders that should be made to reflect the conclusions that I have reached and what consequential orders are appropriate, including whether SSM's claim for costs of delay and disruption and the applicant's claim in respect of the date for practical completion and the deduction for liquidated damages should be referred to the first respondent for further consideration, according to law. I will also hear submissions of the parties on the question of costs.