SUPREME COURT OF QUEENSLAND

CITATION:	*Hervey Bay (JV) Pty Ltd v Civil Mining and Construction Pty Ltd & Ors* [2008] QSC 58
PARTIES:	**HERVEY BAY (JV) PTY LTD** **(ABN 35 117 304 042)** **(applicant)** **v** **CIVIL MINING AND CONSTRUCTION PTY LTD** **(ABN 88 684 521 128)** **(first respondent)** **and** **WILLIAM TIMOTHY SULLIVAN** **(second respondent)** **and** **THE INSTITUTE OF ARBITRATORS & MEDIATORS AUSTRALIA (ABN 80 008 520 045)** **(third respondent)**
FILE NO:	BS 6243 of 2007
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	14 April 2008
DELIVERED AT:	Brisbane
HEARING DATE:	19 March 2008
JUDGE:	McMurdo J
ORDER:	**The decision dated 30 June 2007 be set aside.**
CATCHWORDS:	CONTRACTS - BUILDING ENGINEERING AND RELATED CONTRACTS – ADJUDICATION – payments – appeal from decision of an adjudicator – validity of a decision about entitlement to a progress payment – entitlement to progress payment where no extension of time was claimed CONTRACTS - BUILDING ENGINEERING AND RELATED CONTRACTS – CONSTRUCTION OF PARTICULAR CONTRACTS – entitlement to progress

payments – entitlement to delay costs – where parties have modified the standard conditions of contract

CONTRACTS - BUILDING ENGINEERING AND RELATED CONTRACTS – CONSTRUCTION OF PARTICULAR CONTRACTS – entitlement to extensions of time – power of Superintendent to grant extensions of time – effect of modification of the standard terms upon the powers of the Superintendent

ACN 060 559 971 Pty Ltd (formerly Abel Point Marine (Whitsundays) Pty Ltd) v O'Brien [2007] QSC 91, (2007) 23 BCL 421, distinguished

620 Collins Street v Abigroup Contractors Pty Ltd (No 2) [2006] VSC 491, cited

Abacus v Davenport [2003] NSWSC 1027, applied

Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd [2008] QCA 83, applied

Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd & Anor [2007] QSC 220, distinguished

John Holland Pty Ltd v Roads & Traffic Authority of New South Wales [2007] NSWCA 19, (2007) 23 BCL 205, applied

Kane Constructions Pty Ltd v Sopov [2005] VSC 237, (2006) 22 BCL 92, cited

Peninsula Balmain v Abigroup Contractors Pty Ltd [2002] NSWCA 211, (2002) 18 BCL 322, distinguished

Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd [2007] QSC 333, cited

Transgrid v Siemens Ltd [2004] NSWCA 395, (2005) 21

BCL 273, applied

s 100, Part 3, *Building and Construction Industry Payments Act* 2004 (Qld)

s 13, s 48, *Judicial Review Act* 1991 (Qld)

s 128, *Supreme Court Act* 1995 (Qld)

COUNSEL:	Mr PG Bickford and Mr M Ambrose for the applicant
	Mr R Holt SC and Mr S McLeod for the respondent
SOLICITORS:	Holding Redlich for the applicant
	Clayton Utz for the respondent

[1] The applicant and the first respondent are the parties to a contract for the performance of construction work at Pialba. I shall refer to the parties, as does their contract, as the Principal (the applicant) and the Contractor (the first respondent).

[2] The dispute here concerns the validity, in whole or in part, of an adjudicator's decision as to a progress payment, which was made under the *Building and Construction Industry Payments Act* 2004 ('the *Payments Act*'). The adjudicator was the second respondent, Mr W T Sullivan. He was appointed by the third respondent. His decision was given on 30 June 2007. He decided that the adjudicated amount was $921,079.68, due for payment on 12 June 2007 and attracting interest at 10 per cent.

[3] The Principal seeks statutory orders of review under the *Judicial Review Act* 1991 (Qld) and alternatively a declaration pursuant to s 128 of the *Supreme Court Act* 1995 (Qld) that the decision is void. The alternative claim is made upon the same arguments and its purpose appears to be to avoid the potential for the proceedings under the *Judicial Review Act* to be dismissed pursuant to s 13 or s 48 of that Act.

[4] The Contractor argued that the proceeding should be dismissed under s 13 or s 48, in reliance upon *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA) Pty Ltd*[1] and *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd & Anor*[2]. Section 13 provides as follows:

> **"13 When application for statutory order of review must be dismissed**
> Despite section 10, but without limiting section 48, if—
> (a) an application under section 20 to 22 or 43 is made to the court in relation to a reviewable matter; and

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1 [2007] QSC 333.
2 [2007] QSC 220.

> (b) provision is made by a law, other than this Act, under which the applicant is entitled to seek a review of the matter by another court or a tribunal, authority or person;
> the court must dismiss the application if it is satisfied, having regard to the interests of justice, that it should do so".

[5] The Contractor argued that "provision is made by a law, other than this Act, under which the applicant is entitled to seek a review of the matter by another court or a tribunal, authority or person" by s 100 of the Payments Act. It provides that nothing in Part 3 of the Payments Act (that being the part providing for the adjudication and recovery of progress claims) affects any right a party to a construction contract may have under the contract and that in any proceedings a court or a tribunal may make orders considered appropriate for the restitution of any progress claim which has been paid.

[6] The Principal argued that those cases were wrongly decided and that s 13 does not apply because the effect of s 100 is not to provide for "a review of the matter by another court ...". It says that the effect of s 100 is to make the adjudicator's decision provisional but not to provide for a review of that decision. The correctness of that argument is now demonstrated by the recent judgment of the Court of Appeal in *Intero*[3]. As the Court there held, s 13 is not engaged in such cases but there is still the discretion to dismiss the proceeding under s 48, which provides that the Court may dismiss an application if it would be "inappropriate … for proceedings in relation to the application … to be continued".

[7] The main argument for the Principal is that the adjudicator has erred in law by misinterpreting the contract, and that this error affects the adjudicated amount to the extent of approximately $740,000. If that ground of review could be established then the interests of justice would not be served by nevertheless dismissing these proceedings and leaving it to the Principal to commence other proceedings based upon the same legal argument. The present case, at least in relation to that ground, is different from *Intero* where the grant of judicial review would not have conclusively determined the issue and where that could occur only by a factual investigation "in properly instituted court proceedings of a comprehensive character later in the piece"[4].

[8] The need for expedition in the operation of Part 3 of the Payments Act is clear and has been observed in many judgments, most recently by the Court of Appeal in *Intero*. The Contractor's argument for a dismissal of these proceedings under s 48 is stronger for the alleged grounds for review which do not involve simply an argument of contractual interpretation. But the ground or grounds involving the interpretation of the contract or some other question of law are in a different category. Those grounds have been fully argued and their merits can and should now be decided.

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3 *Intero Hospitality Projects Pty Ltd v Empire Interior (Australia) Pty Ltd* [2008] QCA 83.

4 [2007] QSC 220 at [10].

The Contractor's claim

[9] The Contractor made a payment claim for a balance of $1,004,708.00 and the Principal responded with a Payment Schedule stating that it proposed to pay $135,793.83.

[10] The Contractor submitted an application for adjudication to the third respondent which appointed Mr Sullivan, the second respondent, as adjudicator. There is no suggestion that the various steps towards an adjudication were not duly taken.

[11] The bulk of the amount in dispute is made up of what was called Claim No. 38. This was for a total amount of $821,439.84 and it was for the payment of extra costs incurred by the Contractor because of delay. The adjudicator decided that $53,739.05 of this should be disallowed and that the balance of $767,700.79 should be allowed. The Principal's written submissions here concede that Claim 38 is the only relevant claim in these proceedings.

The contract

[12] The contract incorporated the general conditions of contract AS 2124-1992 but with several amendments.

[13] It provided for progress payments by clause 42.1 (with some amendments to the standard condition) and the addition of clauses which need not be considered. By cl 42.1 it was agreed that a claim for payment should include the "value of the work carried out by the Contractor in the performance of the contract at that time" and that within 10 business days, the Superintendent was to assess the claim and issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, should be made. It further provided that within a certain time the Principal should pay to the Contractor the amount shown in the Payment Certificate.

[14] Clause 36 provided for delay or disruption costs as follows:

> "36 Delay or disruption costs
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> Where the Contractor has been granted an extension of time under Clause 35.5 for any delay 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 valued by the Superintendent under Clause 40.5.
>
> Where the Contractor 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 the Annexure 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 valued by the Superintendent under Clause 40.5

The Contractor shall not be entitled to any Claim or valuation for any delay costs which could have been reasonably avoided by the Contractor.

Nothing in 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."

[15] So according to cl 36, an entitlement to delay costs depended upon an extension of the time for practical completion being granted under cl 35.5. In this contract that clause was substantially amended from the standard condition. Relevantly it provided as follows:

"35.5 Extension of time for practical completion

When it becomes evident to the Contractor that anything, including an act or omission of the Principal, the Superintendent or the Principal's employees, consultants, other contractors or agents, may delay the work under the Contract, the Contractor shall promptly notify the Superintendent in writing with details of the possible delay and the cause ...

If the Contractor is or will be delayed in reaching Practical Completion by a cause described in the next paragraph and within two days after the delay the Contractor gives the Superintendent a written claim for an extension of time for Practical Completion setting out the facts on which the claim is based, the Contractor shall be entitled to an extension of time for practical completion.

The causes are –

...

(b) Any of the following events whether occurring before, on or after the date for Practical Completion, which are beyond the reasonable control of the Contractor –

(i) delays caused by –

- the Principal;
- the Superintendent;
- the Principal's employees, consultants, other contractors or agents ...

> With any claim for an extension of time for Practical Completion, or within 14 days thereafter, the Contractor shall give the Superintendent written notice of the number of days extension claimed and shall set out in detail the facts upon which the claim is based.
>
> If the Contractor is entitled to an extension of time for Practical Completion the Superintendent shall, within 28 days after receipt of the notice of the number of days of extension claimed, grant reasonable extension of time. If within the 28 days the Superintendent does not grant the full extension of time claimed the Superintendent shall before the expiration of the 28 days give the Contractor notice in writing of the reason. ..."

[16] In cl 35.5 of the standard conditions, there is another sentence which provides that the Superintendent may at any time before the issue of the Final Certificate, extend the time for practical completion, notwithstanding that the Contractor is not entitled to an extension of time. But in this contract that sentence in cl 35.5 was deleted. In its place was a new cl 35.5A to which there was added a new cl 35.5B. Those clauses were as follows:

> "35.5A Other Extension by Superintendent
>
> Notwithstanding that the Contractor is not entitled to or has not claimed an extension of time, the Superintendent may at any time and from time to time before the issue of the Final Certificate by notice in writing to the Contractor extend the time for Practical Completion for any reason *in the Superintendent's absolute discretion and without being under any obligation to do so*.
>
> 35.5B Conditions Precedent to Extension of Time Claims
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> Despite clause 35.5 the Contractor shall not be entitled to an extension of time to the Date for Practical Completion or any other Claim unless it has:
>
> (a) complied strictly with Clause 35.5 (including without limitation) given all the notices required by Clause 35.5 in the forms and within the time periods specified in clause 35.5; and
>
> (b) demonstrated to the satisfaction of the Superintendent that the delay has affected the Contractor's critical path for work under the Contract (including without limitation demonstrating that the critical path of the latest approved construction program is affected)."

I have highlighted in cl 35.5A the differences between this term and the sentence from the standard cl 35.5 which was deleted. As I will discuss, those differences are significant.

[17] Clause 23 provides for the role of the Superintendent. Again the standard condition was amended. This clause 23 relevantly provided as follows:

> "23 Superintendent
>
> The Principal shall:
>
> (a) ensure that at all times there is a Superintendent; and
>
> (b) endeavour to ensure that in the exercise of the functions of the Superintendent under Clause 35.5 (assessment of extensions of time), Clause 35 (assessment of delay or disruption costs), Clause 42.5 (issue of the Certificate of Practical Completion), Clause 40.5 (valuation of variations), Clause 42.1 (issue of payment certificates), Clause 42.8 (issue of the Final Certificate), the Superintendent –
>
> (i) acts honestly and fairly;
>
> (ii) acts within the time prescribed under the Contract or where no time is prescribed, within a reasonable time; and
>
> (iii) arrives at a reasonable measure or value of work, quantities or time.
>
> The Superintendent may carry out its functions under the Contract (other than those referred to in paragraph (b) above):
>
> (c) as agent and representative of the Principal;
>
> (d) in accordance with instructions given to it by the Principal (acting in its absolute discretion unless the Contract expressly requires otherwise) and in a manner consistent with the interests of the Principal."

[18] A cl 23A was added to the general conditions as follows:

> "23A Principal's and Superintendent's discretion
>
> The Contractor agrees that except to the extent expressly provided in the Contract:
>
> (a) the Principal and Superintendent may exercise those discretions and rights given to them under the Contract in whatever way the Principal or Superintendent decide in their absolute discretion; and
>
> (b) the Principal or Superintendent may grant, refuse or grant subject to reasonable conditions any consent required from the Principal or Superintendent in their absolute discretion."

[19] There were many arguments which the Principal advanced to the adjudicator as to why delay costs under cl 36 should not be included in this progress payment. They included factual arguments that the alleged delay was not demonstrated. But there were also arguments raising questions of law, for the most part involving the proper construction of the contract. Those arguments were rejected and the Principal says that in each case this involved an error of law upon which the decision should be reviewed. It is convenient now to go to two of those arguments which occupied much of the Principal's submissions at this hearing.

[20] The first is that no delay costs could be payable unless the Superintendent had granted an extension of time corresponding with the delay in question. This argument emphasises the words at the commencement of cl 36: "Where the Contractor has been granted an extension of time under cl 35.5 for any delay ...". The Superintendent had not granted such extensions. I shall call this the Clause 36 point. The Contractor's argument, which the adjudicator accepted, was that the adjudicator was entitled to allow delay costs absent the grant of an extension of time if he concluded, as he did, that the Contractor was entitled to an extension of time.

[21] Then the Principal argued that for the most part (to the extent of approximately $740,000) the delay costs did not relate to extensions of time to which the Contractor was entitled, because (as is undisputed) the Contractor had not given the notices required by cl 35.5. Accordingly cl 35.5B put paid to any entitlement to an extension of time in those instances. The Contractor's argument, which the adjudicator accepted, was that this did not affect the operation of cl 35.5A and that the Contractor was *entitled* under that clause to an extension in each case. This was because the contract, upon what was said to be its proper construction, required the Superintendent to consider whether to grant those extensions under cl 35.5A, and to do so "honestly and fairly". The adjudicator concluded that the Superintendent should grant the extensions under cl 35.5A in this case because that is what an honest and fair Superintendent "on the balance of probabilities"[5] would do. The Principal says that this reasoning misconstrued the contract and in particular cl 35.5A. I shall call this the Clause 35.5A point.

The Clause 36 point

[22] Section 12 of the *Payments Act* provides a right to progress payments under a construction contract. In the present case, as already noted, the contract itself provides a right to progress payments. Section 13 provides for the quantification of a progress payment:

> "13 Amount of progress payment
>
> The amount of a progress payment to which a person is entitled in relation to a construction contract is –
>
> (a) the amount calculated under the contract; or

[5] In the Adjudicator's reasons at [110].

> (b) if the contract does not provide for the matter, the amount calculated on the basis of the value of construction work carried out or undertaken to be carried out, or related goods and services supplied or undertaken to be supplied, by the person, under the contract".

It is common ground that it is paragraph (a) which applies here: the amount of a progress payment to which the Contractor was entitled was an amount calculated under the contract.

[23] By cl 42.1 of this contract the Contractor may make a progress claim for "the value of the work carried out by the contractor in the performance of the contract to that time together with all amounts then due to the Contractor arising out of or in connection with the contract or for any alleged breach thereof". The Superintendent is to assess the claim and issue a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to be made. The Superintendent is to set out in the certificate "the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference". It then provides that provided the Contractor has issued a valid tax invoice for the certified amount, there should be paid an amount not less than that shown on the payment certificate. The contract thereby provides a regime for the assessment of a progress claim and the calculation of the amount to which the Contractor is then entitled.

[24] The Principal argues that "the amount calculated under the contract", as that expression appears in s 13, is whatever was the amount in fact calculated by the Superintendent. The Contractor's argument, which the adjudicator accepted, is that s 13 refers to the amount which should have been calculated under the contract and not the amount in fact calculated. The authorities, with one exception, are against the Principal's argument and in favour of the adjudicator's interpretation of s 13. The first of these cases is the judgment of McDougall J in *Abacus v Davenport*[6]. In *Transgrid v Siemans Ltd*[7], Hodgson JA (with whom Mason P and Giles JA agreed) said that although he did not have to decide the matter, he preferred the reasoning in *Abacus* to that of Macready AJ who at first instance in *Transgrid* disagreed with *Abacus*. It is the judgment of Macready AJ upon which the Principal here strongly relies, it being the only authority cited for its argument. Hodgson JA adhered to the same view in *John Holland Pty Ltd v Roads & Traffic Authority of New South Wales*[8], and Beazley and Basten JJA agreed. Hodgson JA said:

> "38 I note that in *Transgrid v. Siemens Limited* [2004] NSWCA 395, (2004) 61 NSWLR 521 at [35], I expressed the view (obiter) to the effect that "calculated in accordance with the terms of the contract" meant calculated on the criteria established by the contract, and did not mean reached according to mechanisms provided by the contract; and I adhere to that view as being more in accord with the use of the word "calculated" and with the prohibition in s.34 of the Act on

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6 [2003] NSWSC 1027.
7 [2004] NSWCA 395.
8 [2007] NSWCA 19 at [38].

> contracting out of the effect of the Act. On the other view, contractual provisions denying progress payments for construction work otherwise than as certified by a superintendent or in accordance with review procedure provided by the contract could in my opinion have the effect of restricting the operation of the Act, and thus be made void by s.34. I do not think the legislature intended to make such usual provisions void".

Basten JA said[9]:

> "A further fact which gives support to the conclusion set out above is that, as explained by Hodgson JA at [40], Part 2 of the *Building Payment Act*, and in particular the right to a progress payment conferred by s 8 and the calculation of the amount in accordance with ss 9 and 10, suggests that the statutory right to payment is unaffected by calculations undertaken by Superintendent or other authority appointed to value work under the contract. In other words, the statutory regime is, partly, though not of course wholly, independent of the terms of the construction contract and is intended to operate according to its own statutory terms: see the prohibition on contracting out in s 34".

I am not persuaded that this interpretation of the equivalent of s 13 of the *Payments Act*, and in particular the expression "amount calculated under the contract" is wrong. There was no error by the adjudicator in applying these authorities and holding that the Contractor was entitled to a progress payment which he could calculate on the criteria established by the contract.

[25] However that is not in itself an answer to the Clause 36 point. In his calculation of the amount of the progress payment, the adjudicator was obliged to act according to the contract. This comes also from s 26 of the *Payments Act* which provides that an adjudicator is to consider only the provisions of the Act, the payment claim and the payment schedule, the results of any inspection carried out by the adjudicator and "the provisions of the construction contract from which the application arose".

[26] According to cl 42.1, the Contractor was entitled at any relevant time to a progress payment qualified by the value of the work carried out by the Contractor to that time together with all amounts then due to the Contractor arising out of or in connection with the contract. It is common ground that that expression "all amounts then due to the Contractor" would include delay costs under cl 36.

[27] But under cl 36, delay costs are payable only "where the Contractor has been granted an extension of time". So could delay costs be said to have been "then due to the Contractor" when there had been no extension of the date for practical completion? The Principal argued they could not, relying simply on the terms of cl 36 and cl 42.1. There has been no extension and the adjudicator said that he could not grant it. The

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9 [2007] NSWCA 19 at [77].

Contractor argued, as the adjudicator held, that delay costs could be included in a progress claim notwithstanding the absence of a granted extension of time, if the Contractor was then *entitled* to that extension.

[28] The Contractor's argument has apparent support in the judgment of Mullins J in *ACN 060 559 971 Pty Ltd (formerly Abel Point Marine (Whitsundays) Pty Ltd) v O'Brien*[10]. However it is necessary to discuss the context in which her Honour made the comment which is relied upon because, as will appear, the present point was not then in issue. In this case, which I shall call *Abel Point*, a Principal sought judicial review of an adjudicator's decision in a number of respects. Relevantly there was a challenge to the adjudicator's allowance of delay costs. The contract was in terms relevantly the same as the present contract for the purposes of this Clause 36 point. But the arguments were quite different. The Contractor did not argue that the adjudicator should himself determine what extensions of time should have been granted by the Superintendent. Rather it argued that if there had been *any* extension of time granted by the Superintendent, then the pre-condition in cl 36 was thereby satisfied. It was sufficient that the Contractor had been granted *an* extension of time under cl 35.5. It was not necessary that an extension of time be granted corresponding with the period of the delay for which delay costs were claimed. The argument for the Principal in that case was that delay costs were payable only for a delay corresponding with an extension of time under cl 35.5. This argument was put in terms of an entitlement to such an extension of time. The Principal's argument was that the Contractor had to establish that it was at least entitled to the grant of an extension of time for a period corresponding with its delay claim, and that on the evidence it had failed to do so.

[29] Mullins J upheld the Principal's argument. It was in this context that her Honour said at para [49]:

> "[The Contractor's] submissions to the [adjudicator] 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 [adjudicator] 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 [adjudicator] 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 [the Contractor] was entitled to be granted an extension of time under clause 35.5(b)(i)".

[30] So the present point was not argued in *Abel Point*. Moreover the applicant's argument there that the adjudicator should have undertaken the task of the Superintendent in determining what extensions of time should have been granted was premised

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[10] [2007] QSC 91 at [49].

apparently upon the particular fact in that case that the Superintendent had abrogated his role under the contract[11].

[31] In the present case, the adjudicator found that the Superintendent had not made any decision in respect of the extensions of time relevant to the claims for delay costs. The Principal argued that the adjudicator was wrong about that, and that the Superintendent had in fact refused to grant extensions. It is unnecessary to determine that question but in that respect I think the adjudicator was correct. In a letter dated 24 May 2007 the Superintendent approved two claims for the effects of wet weather but wrote that "all other claims for extension of time are not approved at this time pending further information and discussion with the Contractor", although in an attachment to the letter he added that "the grounds for delay and disruption claimed are (in the main) contrary to the terms and conditions of the contract, and do not reflect the changes in the site construction works methodology that clearly effect [sic] the program of WUC". Whether the Superintendent here had refused the extensions of time or simply postponed his consideration of them, for this Clause 36 point the relevant fact is that the extensions had not been granted.

[32] In, for example, an arbitration to finally determine the rights and obligations under this contract, it would be open to the arbitrator to award a component for delay, if persuaded that extensions of time ought to have been granted. But according to the contract, and absent the benefit of such an outcome in an arbitration or other proceeding which finally determined the parties' rights, there would be no amount presently due for delay costs absent an extension of time. Apart from the *Payments Act*, there would be no accrued cause of action by which the Contractor could have sued for the delay costs as a debt then due. The determination of this Clause 36 point ultimately depends upon the scope of an adjudicator's powers, and in particular his power to "calculate" the amount of a progress payment. Consistently with the above authorities, an adjudicator is able to make his own calculations and is not bound by those of the Superintendent. If the Contractor has an entitlement to an extension of time, the grant of which would entitle it to delay costs, then the Contractor could be said to have an entitlement to a progress payment in an amount, according to s 13, "calculated" under the contract so as to give effect to that entitlement. This is an example of the way in which, as Basten JA explained in *John Holland v Roads and Traffic Authority*[12], "The statutory regime is partly, though not of course wholly, independent of the terms of the construction contract and is intended to operate according to its own statutory terms". The adjudicator did not err on this point. Whether the Superintendent had refused or postponed consideration of the extensions of time, the adjudicator was entitled to include delay costs if the Contractor was entitled to those extensions.

The Clause 35.5A point

[33] Clause 35.5 entitles the Contractor to the extensions of time in the circumstances and upon the conditions there described. As noted already, ordinarily these standard conditions of contract also contain a sentence within cl 35.5 by which the

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11 [2007] QSC 91 at [39].

12 [2007] NSWCA 19 at [77].

Superintendent may extend time notwithstanding that the Contractor is not entitled to an extension, but in this contract that sentence was deleted and replaced by cl 35.5A with the addition of cl 35.5B. On the face of the contract, the apparently clear intention is to provide an *entitlement* to an extension of time according to cl 35 and in other cases to provide a power in the Superintendent to grant an extension under cl 35.5A although there is no such entitlement. Moreover, cl 23, in obliging the Principal to endeavour to ensure that the Superintendent acts honestly and fairly in the exercise of certain functions, includes within those functions the functions under cl 35.5 but makes no reference to that under cl 35.5A. In that respect cl 23 seems consistent with cl 35.5A, which refers to "the Superintendent's absolute discretion" and to the absence of "any obligation" under that clause.

[34] The Principal thereby argues that there was no *entitlement* to an extension from cl 35.5A, with the consequence that most of the claim for delay costs should not have been allowed by the adjudicator. The Contractor argued, and the adjudicator held, that cl 35.5A did impose an obligation upon the Superintendent to act fairly and honestly. The adjudicator then reasoned that the Superintendent, if acting in that way in the exercise of his discretion under cl 35.5A, would grant the extensions of time so that the Contractor was now entitled to them and consequently to the delay costs. That conclusion was on the basis of *Peninsula Balmain v Abigroup Contractors Pty Ltd*[13] and cases which have followed it.

[35] In *Peninsula Balmain* the contract was in the standard conditions of AS2124. So within its cl 35 there was the discretionary power in the Superintendent to grant an extension absent an entitlement. The Superintendent there had extended the date for Practical Completion to a certain date and no other extension had been sought or granted. In proceedings brought by the Contractor to finally determine the parties' rights, the whole dispute was sent to a referee. One matter which he had to determine was the Principal's entitlement to liquidated damages. He found that it was entitled to liquidated damages, not from the date to which the Superintendent had extended the date for Practical Completion, but from a later date. The referee found that according to the (standard) paragraph of 35.5 which conferred a discretion to grant an extension to a Contractor not entitled to it, the Superintendent should have granted extensions to the date from which he then assessed liquidated damages.

[36] The referee's report came before the Supreme Court of New South Wales for adoption, variation or rejection and at first instance, Barrett J confirmed those conclusions. The Principal's appeal was allowed in part but on other questions. Its appeal in relation to liquidated damages was dismissed. The leading judgment was given by Hodgson JA, with whom Mason P and Stein JA agreed. Hodgson JA discussed the several arguments as to the discretion to extend time under that paragraph of cl 35.5, one of which was that the power was for the benefit only of the Principal. Hodgson JA held as follows[14]:

> "In my opinion, no error is shown regarding the primary judge's acceptance of the referee's conclusion based on the superintendent's power. In my opinion, this power is one capable of being exercised

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13 [2002] NSWCA 211.

14 [2002] NSWCA 211 at [79] and [81].

> in the interests both of the owner and the builder, and in my opinion the superintendent is obliged to act honestly and impartially in deciding whether to exercise this power. Of course, if a timely claim has not been made, and the ground on which an extension is claimed is one which is difficult to decide because of the time that has elapsed since the time when the claim should have been made, that may be a ground on which the superintendent can fairly refuse the extension; but there is no suggestion that that is the case here.
>
> For those reasons, it was in my opinion open to the referee to do what he considered the superintendent should have done in response to the claims made to the referee; and it was open to the referee to conclude that the superintendent, acting fairly, would have granted the extensions which the referee found to be justified. This view may have some further support from the referee's finding that Peninsula was itself in breach of cl.23 in failing to ensure that the superintendent arrive at a reasonable measure of time in respect of delays caused by Peninsula and the superintendent".

[37] Thus Hodgson JA held that the Superintendent was under an obligation in that he was "obliged to act honestly and impartially in deciding whether to exercise this power"[15].

[38] *Peninsula Balmain* has been subject to strong academic criticism[16] but it has been followed in the Supreme Court of Victoria by Warren CJ in *Kane Constructions Pty Ltd v Sopov*[17] and by Osborn J in *620 Collins Street v Abigroup Contractors Pty Ltd (No 2)*[18]. In each of those cases the contract appears to have been in substantially the same terms as that considered in *Peninsula Balmain*. In *Kane Constructions*, Warren CJ held that under cl 35.5, the Superintendent was there obliged to certify an extension of time ... "where it may be fair and reasonable to do so, notwithstanding a plaintiff's failure to make a claim or non-compliance with the relevant timing requirements for an extension of time claim"[19].

[39] So in the present case, in applying the reasoning from *Peninsula Balmain*, the adjudicator construed this contract as imposing an obligation upon the Superintendent under cl 35.5A. The Principal argues that this was in error because it is contrary to the words of the clause. In particular it is inconsistent with the express provision in this clause that the Superintendent is under no obligation. Further, it is inconsistent with the express provision here that the Superintendent's discretion is "absolute".

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15 [2002] NSWCA 211 at [79].

16 See, for example, A Baron, "Role of the contract administrator: breathing new life into the 'prevention principle'" (2003) *Building and Construction Law* 19(5) 334-344; J Ritchie, "The superintendent's power to extend time in the absence of a complying EOT claim: is the debate over?" (2007) *Australian Construction Law Bulletin* 19(1) 1-6; D Goldstein and C Wong, "Power to extend time: a warning to principals on clause 35.3" (2002) *Australian Construction Law Bulletin* 14(10) 112-113; J Ritchie, "Abigroup Contractors Pty Ltd v Peninsula Balmain Pty Ltd (No 2)" (2002) *Australian Construction Law Bulletin* 14(2) 23-24; D Rodighiero, "Casenotes: Abigroup Contractors Pty Ltd v Peninsular Balmain Pty Ltd (No 2) (2001) NSWSC 752 (3 September 2001)" (2001) *Australian Construction Law Bulletin* 13(8) 65-67.

17 (2006) 22 BCL 92, [2005] VSC 237.

18 [2006] VSC 491.

19 [2005] VSC 237 at [660].

[40] That submission of the Principal should be upheld. Accepting the correctness of *Peninsula Balmain* and the cases which have followed it, in this contract however the parties have substituted different terms and the expressed intention was to confer a power on the Superintendent without imposing any obligation as to the exercise of that power. Indeed the deletion of the relevant paragraph in cl 35.5 and the addition of cl 35.5A and cl 35.5B appear to have been drafted with *Peninsula Balmain* in mind. In my view there is no tenable construction of cl 35.5A by which the Superintendent could be said to be under any obligation and in particular an obligation to extend time if it would be fair to do so. Absent such an obligation there was no entitlement in any sense to an extension of time, if there had not been compliance with cl 35.5. So in the adjudicator's calculation, he was wrong to have included delay costs for which extensions of time have not been granted and for which there was no entitlement to an extension under cl 35.5 or cl 35.5A. This error resulted in the adjudicated amount being excessive by about $740,000.

The other arguments for review

Clause 43(b)

[41] Clause 43(b) of the contract is as follows:

> "Not earlier than fourteen days after the Contractor has made each claim for payment under cl 42.1, and before the Principal makes that payment to the Contractor, the Contractor shall give to the Superintendent a Statutory Declaration by the Contractor or, where the Contractor is a corporation, by a representative of the Contractor who is in a position to know the facts declared, that all subcontractors have been paid all monies due and payable to them in respect of work under the contract and also as to the matters referred in cl 43B".

[42] Material was not provided according to cl 43(b). From this the Principal argues that the Contractor was not entitled to lodge a claim under the *Payments Act*. The adjudicator rejected that submission. He held that the clause did not provide a pre-condition to the validity of a progress claim under the contract or under the *Payments Act*. He noted that the clause required the provision of material *after* the submission of a progress claim.

[43] In my view the adjudicator was correct in this respect. Clause 43(b) does not expressly provide for the consequence or consequences argued by the Principal and nor do they follow by necessary implication. Rather, it is cl 43(c) which expressly provides for the consequence of non-compliance, which is that the Principal may withhold payment of monies due to the Contractor until a statutory declaration or documentary evidence is received by the Superintendent. But cl 43 does not purport to qualify the statutory right to payment of a progress payment "calculated" under the contract, and it says nothing about that process of calculation.

Annexure Item 47

[44] The annexure to the conditions of contract contains this item 47:

> "47 Maximum rate per day for delay or disruption costs: (Clause 36(b))" $1,000.00

[45] Yet, cl 36, set out above at [14] makes no reference to the annexure. Nor does it limit the amount to which the Contractor can be entitled under that clause, save that it is to be an amount valued by the Superintendent under cl 40.5, which makes no reference to the annexure or to any such limitation of $1,000.00 per day.

[46] Paragraph (b) within cl 36 provides that "nothing in Clause 36 shall ... (b) limit the Principal's liability for damages for breach of contract". This simply makes the distinction between damages for breach of contract and amounts to which the Contractor might be entitled under cl 36. So the reference in Annexure Item 47 to "Clause 36(b)" is difficult to understand.

[47] The Principal argues that the effect of item 47 is to limit delay costs under cl 36 to the equivalent of $1,000.00 per day. The adjudicator rejected that argument. He held, the Contractor says correctly, that item 47 limited the Principal's liability for damages for breach of contract, because that is the matter referred to in paragraph (b).

[48] The adjudicator reasoned as follows:

> "This ... appears to be founded on a misconception that the claimant is claiming delay damages whereas my reading of the claim is that it is a claim for the contractual entitlement to be paid for delay costs. It is true that there is an agreed limit on the amount of damages payable under cl 36(b) of the contract but there is no pre-agreed rate for delay costs. Clause 36 distinguishes between costs of delay and disruption on the one hand and damages on the other. Clause 36(b) (to which the daily limit of $1,000 applies) relates solely to damages for breach of contract".

[49] Against the adjudicator's view there is first the fact that item 47, apart from its reference to cl 36(b) rather than simply cl 36, seems plainly to refer to delay or disruption costs rather than to damages. Secondly, the notion that item 47 is intended to limit the Principal's liability for damages for a breach of contract, or more specifically for a breach of contract resulting in delay or disruption, is inconsistent with cl 36 itself, which provides that nothing in that clause shall limit the Principal's liability for damages.

[50] On the other hand, there are difficulties in the interpretation argued by the Principal. The first is the reference to cl 36(b), although it may be, as the Principal argues, that this should be seen as a typographical error and as an intended reference simply to cl

36. Next is the point that cl 36 itself gives no indication of such a limitation. Rather than referring, as do several other clauses, to the annexure, it says nothing of the annexure or any qualification to the provision for a valuation by the Superintendent. Nor is there within cl 40.5 a reference to this limitation. It would be unusual at least if the parties have agreed to limit delay or disruption costs, not by anything within cl 36 or cl 40.5, but by this reference in item 47. But despite these difficulties, the interpretation argued by the Principal is no less unattractive than that which the adjudicator preferred.

[51] Clause 35.6 provides for liquidated damages for delay in reaching Practical Completion. By cl 35.7 it is provided that "the Contractor's liability under cl 35.6 is limited to the amount (if any) stated in the annexure". Item 43 of the annexure is described as "limit of liquidated damages (clause 35.7)" and provides for a limitation of $1,000.00 per day.

[52] Clause 35.8 apparently provides for a bonus for early Practical Completion. It provides that if the date of Practical Completion is earlier than the date for Practical Completion the Contractor is to be paid "the bonus stated in the annexure for every day after the date of Practical Completion to and including the date for Practical Completion" and that the "total of the bonus shall not exceed the limit stated in the annexure". But within the annexure there is item 44 in which next to "bonus for early Practical Completion (clause 35.8)" appears the word "nil" and there is item 45, "limit of bonus (clause 35.8)" against which also appears "nil". So the contract in relation to this bonus is self-contradictory. It provides for a bonus, and a limit on that bonus, within the conditions of contract before appearing to provide within the annexure, in one instance for no bonus and then in another for no limit upon a bonus.

[53] Then there is item 46 of the annexure which, next to "extra costs for delay or disruption: (clause 36)" has provision for some details to be inserted under the word "event" but also the words "(not applicable)". That is then followed by item 47 of the annexure, which is the one in question.

[54] All of this gives the impression that something has gone awry in the preparation of this contract document and that it does not represent the intention of at least one of the parties. The connections between cl 35.8 and cl 36 and items in the annexure in have no rational explanation. Perhaps the intention was that $1,000 per day would apply to the bonus for early Practical Completion and that there was no intention to so limit delay or disruption costs under cl 36. But to interpret the contract in that way would require a substantial restructure of the terms of the annexure. And neither party argued for such an interpretation before the adjudicator.

[55] Whilst I think that the adjudicator's interpretation was wrong, I am not persuaded that I should remit the dispute to him for reconsideration in order to limit the operation of cl 36 to $1,000 per day. It may well be that with the benefit of a fuller argument on this question, and a consideration of possibilities other than those argued to the adjudicator, it will become apparent that the costs recoverable under cl 36 should not be limited in this way. So I am not persuaded that the adjudicator's decision not to limit the costs in that way should be the subject of an order for review.

The alleged failure to consider evidence

[56] It is argued that the adjudicator erred in law by failing to consider or "properly consider" the reports of Mr Welsh, Mr Wilson and Mr Gregg. It is said to be apparent that in relation to claims for extension of time, on no view of the matter was there delay to any activity on the critical path of the Contractor. It is also said that there are many claims for extensions of time for which, according to Mr Welsh and Mr Wilson, there was no reliable evidence to accurately identify the time at which works were commenced. So it is said that there was a breach of the rules of natural justice by not considering these reports.

[57] In my view it far from appears that the adjudicator failed to consider the reports. In the course of oral submissions it emerged that the Principal's argument had proceeded upon a misunderstanding of the detail of the Contractor's program and the critical path. But in any case, if the adjudicator was wrong in assessing these factual questions in relation to extensions of time, it is another matter to say that he gave no consideration to the Principal's case and the evidence which it provided. There are very many references in the adjudicator's detailed and carefully prepared reasons which indicate quite the contrary.

Result

[58] The Principal has demonstrated that the adjudicator erred in law by his construction of the contract, and specifically of cl 35.5A. This had the result that about $740,000.00 of the adjudicated amount was wrongly included[20]. The decision dated 30 June 2007 will be set aside. The parties ought to be able to agree on the correct amount which would follow from the Principal's success on the Clause 35.5A point. It is preferable that they do so and I make a further order to that effect, rather than remit the matter to the adjudicator to do so. I will allow the parties a few days to reach agreement on the amount, failing which I will further order that the matter be remitted to the adjudicator for reconsideration according to this judgment. I shall hear the parties as to costs.

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[20] See [40].