Supreme Court of New South Wales

Walton v Illawarra [2011] NSWSC 1188 (13 October 2011)

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New South Wales

Case Title:	Walton v Illawarra
Medium Neutral Citation:	[2011] NSWSC 1188
Hearing Date(s):	22/08/2011, 23/08/2011, 24/08/2011, 25/08/2011 and 26/08/2011
Decision Date:	13 October 2011
Jurisdiction:	
Before:	McDougall J
Decision:	Plaintiff entitled to damages for breach of contract. Defendant entitled to damages for delay and rectification costs. Damages to be set off. Parties to bring in short minutes of order.
Catchwords:	BUILDING AND CONSTRUCTION - contract - interpretation of contract - nature of superintendent's task - whether contractor's entitlement to extensions of time and payments are limited to those so determined by superintendent - extent to which liability flowed to principal for superintendent's failure to adequately perform tasks - DAMAGES - quantification - damages for shortfall between entitlement and superintendent's valuation- - whether recovery constrained by contract - damages for delay in practical completion - whether loss too remote - entitlement to interest.
Legislation Cited:	Building and Construction Industry Security of

	Payment Act 1999 (NSW) Industrial Relations Act 1996 (NSW)
Cases Cited:	Alexander v Cambridge Credit Corporation Ltd (1987) 9 NSWLR 311 Atlantic Civil Pty Ltd v Water Administration Ministerial Corporation (1992) 39 NSWLR 468 Beaufort Developments (NI) Ltd v. Gilbert-Ash NI Ltd and Others [1998] UKHL 19; [1999] 1 AC 266 Hawker Noyes Pty Ltd v New South Wales Egg Corporation (11 November 1988, unreported; BC 8801337) Northern Regional Health Authority v Derek Crouch Construction Co Ltd[1984] 1 QB 644 Victoria Laundry (Windsor) Ltd v Newman Industries Ltd [1949] 2 KB 528 Watson v Foxman (1995) 49 NSWLR 315
Texts Cited:	
Category:	Principal judgment
Parties:	Walton Construction Pty Limited ACN 060 900 218 (Plaintiff) Illawarra Hotel Company Pty Limited (ACN 063 558 467) (Defendant)
Representation	
- Counsel:	Counsel: M R Gracie / D A Neggo (Plaintiff) S R Donaldson SC / H M Durham / D A Moujalli (Defendant)
- Solicitors:	Solicitors: Crisp Legal (Plaintiff) Norbert Lipton & Co (Defendant)
File number(s):	2008/290556
Publication Restriction:	

JUDGMENT

1. On 5 August 2006, the defendant (Illawarra) as principal and the plaintiff (Walton) as contractor made an agreement for the refurbishment of the Illawarra Hotel at Wollongong (the hotel). The date of commencement of the works was specified as 9 January 2006. The date for practical completion of the works was specified as 5 August 2006.

2. Work under the contract was delayed almost from the beginning, and thereafter frequently during the execution of the works. Practical completion was not achieved until 9 July 2007.

3. The parties disagreed as to the number of days of extensions of time to which Walton was entitled. They disagreed, further, as to the extent and value of variations to the works performed by Walton and as to the amount to be allowed for provisional cost (PC) items. Some of the issues in dispute between the parties were referred to a referee, Ms Janet Grey (the referee), for enquiry and report. With some exceptions, her report was adopted by the court.

4. This judgment is concerned with the consequences that flow from adoption of the referee's report, and with the remaining issues in dispute between the parties that were not the subject of the reference out.

The real issues in dispute

5. The parties agreed on the real issues in dispute. I set out their statement of those issues:

1. Did the Superintendent act reasonably and grant reasonable extensions of time to Walton in accordance with the requirements of clause 35.5?

2. Did the Superintendent value Walton's variations, including any margin on variations, and provisional sum adjustments using reasonable rates and/or prices in accordance with the requirements of clause 40.5(c)?

3. Has Illawarra breached clause 23(a) and/or (c) of the Contract by reason of the Superintendent's conduct or any determinations made by her?

4. If Illawarra is in breach of clause 23, what legal consequences flow from that in relation to:

(a) The Superintendent's determinations of Walton's entitlement to extensions of time; and

(b) The Superintendent's determinations as to variations, margin on variations and provisions sums?

5. Is Illawarra [sic; Walton] entitled to press its claim for "damages for extra time incurred"? If so, what is the quantum of that claim?

6. If any damages are awarded to Walton, is Walton entitled to pre-judgment interest on such damages and, if so, from what date should interest be awarded?

7. if any damages are awarded to Walton do those damages include an amount to compensate Walton for any liability to pay GST?

Issues arising from Illawarra's cross-claim

8. Is Illawarra entitled to damages for Walton's failure to bring the works under the Contract to practical completion by the date for practical completion? If so:

(a) Are damages to be assessed by reference to loss of "turnover rent"; or

(b) Does clause 35.6 operate as a liquidated damages provision so as to constrain the damages recoverable?

9. Does clause 42.8 of the Contract operate so as to reduce the amount of Walton's liability on account of work left defective or incomplete by Walton?

10. Is any liability of Walton to pay damages for the rectification of defective works to include a sum referable to GST on the cost of those rectification works?

11. Did Walton engage in misleading conduct in breach of s 52 *Trade Practices Act* 1974 and/or s 42 *Fair Trading Act* and, if so, did Illawarra suffer loss as a result of such conduct? If so, how is that loss to be quantified?

The witnesses

6. The principal witness of fact for Walton was Mr Chris Jerez. He was retained by Walton to supervise

the works, and did so for most of the period over which they were performed. The principal witnesses of fact for Illawarra were its director Mr Garry Kam and the architect retained by it to design the works and as Superintendent, Ms Shelley Indyk. Illawarra also called Mr Paul Anzani, the manager of the hotel.

7. Each of those witnesses swore affidavits, and was cross-examined although relatively briefly. In addition, Walton tendered extracts from the evidence of Mr Kam and Ms Indyk given before the referee. That material was tendered (ultimately, without objection) to prove the truth of the matters asserted in that evidence. The alternative course would have been to put the relevant material to them in cross-examination, and secure their assent to the truth of what they had said.

8. Although the way in which the evidence of fact was adduced was efficient, in the sense that it minimised the time taken for the hearing, it has meant that I had little opportunity to assess the credibility of the witnesses in question. In those circumstances, I do not propose to make detailed findings as to credibility. I note that counsel, in their final submissions, did not attack the credibility of any witness. I do however rely on my impressions of the witnesses, and express a preference for the evidence of some over others, in dealing at [140] and following below with Illawarra's claim for damages for misleading or deceptive conduct.

9. In addition, Illawarra called as an expert witness an accountant, Mr Abraham Hersz (known as Robert) Krochmalik. Mr Krochmalik gave evidence of loss of revenues on various scenarios that he described. Mr Krochmalik provided four reports, which were tendered. He was cross-examined on those reports.

10. Walton had retained an expert accountant, Mr Brent James. Mr James provided two reports, in which he criticized aspects of Mr Krochmalik's reasoning and conclusions, but in which he did not himself express any conclusions as to the losses the subject of Mr Krochmalik's reports. Unfortunately, Mr James died before the hearing of the proceedings. His reports were tendered by consent.

Relevant provisions of the contract

11. The contract was based on AS 2124 -1992, with amendments made by the parties which in some cases did nothing to improve the clarity of the statement of the terms their agreement.

12. By cl 23, Illawarra as principal was required to ensure that at all times there was a Superintendent who would act honestly and fairly and arrive at reasonable measures or value of work, quantities or time. I set it out:

23 SUPERINTENDENT

The Principal shall ensure that at all times there is a Superintendent and that in the exercise of the functions of the Superintendent under the Contract, the Superintendent -

(a) acts honestly and fairly;

(b) acts within the time prescribed under the Contract or where no time is prescribed, within a reasonable time; and

(c) arrives at a reasonable measure or value of work, quantities or time.

If, pursuant to a provision of the Contract enabling the Superintendent to give directions, the Superintendent gives a direction, the Contractor shall comply with the direction.

In Clause 23 'direction' includes agreement, approval, authorization, certification, decision, demand, determination, explanation, instruction, notice, order, permission, rejection, request or requirement.

Except where the Contract otherwise provides, a direction may be given orally but the Superintendent shall as soon as practicable confirm it in writing.

If the Contractor in writing requests the Superintendent to confirm an oral direction, the Contractor shall not be bound to comply with the direction until the Superintendent confirms it in writing.

13. By cl 35.2, Walton was required to bring the work under the contract to practical completion by the date for practical completion (which, as I have said, was specified in the contract as 5 August 2006). It is important to note the definition of the expression "Date for Practical Completion". I set it out:

'Date for Practical Completion' means -

(a) where the Annexure provides a date for Practical Completion, the date;

(b) where the Annexure provides a period of time for Practical Completion, the last day of the period,

but if any extension of time for Practical Completion is granted by the Superintendent **or allowed in any arbitration or litigation** , it means the date resulting therefrom;

(Emphasis added.)

14. Clause 35.5 provided for the date for practical completion to be extended in certain circumstances. If those circumstances arose, and if an extension of time was claimed, the Superintendent was required to "grant a reasonable extension of time". I set out cl 35.5 so far as it is relevant:

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.

When it becomes evident to the Principal that anything which the Principal is obliged to do or provide under the Contract may be delayed, the Principal shall give notice to the Superintendent who shall notify the Contractor in writing of the extent of the likely delay. If the Contractor is or will be delayed in reaching Practical Completion by a cause described in the next paragraph and within 28 days after the delay occurs 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 -

(a) events occurring on or before the Date for Practical Completion which are beyond the reasonable control of the Contractor including but not limited to -

industrial conditions;

inclement weather;

(b) any of the following events whether occurring before, on or after the Date for Practical Completion -

(i) delays caused by -

- the Principal; -

- the Superintendent;

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

...

Where more than one event causes concurrent delays and the cause of at least one of those events, but not all of them, is not a cause referred to in the preceding paragraph, then to the extent that the delays are concurrent, the Contractor shall not be entitled to an extension of time for Practical Completion.

In determining whether the Contractor is or will be delayed in reaching Practical Completion regard shall not be had to -

whether the Contractor can reach Practical Completion by the Date for Practical Completion without an extension of time;

whether the Contractor can, by committing extra resources or incurring extra expenditure, make up the time lost.

With any claim for an extension of time for Practical Completion, or as soon as practicable thereafter, the Contractor shall give the Superintendent written notice of the number of days extension claimed.

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 extension claimed, grant a reasonable extension of time. If within 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.

In determining a reasonable extension of time for an event causing delay, the Superintendent shall have regard to whether the Contractor has taken all reasonable steps to preclude the occurrence of the cause and minimise the consequences of the delay.

15. Clause 35.6, as printed, would have provided that Walton should pay liquidated damages to Illawarra if it failed to reach practical completion by the date for practical completion:

35.6 Liquidated Damages for Delay in Reaching Practical Completion

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 the Annexure for every day after the Date of Practical Completion to and including the Date of Practical Completion or the date that the Contract is terminated under Clause 44, whichever first occurs.

If after the Contractor has paid or the Principal has deducted liquidated damages, the time for Practical Completion is extended, the Principal shall forthwith repay to the Contractor any liquidated damages paid or deducted in respect of the period up to and including the new Date for Practical Completion.

16. The printed form of cl 35.6 was deleted. Against right hand side of the heading to the deleted clause, the parties wrote "See Part B". On the other side of the page, against the left hand side of the deleted clause, they put an asterisk and wrote the words "insert" and "Part B", with an arrow pointing towards the deleted text.

17. Part B of the annexures to the contract set out the text of clauses that had been varied. As to cl 35.6, it stated:

Clause 35.6 is amended by deleting all wording and inserting the following:

The Contractor shall ensure that all subcontracts include a liquidated damages clause in the event of the subcontractor failing to reach the date for substantial completion under the subcontract at the rate of $500 per day for the first 3 weeks of delay caused by the subcontractor increasing to $1000 per day thereafter.

Any liquidated damages paid by or retained from monies due and owing, to subcontractors shall be held in trust by the Contractor for the Principal until the Principal is entitled under to receive them.

18. Clause 36 provided for Walton to be paid delay or disruption costs in some circumstances when granted an extension of time under cl 35:

36 DELAY OR DISRUPTION COSTS

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.

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.

...

19. Clause 40 dealt with variations to the works. There is no need to set out the detail of much of that clause, but it may be noted that by clause 40.2, where a variation was to be carried out, it was to be valued under cl 40.5 unless the price for the variation had been agreed between the Superintendent and Walton.

20. Clause 40.5, dealt with the way in which the Superintendent was to value a variation. As amended by the parties, cl 40.5 reads, so far as it is relevant:

40.5 Valuation

Where the Contract provides that a valuation shall be made under Clause 40.5, the Principal shall pay or allow the Contractor or the Contractor shall pay or allow the Principal as the case may require, an amount ascertained by the Superintendent as follows -

(a) if the Contract prescribes specific rates or prices to be applied in determining the value, those rates or prices shall be used;

(b) [deleted by the parties]

(c) to the extent that neither Clause 40.5(a) or 40.5(b) apply, reasonable rates or prices shall be used in any valuation made by the Superintendent;

(d) in determining the deduction to be made for work which is taken out of the Contract, the deduction shall [deleted] NOT INCLUDE AN amount for profit and overheads;

(e) if the valuation is of an increase of decrease in a fee or charge or is a new fee or charge under Clause 14.3, the value shall be the actual increase or decrease or the actual amount of the new fee or charge without regard to overheads or profit;

(f) if the valuation relates to extra costs incurred by the Contractor for delay or disruption, the valuation shall include a reasonable amount for overheads but shall not include profit of loss of profit;

(g) [deleted by parties] INSERT PART B APPENDIX

(h) daywork shall be valued in accordance with Clause 41.

...

21. The capitalised words were written in by the parties in the place of words that they had deleted.

22. Clause 42 dealt with certificates and payments. In substance, during the currency of works under the contract, there was provision for payment claims to be made to and certified by the Superintendent, and for Illawarra to pay the amount so certified. In addition, there was a regime for a final payment claim and a final certificate. I set out cl 42, so far as it is relevant:

42 CERTIFICATES AND PAYMENTS

42.1 Payment Claims, Certificates, Calculations and Time for Payment

At the time for payment claims stated in the Annexure and upon issue of a Certificate of Practical Completion and within the time prescribed by Clause 42.7, the Contractor shall deliver to the Superintendent claims for payment supported by evidence of the amount due to the Contractor and such information as the Superintendent may reasonably require. Claims for payment shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the Contractor arising out of or in connection with the Contract or for any alleged breach thereof.

Within 14 days after receipt of a claim for payment, the Superintendent shall issue to the Principal and to the Contractor a payment certificate stating the amount of the payment which, in the opinion of the Superintendent, is to be made by the Principal to the Contractor or by the Contractor to the Principal. The Superintendent shall set out in the certificate the calculations employed to arrive at the amount and, if the amount is more or less than the amount claimed by the Contractor, the reasons for the difference. The Superintendent shall allow in any payment certificate issued pursuant to this Clause 42.1 or any Final Certificate issued pursuant to Clause 42.8 or a Certificate issued pursuant to Clause 44.6, amounts paid under the Contract and amounts otherwise due from the Principal to the Contractor and/or due from the Contractor to the Principal arising out of or in connection with the Contract including but not limited to any amount due or to be credited under any provision of the Contract.

If the Contractor fails to make a claim for payment under Clause 42.1, the Superintendent may nevertheless issue a payment certificate.

Subject to the provisions of the Contract, within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be, an amount not less than the amount shown in the Certificate as due to the Contractor or to the Principal as the case may be, or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim. A payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47 whether the amount so paid is the amount properly due and payable and on determination (whether under clause 47 or as otherwise agreed) of the amount so properly due and payable, the Principal or Contractor, as the case may be, shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable.

Payment of moneys shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only, except as provided by Clause 42.8.

...

42.7 Final Payment Claim

Within 28 days after the expiration of the Defects Liability Period, or where there is more than one, the last to expire, the Contractor shall lodge with the Superintendent a final payment claim and endorse it 'Final Payment Claim'

The Contractor shall include in that claim all moneys which the Contractor considers to be due from the Principal under or arising out of the Contract or any alleged breach thereof.

After the expiration of the period of lodging a Final Payment Claim, any claim which the Contractor could have made against the Principal and has not been made shall be barred.

...

42.8 Final Certificate

Within 14 days after receipt of the Contractor's Final Payment Claim or, where the Contractor fails to lodge such claim, the expiration of the period specified in Clause 42.7 for the lodgment of the Final Payment Claim by the Contractor, the Superintendent shall issue to the Contractor and to the Principal a final payment certificate endorsed 'Final Certificate'. In the certificate the Superintendent shall certify the amount which in the Superintendent's opinion is finally due from the Principal to the Contractor or from the Contractor to the Principal under or arising out of the Contract or any alleged breach thereof.

Unless either party, either before the Final Certificate has been issued or not later than 15 days after the issue thereof, serves a notice of dispute under Clause 47, the Final Certificate shall be evidence in any proceedings of whatsoever nature and whether under the Contract or otherwise between the parties arising out of the Contract, that the Works have been completed in accordance with the terms of the Contract and that any necessary effect has been given to all the terms of the Contract which require additions or deductions to be made to the Contract Sum, except in the case of -

(a) fraud, dishonesty or fraudulent concealment relating to the Works or any part thereof or to any matter dealt with in the said Certificate;

(b) any defect (including omission) in he Works or any part thereof which was not apparent at the end of the Defects Liability Period, or which would not have been disclosed upon reasonable inspection at the time of the issue of the Final Certificate; or

(c) any accidental or erroneous inclusion or exclusion of any work, plant, materials or figures in any computation or any arithmetical error in any computation.

Within 14 days after the issue of a Final Certificate which certifies a balance owing by the Principal to the Contractor, the Principal shall release to the Contractor any retention moneys or security then held by the Principal.

23. Clause 47 dealt with dispute resolution. I set out cl 47.1:

47 DISPUTE RESOLUTION

47.1 Notice of Dispute

If a dispute between the Contractor and the Principal arises out of or in connection with the Contract, including a dispute concerning a direction given by the Superintendent, then either party shall deliver by hand or send by certified mail to the other party and to the Superintendent a notice of dispute in writing adequately identifying and providing details of the dispute.

Notwithstanding the existence of a dispute, the Principal and the Contractor shall continue to perform the Contract, and subject to Clause 44, the Contractor shall continue with the work under the Contract and the Principal and the Contractor shall continue to comply with Clause 42.1.

A claim is tort, under statute or for restitution based on unjust enrichment or for rectification or frustration, may be included in an arbitration.

24. Clause 47.2 dealt with further steps that should be taken before the commencement of proceedings. Clause 47.3 dealt with arbitration. Clause 47.4 preserved the rights of the parties to commence proceedings in court either to enforce payment or for urgent injunctive or declaratory relief. Since the parties agreed that their disputes were to be resolved by litigation, it is not necessary to set out the rest of cl 47.

25. It will be recalled that the printed (and deleted) cl 35.6 referred to "liquidated damages at the rate stated in the Annexure". Annexure A stated, against the words "Liquidated Damages per day: (Clause 35.6)": "$0. Refer to amended clause 35.6".

26. There were a number of documents attached to the contract. One of those, Attachment 6, referred to "rates for supervision". It provided for daily and hourly rates are as follows:

ATTACHMENT 6 - RATES FOR SUPERVISION

1. Rates per day:

Project Manager: $675.00

Leading Hand: $450.00

2. Rates per hour:

Project Manager: $75.00

Leading Hand: $50.00

The referee's report

27. Some seven questions were referred to the referee for enquiry and report. Those questions were:

Question 1: *What works within the Contract scope of works required to be performed by the Cross Defendant were left defective or incomplete ("Defective or Incomplete Works") by the Cross-Defendant?*

Question 2: *What is the fair and reasonable cost of the works necessary and reasonable to bring the Defective or Incomplete Works into substantial conformity with the Contract?*

Question 3: *What is the proper adjusted Date for Practical Completion pursuant to the terms of the Contract?*

Question 4: *To what payment or allowance is the Plaintiff entitled with respect to any extensions of time?*

Question 5: *What works performed by the Plaintiff amount to variations or are PC items under the Contract?*

Question 6: *To what payment or allowance is the Plaintiff entitled with respect to any such variations or PC items?*

Question 7: *What is the amount of retention (if any) under the Contract still held by the Defendant?*

28. The referee answered question one by listing some 24 items of defective or incomplete work, and setting out her estimate of the amount required to bring those works into conformity with the contract. She answered question two by specifying a total cost of $123,895.20, made up in the way that she set out (which it is not necessary to repeat).

29. The referee concluded, in answer to questions three and four, that the proper adjusted date for practical completion was 26 June 2007, and that Walton was entitled to be paid $247,959.69 with respect to that extension of time.

30. The referee answered question five by listing numerous variations, together with a description of their cause (variously, as due to delay, or as due to variation of the works, or as relating to a provisional sum item) and a statement of the amount to which she thought Walton was entitled. She specified further, the PC items in respect of which she thought an allowance should be made (either to or by Walton) against the provisional sum allowed in the contract.

31. Following from her answers to question five, the referee concluded that Walton was entitled to be paid some $873,385.23 for variations and PC items. The allowance for variations included a 10% margin.

32. The referee answered questions seven by stating that Illawarra held retention of $138,948.36. The parties did not address the significance of this finding. Presumably, it is to be taken into account in quantifying the balance due one way or the other.

33. The amounts found by the referee to be payable for rectification of defective or incomplete works, and for variations and PC items, were stated exclusive of GST.

34. In addition, the referee was invited by the parties to consider whether, and if so in what way and to what extent, Ms Indyk had failed to act honestly and fairly, or to make reasonable assessments of work, quantities or time; and to consider also the extent to which the defective or incomplete work found by her should have been apparent, or such as to have been disclosed on reasonable inspection, on completion of the works. The referee made findings on those matters. I will go to those findings, to the extent necessary, in considering the first, second, third and ninth issues.

The nature of Walton's entitlements under the contract

35. Before turning to the first group of issues, it is necessary to identify and resolve the underlying dispute as to the way in which the contract operated to define the basis of Walton's entitlements. In substance, the case for Illawarra was that Walton had an entitlement to such extensions of time and payments as the Superintendent might from time to time determine. Thus, Illawarra submitted, the parties were bound by the determinations of the Superintendent, and those determinations, when

made, fixed conclusively the full extent of Walton's entitlements.

36. Illawarra submitted, further, that Walton had recognized this by framing this part of its case as it did: namely, as a claim for damages payable by Illawarra for the Superintendent's alleged failure to act honestly, fairly and reasonably. (I note that Mr Donaldson of Senior Counsel, who appeared with Mr Moujalli and Ms Durham of Counsel for Illawarra, focused on para (a) of cl 23, dealing with the obligation to act honestly and fairly, rather than on para (c), dealing with the obligation to act reasonably.)

37. Walton disputed that its entitlements were limited to those determined by the Superintendent, in circumstances where the referee had reached a different conclusion (for example, as to extensions of time and the amount payable for variations and PC items). It submitted that, at least to the extent that the referee's report had been adopted, the court should make findings as to its entitlements based on the adopted findings of the referee.

38. Alternatively, Walton submitted, the Superintendent had not acted honestly, fairly and reasonably, and thus it was entitled in any event to damages from Illawarra for breach of cl 23. The amount of those damages was equivalent to the value of the entitlements that should have been determined by the Superintendent, acting honestly, fairly and reasonably.

39. The starting point of any analysis must be the language used by the parties in their contract. The Superintendent was not a party to the contract, but someone appointed under it. No doubt, she was required to act honestly, fairly and reasonably. But those obligations were imposed on her, at least in the first instance, by operation of law, by reason or as an incident of the position that she held, and not by the terms of the contract to which she was not a party.

40. Nonetheless, the contract provides guidance as to the way in which the parties expected the Superintendent to carry out her obligations. She is to act honestly and fairly; she is to act within any time prescribed or otherwise within a reasonable time; and when required to do so, she is to arrive at a reasonable measure or value of work, quantities and time. Those matters all appear from cl 23.

41. There are other provisions of the contract which give guidance as to how the Superintendent is to act, or as to what it is that she is required to do. For example, where Walton, having sought it, has made out a case to be given an extension of time, the Superintendent is obliged to "grant a reasonable extension of time". Thus, in relation to extensions of time, the Superintendent should act honestly, fairly and reasonably (because that is the way in which she is to perform the functions under the contract, following from cl 23); and to grant a reasonable extension of time (because that is Walton's contractual entitlement under cl 35.5).

42. On that analysis, the contract requires, in relation to extensions of time, both that the Superintendent's manner of exercise of her functions must be honest and fair and that the product of her deliberations must be reasonable. It follows that, even if the Superintendent had acted honestly and reasonably, Walton could not be bound by her determination if that determination did not meet the description "a reasonable extension of time". That is because, by definition, it would not have got what it was entitled to receive.

43. I do not think that any different analysis is required in relation to variations. The only possible distinction of present significance is that, in relation to the valuation of variations, the requirement to arrive at a reasonable value is imposed not by the clauses that authorize the Superintendent to value the variations (cls 40.2 and 40.5) but by cl 23 (c). I do not think that anything flows from this distinction. The Superintendent is, nonetheless, required to arrive at a reasonable outcome.

44. Mr Donaldson relied on the " *Derek Crouch* " principle (see *Northern Regional Health Authority v Derek Crouch Construction Co Limited* [1984] 1 QB 644). He submitted that this decision was authority for the proposition that, when parties to a contract had agreed upon an exclusive contractual mechanism for the establishment of their rights under that contract, the court could not substitute its own view for whatever might be determined through the exercise of that contractual mechanism.

45. The decision in *Derek Crouch* was analysed and explained by Giles J in *Atlantic Civil Pty Ltd v Water Administration Ministerial Corporation* (1992) 39 NSWLR 468. In that decision, Giles J concluded

at 476 that the essence of the reasoning of the Court of Appeal in *Derek Crouch* "lies in the distinction between establishing and enforcing rights and obligations... and creating rights and obligations...". Thus, his Honour said, the decision construed the contract in question as one whereby "the parties had relevantly agreed that their rights and obligations would be as certified or otherwise stated by the architect, or by the arbitrator on review, and not otherwise (in the sense of, not as stated by someone else)".

46. Before I turn to what I see as being a key distinction between the reasoning in *Derek Crouch* and the contract with which I am concerned, I should note that the decision in *Derek Crouch* was considered by the House of Lords in *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1998] UKHL 19; [1999] AC 266. In that case, the House of Lords criticized the reasoning in *Derek Crouch* , and held that the case had been wrongly decided. Lord Hope of Craighead (with whom Lord Lloyd of Berwick agreed) noted at 288 that "there is a difference between an agreement that machinery is to be used to implement or to give effect to the contract and an agreement that the parties' rights are to be determined solely by means of that machinery". His Lordship then said, at 288-299:

An agreement which falls into the first category will be needed in almost every building or engineering contract. Some method has to be laid down for dealing with such matters as variations to the contract works and the making of interim payments to the contractor as the work proceeds. But an agreement of that kind does not imply any limitation on the ordinary powers of the court. Nor does it confer any powers on the architect or engineer, or in his turn on the arbitrator, which restrict the power of the court, in the event of litigation, to conduct its own inquiry into the facts. Its purpose is simply to enable the contract to be worked out upon the agreed terms to achieve the result to which it was directed. The purpose of an agreement which falls into the second category, on the other hand, is to exclude the point at issue from being determined by the court. If the parties have agreed that a dispute between them is to be determined conclusively by the architect or engineer, or in the event of dispute by an arbitrator, the sole function of the court is to give effect to the agreement which they have made. Its jurisdiction is to enforce the contract. Its duty is to ensure that the decision of the architect or the engineer or, in his turn, of the arbitrator is given the conclusive effect which has been agreed. But none of the judges in the *Crouch* case addressed the question whether the certificates or opinions of the architect which the arbitrator had power to open up, review and revise were agreed by the parties to the contract to have effect as conclusive evidence.

47. I return to the reasoning of Giles J in *Atlantic Civil* . His Honour did not need to express a view as to whether or not *Derek Crouch* had been correctly decided. However, his Honour's analysis of the decision is illuminating. He pointed out at 476 that the decision did not depend on the fact that the jurisdiction to review had been given to an arbitrator. He said that:

...in principle a similar decision could be reached even if there were no arbitration clause in the contract... the ample arbitration provision was no more than a ground for holding that the parties had relevantly agreed that their rights and obligations were to be found in the certificates or opinions of the architect, as reviewed if required by the arbitrator, and not otherwise.

48. Thus, Giles J said at 476:

...[c]onceivably, it could be held that the parties to a contract had relevantly agreed that their rights and obligations would be found in the certificates or opinions of a designated person and not otherwise even if there were no provision for review in the event of dispute .

49. Against that background, Giles J stated, again at 476, that before the principle established by *Derek Crouch* could stand in the way of relief:

(i) the parties must have agreed that the relevant rights and obligations will be as certified or otherwise stated by a designated person (initially or on review) and not otherwise;

(ii) that person must have given his certificate or statement;

(iii) the court must be asked to review the very thing certified or stated;

(iv) the court must be asked to do so by way of substituting its opinion for that of the designated person.

50. As Giles J recognized in *Atlantic Civil* , the decision in *Derek Crouch* was considered by Brownie J in *Hawker Noyes Pty Ltd v New South Wales Egg Corporation* (11 November 1988, unreported; BC 8801337). The contract considered by Brownie J in that case required the Superintendent to exercise his powers "in a reasonable and equitable manner". It authorized the Superintendent to fix the amount payable for, among other things, disruption and variations.

51. Brownie J thought that the decision in *Derek Crouch* could be distinguished because, as his Honour put it (at BC 8):

...the duty of the Superintendent... was to exercise the power conferred upon it by the Contract in an objective way; the powers of the Arbitrator were to review the decision, or failure of the Superintendent to make a decision, in an objective way; and the Court is in the circumstances able to do the same, that is decide in an objective way what is a reasonable price for the variations.

52. Thus, his Honour said (at BC 13), the contractual mechanism that he was required to consider "provides a mechanism for the valuation of the variations which does not really involve any exercise of discretion, properly so called". That was so, his Honour said, because the Superintendent was required "to determine a reasonable price... [and] to act in a reasonable and equitable manner. This seems to me to involve no more than that he decide, as a question of fact, what is a reasonable rate or price".

53. Brownie J concluded (again at BC 13) that:

...[i]n my view what the Superintendent was required to do was to make a determination, i.e. decide a question of fact, and not to exercise a discretion, properly so called. He was required to act on an objective basis, and if the matter proceeded to arbitration, then the arbitrator could review the decision of the Superintendent upon the same objective basis, and in any event it is open to the court to review the decision of the Superintendent, or in the absence of a decision by the Superintendent to make a decision upon the same objective basis... .

54. In the present case, as I have said, the Superintendent is specifically required, in relation to extensions of time, to grant a reasonable extension of time (that obligation being contained in the very clause, cl 35.5, that empowers the Superintendent to grant an extension of time). Equally, in relation to variations, the Superintendent is required to arrive at a reasonable value for the cost of the varied work.

55. What is a reasonable extension of time for a particular cause and in a particular situation is a question of fact to be assessed objectively. Likewise, what is a reasonable sum to allow for the cost of executing a variation to the work is a question of fact to be assessed objectively. That is so in each case notwithstanding that, as I accept, reasonable minds acting on a properly informed basis and in a rational way may differ as to what is, in either case, reasonable. (It could be said that the use of the indefinite article preceding "reasonable" recognises this.) The obvious fact that, in any case, there may be a range of reasonable outcomes or opinions has never stopped the law from relying on the concept of "reasonableness" in a wide range of contexts, both civil and criminal. Nor does it mean that a determination of what is, in any given situation, reasonable is something other than a question of fact to which an objective answer can be given.

56. In relation to both extensions of time and the valuation of variations, the court is able to look at the product of the Superintendent's labours, to see whether she has arrived at a reasonable extension of time or a reasonable valuation for a variation. (That is made clear, in relation to extensions of time, by the emphasised words in the definition of "Date for Practical Completion" set out at [13] above.) If the superintendent did not do so, then she has not performed her task, and Walton has not received its contractual entitlement

57. Accordingly, I conclude that it is open to the court to look at the challenged assessments (for extensions of time and valuation of variations and the like), to determine whether or not they equate to the contractual standard of reasonableness, and to substitute its own determination of what should reasonably have been allowed if they do not. Having regard to the way in which the dispute was framed and argued, the consequences will fall for consideration under the third and fourth issues.

First and second issues: did the Superintendent act reasonably in relation to extensions of time and her valuation of variations?

58. As to extensions of time: the Superintendent concluded that Walton was entitled in total to 75 days' extension of time. The relevant question referred to the referee and answered by her was "what is the proper adjusted Date for Practical Completion pursuant to the terms of the Contract?". She concluded that it was 26 June 2007, and that thus that Walton was entitled in total to 230 days' extension of time. Her findings and conclusions in answer to that question have been adopted. The consequence of adoption of those findings and that conclusion, bearing the relevant terms of the contract, is that the total of 230 days is the reasonable allowance for extensions of time to which Walton was entitled and which the Superintendent, acting reasonably, should have determined. The parties are estopped from contending otherwise.

59. It follows, in the language of clause 23(c), that the Superintendent did not arrive at a reasonable measure of time in relation to the extensions of time that Walton had sought.

60. As to the valuation of the cost of variations and provisional sum items: the Superintendent's allowance (adjusted so that the figures relate only to those matters in respect of which the referee's findings were adopted) totalled $370,979.82. According to the final certificate, the Superintendent allowed $435,143.96 for variations, nothing for margin on variations and a negative allowance (i.e., deduction) of $64,164.14 for provisional sum items. However, the parties are agreed that $78,515.20 of the amount allowed by the Superintendent for variations is in fact attributable to provisional sum items. It is unnecessary to consider whether this sum should be left where the Superintendent left it, or whether the amount allowed for variations should be notionally reduced, and the amount allowed for provisional sum items notionally increased, by this amount.

61. The referee's conclusions, to the extent that they have been adopted by the court, are (in terms of the relevant question referred to her) that Walton is entitled to a payment or allowance of $530,595.93, comprising $445,669.29 for variations, $44,566.93 for margin on variations and $40,359.71 for provisional sum adjustments. (I have taken these figures from MFI 4, an agreed note submitted by counsel at my request.)

62. It follows, in my view, that those adopted figures represent (in the language of clause 23 (c)) the reasonable value of the work and quantities underlying those variations and provisional sum items or adjustments. Once again, the parties are estopped from contending otherwise. Those amounts are the amounts that the Superintendent should have determined for those matters as required by clause 23(c).

63. It follows, again in the language of clause 23(c), that the Superintendent did not arrive at a reasonable value for those matters.

64. In my view, the same conclusion - that the Superintendent's allowances for extensions of time and variations and provisional sum items were not reasonable - may be reached simply by considering the disparity between the Superintendent's determinations on those matters and the referee's findings, to the extent that they have been adopted.

65. As to extensions of time: the referee's findings are that Walton was entitled to allowances more than three times those determined by the Superintendent. That difference cannot, in my view, be explained on the basis that there is a reasonable range, and that both allowances fall within it. The disparity is too stark.

66. As to variations and provisional sum allowances: the difference between the total found by the referee (to the extent that the court has adopted her findings) and the equivalent amount determined by the Superintendent is $159,616.11. That is, the reasonable amount to which Walton was contractually entitled was 43% greater than the amount determined by the Superintendent. Again, in my view, that disparity cannot be explained by saying that both amounts fall within a reasonable range. That this is so is confirmed if one analyses the figures, particularly if one has regard to the way in which the Superintendent set out her conclusions. The amount allowed by each for variations varies by a little under $10,000.00. It may be accepted that both of those figures are capable of falling within a reasonable range. However, the Superintendent allowed nothing for margin on variations; yet

Walton had a contractual entitlement to that margin. When one turns to provisional sum adjustments, the disparity between the negative figure determined by the Superintendent and the positive figure found by the referee is stark. If one adjusts the figures, to take account of the fact that some of the amount determined by the Superintendent for variations should have been classified as referable to provisional sum adjustments, then the disparity between the Superintendent's determination on variations and the referee's findings becomes significant; the disparity in relation to margin remains; and the disparity between the (notional, in the case of the Superintendent) provisional sum allowances remains at least substantial.

67. Thus, whether one considers simply the consequence of adoption of the referee's findings (to the extent that they were adopted) or the disparity between those findings (to the same extent) and the equivalent determinations of the Superintendent, the position is the same. The Superintendent's determinations were not "reasonable", as required by the terms of the contract. It follows that, in respect of both extensions of time and the proper allowance for variations and the like, Walton did not receive its contractual entitlement.

68. Walton spent a lot of time in attacking the honesty and fairness of the Superintendent's determinations, relying in substantial part on observations made by the referee and the evidence that was said to underlie and justify those findings. On the view to which I have come, it is not necessary to express a view as to whether the Superintendent did act honestly and fairly. Were it necessary to do so, I would conclude that the court should not accept the referee's observations on that question. There are three reasons why I would so conclude.

69. The first reason is that the question, of whether the Superintendent did act honestly and fairly, was not referred to the referee. There is no doubt that the parties agreed that she could express views on it. However, as Illawarra has submitted, they did so on the basis that questions of reasonableness would have a bearing on her determination of the proper adjusted date for practical completion. Walton expressly acknowledged to the referee that the issue of breach of clause 23 had been "kept for the preserve of the court". Thus, Illawarra did not lead evidence before the referee that went specifically but only to the question of honesty and fairness. The referee's findings, on the issue of honesty and fairness, were based on such evidence as there was that emerged in relation to the other questions that were referred to her.

70. The second reason is that, on examination, much of the material on which Walton relied (and which in turn appears to have been the foundation for the referee's expression of opinion) was not capable of bearing the weight put upon it. In this context, it is to be remembered that a conclusion that a superintendent has not acted honestly and fairly is a serious one, and not lightly to be reached.

71. The third reason is that, to the extent that the referee's findings were based on the disparity between her conclusions on some matters (in particular, as to extensions of time) and the conclusions reached by the Superintendent, the referee had (as she acknowledged) the benefit of expert programming evidence, and submissions from capable Counsel, that the Superintendent did not have. Thus, whilst I have concluded that the disparity between the Superintendent's conclusions as to reasonable measures or values of time and work and the referee's conclusions on the same topics indicates that the Superintendent's conclusions were not reasonable, it does not follow that the Superintendent acted otherwise than honestly and fairly in reaching her conclusions.

72. Although I am not prepared to find that Ms Indyk acted otherwise than honestly and (at least subjectively) fairly, in her capacity as Superintendent, I do observe that her dual roles as project architect and Superintendent put her in a very difficult situation.

73. As project architect, Ms Indyk's primary loyalty was to her client. In that role, she was required to assist the client in the administration of the contract. For example, in her capacity as architect, she assisted Illawarra to answer at least one payment claim made by Walton under the *Building and Construction Industry Security of Payment Act* 1999 (NSW). In doing so, Ms Indyk was required to support, for the benefit of Illawarra, a determination of the amount due to Walton that she had made in her capacity as Superintendent. It is hardly surprising that the steps taken, both by Illawarra (including through its legal adviser Mr Sankey) and by Ms Indyk, were relied upon by Walton as showing bias. The communications between them could well suggest, at least to an eye not entirely free of prejudice, that Ms Indyk was aligning herself entirely with the interests of Illawarra, and that

she had abandoned the neutral or indifferent position required of her as Superintendent.

74. In my view, both the dual roles that Ms Indyk held and the demands made of her by Illawarra in her capacity as architect placed her in a position where the possibility of conflict was real, and the appearance of bias was likely to result.

Third and fourth issues: did Illawarra breach cl 23, and if it did what are the consequences?

75. Illawarra's obligations under cl 23 include an obligation to ensure that, in the exercise of her functions under the contract, the Superintendent arrives at a reasonable measure or value of work, quantities and time. It must follow that, if in any respect the Superintendent failed to arrive at a reasonable measure or value of work, quantity or time, Illawarra has breached that obligation by not ensuring that she do so.

76. Since I have concluded that the Superintendent did fail to arrive at a reasonable measure of the extensions of time to be allowed to Walton, and at a reasonable value of allowances to be made for variations and provisional sum adjustments, Illawarra has to the like extent breached its obligation under cl 23.

77. So far as extensions of time are concerned, the effect of adoption of the referee's conclusions on this point is that the parties are estopped from denying that the proper allowance to be made, pursuant to cl 35.5, for extensions of time is 230 days.

78. So far as variations and provisional sum adjustments are concerned, the effect of adoption of the referee's conclusions on this point (to the extent that they have been adopted) is that the parties are estopped from denying that the proper amounts to be paid or allowed to Walton for those matters are as set out above.

79. In terms of extensions of time, the question of damages falls for consideration under the next issue.

80. In terms of variations and provisional sum adjustments, Walton is entitled to damages for breach of cl 23 (c). The measure of those damages is the difference between the total of the amounts paid or allowed to it for those matters and the total of the amounts that the referee has concluded (to the extent adopted by the Court) should be allowed.

Fifth issue: damages for extra time incurred

81. The fourth of the questions referred to the referee was "to what payment or allowance is [Walton] entitled with respect to any extensions of time?". The referee concluded that Walton was entitled to delay costs in the sum of $247,959.69. That finding was rejected by the court on the adoption application. Thereafter, Walton's solicitors wrote to Illawarra's solicitors stating that, if the court had left open to Walton the possibility of making "a different or further claim to [sic] delay different to that which was dealt with by the referee and rejected by his Honour", their client would not do so. The court was informed of this.

82. Contrary to that stated position, Walton now seeks delay costs "recoverable... under the contract" (as stated in Walton's outline of submissions). The contractual basis for that claim is not expressly identified. According to Walton's outline of submissions at [44], "the prices and rates set out in Attachment 6 to the contract were agreed between the parties to be used for the purpose of calculating all claims made by Walton in respect of the works including time related claims". That paragraph asserts further, that the Attachment 6 rates "were inserted into the contract for that purpose at the insistence of the Superintendent".

83. The only contractual entitlement to be paid extra costs incurred by reason of delay is that given by cl 36. That is the only claim for delay costs that was "pleaded". That claim was referred to and quantified by the referee. The referee's conclusions on that claim were rejected by the court. The claim that is now put in submissions was not pleaded. No leave has been sought to amend the list statement to plead it. In my view, in particular having regard to what is set out at [81] of these reasons, that is a sufficient reason for rejecting the claim.

84. Nonetheless, I think, the claim is in any event misguided. I have set out at [26] above the wording of Attachment 6 to the contract. There is no provision of the contract that refers to Attachment 6. Thus, there is no provision of the contract that says how, or for what purposes, Attachment 6 is to be used.

85. I accept, as Mr Gracie submitted, that the parties should be taken to have intended that Attachment 6 would perform some useful function. In my view, it is easy to see what that function it was. In any case where a question was raised as to the amounts to be allowed for a project manager or leading hand (for example, in the quantification of a claim for delay or disruption costs made under cl 35.6, or in the valuation of variations pursuant to cls 40.3 and 40.5), Attachment 6 would provide the answer. But it does not follow that Attachment 6 creates some freestanding right to be paid for the time of a project manager or leading hand whenever a claim is made to be reimbursed or indemnified for such time. Attachment 6 does not come into play unless there is some provision of the contract that requires or permits it to be used.

86. Even accepting (although I do not decide) that Attachment 6 was inserted into the contract at the request or direction of the Superintendent, it does not follow that the attachment is to be given some function beyond that which appears from its words, read in context. It certainly does not follow that the attachment should be read as giving Walton some freestanding right to be paid for delay costs in circumstances where (by hypothesis, having regard to the court's rejection of this part of the referee's report) cl 36 does not operate.

87. To the extent that Walton is seeking to argue that there was some separate agreement made between it and Illawarra to the effect that it was entitled to be paid for delay at the rates set out in Attachment 6, that claim was argued before Einstein J on the adoption hearing. His Honour considered it at [107] to [110]. He concluded, at the latter paragraph, that there was no agreement of the kind now alleged. Thus, and in any event, the factual basis for this claim (as it is now presented) is lacking.

88. There is another reason for concluding that this claim cannot succeed. By cl 42.7 of the contract, "any claim which the contract or could have made against the Principal [which] has not been made shall be barred". Walton submitted a final payment claim as required by cl 42.7. The claim that is now pressed was not made by, or prior to the service of, the final payment claim. It is therefore barred.

89. Accordingly, I conclude that Walton has no entitlement to "damages for extra time incurred".

Sixth issue: interest on damages

90. Illawarra relied on cl 43(b) of the contract and on s 127 of the *Industrial Relations Act* 1996 (NSW). Clause 43(b) provided, in substance, that if Walton did not give the Superintendent a statutory declaration as to payment of subcontractors then Illawarra could withhold payment of any money otherwise due to Walton. Section 127 of the *Industrial Relations Act* is to similar effect (in relation employees).

91. The short answer to this submission is that the Superintendent should have determined that amounts were payable for variations and in respect of provisional sum adjustments as found by the referee. Had the superintendent so determined, then those amounts would have been paid or allowed to Walton. It does not appear that Illawarra relied on either cl 43(b) or s 127 as a reason for withholding payment of whatever it was that the Superintendent certified. In those circumstances, it seems to me, Illawarra has had the use of the money that otherwise it would have paid to Walton, and Walton has been deprived of the use of that money, from whatever times it was that amounts in respect of variations and provisional sum adjustments were awarded and either paid or allowed. On that basis, in my view, interest should run from those times.

Seventh issue: GST

92. The parties agreed that all issues relating to GST (both on Walton's claim and on Illawarra cross-claim) should be reserved for further consideration, so that it could be seen whether any amounts payable by one to the other as a result of the court's conclusions and orders would render the recipient liable for GST. I shall take that course.

Eighth issue: damages for delay in completion

93. On the referee's findings as adopted (the effect of which adoption is, as I have said, to estop the parties from contending to the contrary of those findings), the (correctly adjusted) date for practical completion was 26 June 2007. The date of practical completion was 9 July 2007. Thus, Walton achieved practical completion some 13 days later than it should have done.

94. Before I look at the various ways in which Illawarra formulated its claim for damages for delay, I shall deal with two preliminary arguments.

The effect of cl 35.6

95. It will be recalled that the printed version of cl 35.6 (under which Walton was liable for liquidated damages at the rate stated in the annexure for delay in achieving practical completion) was deleted, and that an amended cl 35.6, which dealt only with the position as between Walton and its subcontractors, was inserted.

96. Mr Gracie submitted that cl 35.6 (as it had been reworded) should be read as operating not only as between Walton and its subcontractors but also as between Walton and Illawarra. He relied on the concluding subparagraph, under which liquidated damages received by Walton from its subcontractors should "be held in trust... for Illawarra until Illawarra is entitled to receive them". He submitted that those words showed an intention that Illawarra should be entitled to receive, and Walton to pay, liquidated damages at the rates specified in cl 35.6 to apply between Walton and its subcontractors. That entitlement operated, he submitted, to cap or limit the amount of damages payable for any unjustified delay in achieving practical completion.

97. I do not accept that submission. I do accept that, as Mr Gracie submitted, it is very difficult to see what work cl 35.6 was intended to perform unless there were intended to be back to back rights, or some correlative rights, to liquidated damages. But in circumstances where the express contractual provision giving Illawarra an entitlement to liquidated damages against Walton was deleted, it is expecting far too much of the substituted form of cl 35.6 to read it as going beyond its plain terms and covering that which, in the ordinary way, would have been dealt with by the printed but deleted form of cl 35.6. I accept that the parties to a contract should be taken to have intended that no part of the words they used would be redundant. But, as Lord Hoffmann said in *Beaufort Developments* at 274:

...the argument from redundancy is seldom an entirely secure one. The fact is that even in legal documents (or, some might say, especially in legal documents) people often use superfluous words... In the case of a contract which has been periodically renegotiated, amended and added to over many years, it is unreasonable to expect that there will be no redundancies or loose ends.

98. In this case, the parties, it appears without legal advice, amended the terms of the standard form of contract on which they based the wording of their bargain. Although Mr Kam is or was a solicitor, it does not appear that he was involved in the drafting exercise. That appears to have been carried out between Ms Indyk and representatives of Walton. Thus, whilst it is regrettable that the redrafting exercise appears to have produced an orphaned provision relating to damages as between Walton and its subcontractors, that does not justify the court in reading that orphaned provision as having an operation a wider than its words fairly permit.

99. It may be accepted that the substituted form of cl 35.6 was intended to replace what was deleted (this is apparent from the way in which the deletion was carried out). But that does not mean that the substituted form of cl 35.6 should be read as doing the same work as the clause that it replaced. On the contrary, it seems to me, the way in which the parties filled in the item of the schedule that refers both to cl 35.6 and to the topic of liquidated damages (by inserting "$0. Refer to amended cl 35.6") is a powerful indication that the parties did not intend any amount to be payable by Walton to Illawarra by way of liquidated damages.

100. Thus, I conclude, whatever cl 35.6 does mean, it does not have the effect that Illawarra is not entitled to general damages for delay in achieving practical completion.

The effect of the Superintendent's certification

101. Illawarra submitted that, whatever the referee might have decided (and whatever the court might have concluded, by adopting this aspect of the referee's report), the question of the extent of the delay in achieving practical completion was to be answered by reference to the Superintendent's determination of the number of days of extension of time to which Walton was entitled. For the reasons I have given earlier, I do not accept that submission.

The parties' submissions on quantification of damage

102. Illawarra had leased the hotel to two associated entities, known as Vosava Pty Limited and Gamone Pty Limited. That lease was made well after the contract between Illawarra and Walton was signed. There is nothing in the evidence, at least as the parties referred to it in their submissions, to show that the lease that was granted had been in the contemplation of Walton and Illawarra when they negotiated and made their contract. Under the lease, the lessees paid a fixed or base rent and a turnover rent. Illawarra's claim for damages was based only on loss of the turnover rent. It relied on Mr Krochmalik's evidence to quantify this.

103. Walton submitted that Illawarra was not entitled to any damages for the period of delay in question (that is, for the 13 trading days from the adjusted date for practical completion, 26 June 2007, to the date of practical completion, 9 July 2007). It based that submission on the proposition that the referee had found, first, that the period from 26 June until 6 July was one for which Walton was entitled to extensions of time by reason of delays attributable to Illawarra or the Superintendent; and, secondly, that Walton was not responsible for the delay in certification of practical completion from 6 to 9 July 2007.

104. As to loss based on turnover rent, Walton criticized aspects of Mr Krochmalik's analysis: in particular, a determination of the lost daily turnover rent calculated by reference to a time when trading had stabilized, about a year after the delays in question.

105. More fundamentally, Walton submitted that the claim was too remote. It noted that, according to Mr James (whose evidence on this point was said to be supported by the evidence of Illawarra's values, Mr Robertson), the terms of the lease that dealt with turnover rent were "uncommercial".

106. To meet that submission, Illawarra relied alternatively on what it says was the loss that it would have suffered had it operated the hotel itself (as calculated by Mr Krochmalik) or, alternatively, the loss of the market rental for the hotel (as assessed by Mr Robertson).

Decision

107. I do not accept the proposition that Illawarra is not entitled to damages for delay in achieving practical completion because the actual days of delay were (or should be taken to have been) covered by extensions of time. The reality, on the facts and on the referee's findings as adopted, is that practical completion was achieved some nine contractual working days, and more relevantly some 13 trading days, later than it should have been. Illawarra was deprived of the benefit of those 13 trading days. To my mind, it does not matter that the actual days were (or should be regarded as having been) covered by extensions of time.

108. For essentially the same reasons, I do not accept Walton's criticism of Mr Krochmalik's methodology in so far as Mr Krochmalik used trading figures from a period in the future when trading had stabilized. The effect of the delay in achieving practical completion was that the "ramp-up" period, during which trade would have increased until it stabilized into a normal seasonal pattern, was delayed.

109. Again for essentially the same reasons, I do not think that anything turns on the selection of particular trading days, although it might have been preferable for some annual average figure (once trading had stabilized) to have been used.

110. However, the fundamental point that Walton takes cannot be disposed of so easily. The essentially unchallenged evidence of Mr James is that the turnover rent provisions in the lease between Illawarra and its related entities were uncommercial. The turnover rent was based on gross turnover and not net turnover; it was a fixed percentage of gross turnover. The impact of the "payout ratio" and tax on

gambling revenues was such that, as Mr James said, the lessees "lost money on every dollar put into a gambling machine; the more successful the gaming operations, the more money [the lessees] lose". Even leaving taxes out of consideration, the payout ratio (89%) and turnover rent (15% of gross revenue) meant that the lessees were required to pay out $1.04 for every dollar gambled.

111. Mr Robertson made the same point, although in different terms. He said that the turnover provision, read in conjunction with the definition of "turnover rent", would not be found in any arms' length lease. He said that the definition of "gaming revenue" was not consistent with any provision that would be found in a lease negotiated at arms' length. On figures given by Mr Robertson, the turnover rent actually payable under the lease would be about nine times greater than that which would be payable under a lease (of the same hotel) negotiated at arms' length. Mr Robertson said that "no prospective arms' length lessee would have agreed to these terms, despite the prospect of renovations being undertaken to the premises and the potential for significantly increased trading".

112. I do not think that this problem can be overcome by ignoring the arrangements that Illawarra put in place (no doubt, for good commercial reasons) with its related entities, and by assessing damages on some hypothetical scenario, or on a basis that Illawarra might have (but did not) put in place. The question, after all, is "what (not too remote) loss has Illawarra suffered by the delay in practical completion?". It is not "what (not too remote) loss might Illawarra have suffered, had it put in place different arrangements to derive income from the hotel, by the delay in practical completion?".

113. I have no doubt that, in principle, loss of the value of the opportunity to derive income from the hotel business is recoverable. The parties knew (or, at the least, must be taken to have known) that the hotel was a functioning trading business, and that it was being renovated to make it more attractive to patrons, and thus to maximize the value of its trade. They knew (or must be taken to have known) that Illawarra intended to derive income from the trading activities of the hotel. It is not necessary that they should have had in contemplation "the precise details of the events giving rise to the loss". It is enough "that they contemplate the kind or type of loss or damage suffered". See McHugh JA in *Alexander v Cambridge Credit Corporation Ltd* (1987) 9 NSWLR 311 at 365-366. In this case, the kind of loss that the parties would (or should) have contemplated was loss of the opportunity to derive income from the operations of the hotel either directly, that is, operated by Illawarra, or through arrangements made at arms' length and on commercial terms.

114. In those circumstances, I think, Walton should be taken to have accepted the risk of loss in the event of delay (for which it was not entitled to any extension of time) in achieving practical completion. But it does not follow that Walton should be taken to have accepted the risk of loss calculated on the basis that Illawarra had entered into uncommercial arrangements with related entities so as, in effect, to reap a greater return from the trading operations of the hotel than might have been achieved by any arrangement made at arms' length.

115. On this point, I think, assistance can be gained from the decision in *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd* [1949] 2 KB 528. The plaintiff carried on business as a launderer and dyer. It bought a boiler from the defendant for use in its business. The defendant knew the nature of the plaintiff's business, and knew that the plaintiff proposed to put the boiler to immediate use in that business. The defendant delayed in delivering the boiler. Unknown to the defendant, the plaintiff had the opportunity to make specially lucrative contracts with the government, and proposed to use the boiler to enable it to fulfill those contracts. The Court of Appeal held that the plaintiff could recover damages for loss of ordinary business profits arising from delay in delivery of the boiler, but not for loss of the profits that would have arisen from the particularly lucrative contracts. The defendant did not know of the prospect that there would be such contracts, or of the terms on which they would be made.

116. In this context, it is important to bear in mind that the test of remoteness, in a claim for damages for breach of contract, is not based on reasonable forseeability. McHugh JA made that point in *Alexander* at 365. As his Honour said, in relation to the decision in *Victoria Laundry* , "it was surely reasonably foreseeable as a serious possibility... that a launderer and dyer might have special contracts with a lucrative profit margin". But, his Honour said, its losses "arising from those circumstances were not recoverable".

117. Applying those considerations to the present case, I think it could be said that losses arising from the

inability to earn income from the trading operations of the hotel must have been in the contemplation of the parties as a consequence of unjustified delay in achieving practical completion. But losses arising from a specially lucrative arrangement made to maximize the profits of Illawarra as landlord at the expense of Vosava and Gamone as lessees should not be taken to have been in the contemplation of the parties. To put it in a positive way: the parties should be taken to have contemplated that delay would cause loss of income based on the ordinary commercial operations of the hotel, but no more.

118. Bearing those principles in mind, I think that the appropriate way to assess loss from flowing in delay from completion is to proceed on the basis that the parties had in contemplation that Illawarra might either lease the hotel out, or operate the hotel itself. It is inherent in Illawarra's submissions that the court should proceed on the former basis. However, I think, the court should also take into account that, in the former circumstance, the parties would have had in contemplation that the rental payable would be a rental calculated at a reasonable, or market, or arms' length rate. Accepting (as again as inherent in Illawarra's submissions) that the parties may well have contemplated that the rent would be composed partly of a base rent and partly of a turnover rent, the question then becomes: what would be a reasonable, or market, or arms' length quantification of the turnover rent component?

119. Alternatively, it may be enough to say, based on what McHugh JA said in *Alexander* , that it is not necessary to descend to that level of detail, and that the question is simply: what measure of loss, or range of losses, should the parties have had in contemplation when they made their bargain?

120. Mr Robertson's analysis gives the best evidence of what a market turnover rent would be (or of the likely extent of the turnover component of a composite market rent).

121. Mr Robertson worked on an a basis of an assumed gaming turnover of $1,500,000.00 quarterly, which he said was "an approximate figure obtained from the quarterly CMS gaming invoice". He said that a turnover rent should be based on the net gaming turnover (i.e., after allowing for the payment of winnings, which Mr Robertson quantified at 89% of turnover). That resulted in what he called "a net clearance figure" of $165,000.00 quarterly, or $12,692.00 weekly. At 15%, that produced a turnover rent of $1,904.00 weekly.

122. It was the disparity between that figure and the equivalent figure of $17,732.00 per week produced, on the equivalent turnover, by the formula in the lease, that led Mr Robertson to express the view that "no prospective arms' length lessee would have agreed to these terms, despite the prospect of renovations...".

123. In round figures, a turnover rent of $1,903.00 per week (Mr Robertson's figure; perhaps he rounded down) can be said to be a little less than $300.00 per day. I propose to fix an amount of $4,000.00 for the 13 days in question. I acknowledge that this is somewhat higher than the arithmetical working-out of the figures that I have set out, but the assessment of damages is not a precise science.

124. I have not overlooked the fact that Mr Robertson assessed a market rental for the hotel (by reference to maintainable average weekly turnover, and maintainable annual net operating profit or EBITDA), at $825,000.00 per annum once the renovations had been completed. That included, as I understand it, a turnover rent of 15% but based on net turnover (i.e., after allowing for payouts), and thus a substantially higher base rent.

125. Since the claim is only for loss of turnover rent (presumably, on the basis that the base rent was payable in any event), it is not appropriate to rework Mr Robertson's calculations of turnover rent in some way by taking account of his opinion as to average annual rental. In short, since the claim that is put is one for loss of turnover rent, the question is really: what is the reasonable, or market, or arms' length, turnover rent to be taken into account as the basis for calculation of loss?

126. If, contrary to what I have said, it is correct to calculate damages on the basis of the loss of the turnover rent that was actually payable under the lease that Illawarra had negotiated with its related entities, then I would accept Mr Krochmalik's calculation of that loss (for a period of 13 days) on the basis of his calculation of "equilibrium" turnover rent. That calculation produced a weekly figure of $12,456.50, with a daily figure of $1,779.50. Thus, for the 13 days in question, the loss on this basis would be $23,133.50.

127. However, as I have said, I assess this part of the loss at the figure of $4,000.00.

128. Illawarra also claimed the cost of two additional site visits undertaken by Ms Indyk. It said that those visits would not have been undertaken had Walton achieved practical completion by the extended date for practical completion. The total amount claimed is $980.00. Walton submitted that this claim should be disregarded, on " *de minimis* " principles.

129. Since the claim is pressed, it should be allowed. An obvious consequence of unjustified delay in achieving practical completion is that more site visits will be required, so that the Superintendent can check on the progress of the works and assure herself that everything is being done in accordance with the contract.

130. Since the quantification of the claim was not challenged, I propose to allow $980.00 by way of damages for this aspect of the claim.

131. In summary, I allow $4,980.00 to Illawarra as damages for Walton's delay in achieving practical completion.

Ninth issue: damages for defective work

132. The referee assessed the cost of repair of defective and incomplete work, so as to bring the works into conformity with the contract, at $123,895.20. Her assessment has been adopted by the court. I note that the figure is in 2009 dollars, and excludes GST. The question is to what (if any) extent cl 42.8 bars Illawarra's claim for these damages.

133. Walton submitted that the final certificate issued by the Superintendent operated according to its terms, so that the works should be taken to "have been completed in accordance with the terms of the Contract" except to the extent that there were defects that were not apparent, when the certificate was issued, or which could not then have been discovered upon reasonable inspection.

134. The parties agreed that the referee should consider, and express a view upon, the question of whether such defects as she found were present would have been apparent at the relevant time, or of such a nature as to have been discovered upon reasonable inspection. Once again, that was not among the questions referred to the referee. Nonetheless, she did express a view on this.

135. Illawarra submitted, although with less vigour than it did in relation to the referee's observations as to the reasonableness of the Superintendent's determinations, that I should not accept the referee's views on this matter. I do not agree. It was necessary for the referee to consider whether any of the alleged defects existed and, if they did, the method of repair and the reasonable cost of repair (or making good). To do that, it was necessary for her to give close attention to the actual defects. She was well placed to comment on whether the defects were apparent, or should have been disclosed on reasonable inspection. The parties had an adequate opportunity of addressing the question. If it were necessary to do so, I would accept the referee's conclusions on this point.

136. However, in my view, cl 42.8 can be put to one side. It is not a "conclusive evidence" provision (unlike others frequently found in building contracts). It provides no more than that the certificate is to be evidence in any proceedings that the works have been completed in accordance with the terms of the contract. Thus, the evidentiary effect of the certificate is to be weighed along with all other evidence dealing with the nature and extent of defective and incomplete work.

137. As I have said, this aspect of the referee's report (as to the extent of defective and incomplete work and the reasonable cost of repair or making good) has been adopted. It follows that the parties are estopped from contending to the contrary of her report on those matters, as adopted. But even if it were open to the parties to debate the point once more, I would conclude, in the light of the referee's detailed analysis and report, that her views on the nature and extent of defective and incomplete work should be accepted in preference to the apparently contrary conclusion expressed by or ascertainable from the Superintendent's final certificate.

138. Accordingly, I conclude that Illawarra is entitled to damages, for defective or incomplete work, in the amount of $123,895.20 found by the referee.

Tenth issue: GST on those damages

139. For the reasons given at [92] above, this issue is to be reserved for further consideration.

Eleventh issue: Illawarra's claim for damages for misleading or deceptive conduct

The misleading or deceptive conduct alleged

140. Mr Kam gave evidence of a conversation that, he said, took place "towards the end of June 2006" between himself, Mr Jerez and Ms Indyk. The subject of the conversation was how time lost might be caught up. According to Mr Kam, there was a discussion to the following effect (affidavit sworn 18 December 2008, paragraph 31):

31. Towards the end of June 2006, there was a meeting between Chris Jerez, Shelley and me. I can not recall if Chris Chambers was also present at this time. However, if he was present, I can not recall him taking any active part in the discussions which were led by Chris Jerez. We had a conversation including words to the following effect:

I: "I'm very concerned with the progress of this job. It's meant to be finished late August, early September and to my untrained eye, it looks like there's no chance of that happening."

Shelley: "There's no way that this job will be finished by early September."

Chris Jerez: "I agree that the job won't finish by early September. We lost a lot of time with variations from latent conditions and so on."

I: "My Summer trade is vital. We must be open by Summer."

Chris Jerez: "We'll make up lost time if, in late August September we close down the whole hotel other than for the gaming room and toilets. You could then be open by late October early November. But both bars will be closed."

I said: "If I don't have Summer, I'll lose a lot of trade and goodwill. I guess I have no choice."

Shelley said to Chris Jerez:

"I'll need a revised construction programme."

Chris Jerez said: "I'll get it to you."

A revised construction programme was not received until late August 2006, which programme showed a completion date in early December 2006.

141. According to Ms Indyk, the discussion took place "in about June 2006" and in the course of it Mr Jerez said words to the following effect (affidavit sworn 22 May 2009, paragraph 57):

"If you close down the bar when Stage 2 starts, and have just the gaming room and toilets, I'll be able to finish by late October early November 2006."

142. Mr Jerez denied that there was a conversation to the effect set out by Mr Kam, and denied that he suggested the closing down of both bars (other than the gaming room and its associated toilet) in order to expedite the completion of the works.

143. Illawarra relies also on a letter sent by Ms Indyk to Walton on 15 September 2006. So far as it is relevant, that letter states:

At our site meeting on 23 June, with Mr Garry Kam and Chris Jerez, we discussed ways that could assist the builder in reducing the time delays in his building program. As a team, decisions were made to reorganise the program of construction, so as to reduce the program and thus save time. The completion of Bar 2 was delayed as was the completion of the hallway tiling etc.

144. In those circumstances, Illawarra submits, it should be found that Mr Jerez represented that if both bars were closed down, the works could be finished by October or November 2006. It submits that this representation, being as to a future matter, must be taken to have been misleading or deceptive unless Walton shows the contrary. Finally, Illawarra submits, it relied on that representation by closing down both bars as (it says) Mr Jerez advised, leaving only the servery adjacent to the gaming room available for the sale of alcohol.

Decision

145. I start with the proposition that, in a case of misleading or deceptive conduct based on spoken words, "it is necessary that the words spoken be proved with a degree of precision sufficient to enable the court to be reasonably satisfied that they were in fact misleading in the proved circumstances". See *Watson v Foxman* (1995) 49 NSWLR 315 at 318. In assessing the evidence, I take account of the warning given by McLelland CJ in Eq in that case at 319:

...Furthermore, human memory of what was said in a conversation is fallible for a variety of reasons, and ordinarily the degree of fallibility increases with the passage of time, particularly where disputes or litigation intervene, and the processes of memory are overlaid, often subconsciously, by perceptions or self-interest as well as conscious consideration of what should have been said or could have been said. All too often what is actually remembered is little more than an impression from which plausible details are then, again often subconsciously, constructed. All this is a matter of ordinary human experience.

146. A decision on this issue requires that close attention be given to the evidence of Mr Kam and Ms Indyk. Although there appears to be substantial consistency between their accounts of the relevant conversation, at least to the extent that Ms Indyk puts it in evidence, my impression of their oral evidence on this point was not favourable.

147. As to Mr Kam: it was apparent that his evidence on reliance was open to doubt. As will be seen from the extract from his affidavit set out above, Mr Kam appreciated that there was a need for a revised construction program. He said that he received it in late August 2006, and that when he received and considered it, he did not expect that Walton could bring the work to completion by late October or early November 2006. However, in his affidavit, Mr Kam had said also that the bars were not closed down until late August 2006. On that basis, it was at least doubtful that he could have undertaken the closing down of the bars in reliance on the alleged representation, because by the time the bars were closed down, the revised construction program would have made it clear that the representation (if made) was no longer operative.

148. When confronted with this difficulty in cross-examination, Mr Kam said that the bars were closed down "around 17 August" (T 36.40). (He had not been asked, in his evidence in chief, to qualify the relevant paragraph of his affidavit.) He said that he had identified those dates by reviewing "some... old weekly trading sheets" so as to "identify those days when there was nil trade for a few days" (T 36.43, .44). Not only was that evidence inconsistent with what Mr Kam had said in his affidavit, it was also inconsistent with the evidence of Illawarra's employee Mr Anzani, who had commenced his duties as manager of the hotel before the bars were closed down. He said that the bars closed down "around a month" after he started work (which was on 17 August 2006) (T 53.9-.22).

149. I had the very clear impression that Mr Kam recognized the difficulty in this part of his evidence. It is, to say the least, surprising that the records on which he relied to suggest that that the bars were closed on around 17 August 2006 had not been scrutinized, or if they had that their significance had not been identified, over the years that this litigation has been brewing. That is so particularly given the evident animosity between the parties and the lengths to which each has gone to buttress its case.

150. I accept, of course, that the particular question with which I am presently dealing is whether I am satisfied (in the sense of feeling a sense of actual persuasion), on the balance of probabilities, that the words on which this part of the case is based were actually spoken. But in my view, this aspect of Mr Kam's evidence needs to be assessed as a whole. It is artificial to divide it into segments, and to say that part is acceptable and part is not, when all of it is concerned with the case of misleading or deceptive conduct.

151. My impression of this part of Mr Kam's evidence is that, as I have said, he was aware of the difficulty

with which he was confronted, and that he has reconstructed his narrative of events in an attempt to overcome that difficulty. This is, I think, a clear example of the role that perceptions of self-interest play in influencing testimonial evidence.

152. I should add that I saw no reason to doubt the accuracy of Mr Anzani's recall. After all, he was directly involved, as manager of the hotel at the time, and indeed responsible for closing down operations. Mr Kam had nothing personally to do with that process.

153. Nor do I regard the evidence of Ms Indyk as providing acceptable corroboration of this aspect of Mr Kam's evidence. The impression I had listening to her in the witness box was that she had very little (if any) actual recall of relevant events; that she resented being questioned on such recall as she had professed in her affidavits to have; and that, in general, she was hostile to both Walton and its legal representatives. I do not regard this aspect of her evidence as reliable.

154. Of course, there is the letter of 15 September 2006, on which Mr Donaldson placed reliance. To my mind, the significant feature of the letter is that it does not say that Mr Jerez used the words attributed to him, or words to their effect. Certainly, the letter records that, on 23 June 2006, there were discussions as to ways in which delays could be reduced. It records, further, that "decisions were made to reorganize the program of construction, so as to reduce the program and thus save time" and that one of those decisions appears to have been that "the completion of Bar 2 [would be] delayed...". It is common ground that there were such discussions, and that the construction program was reorganized in an attempt to speed work up. But what the letter does not say is that there was any representation made by Mr Jerez that, if both bars were closed, the work would be completed by October or November 2006.

155. Mr Jerez's evidence on the conversation of late June 2006 was unshaken in cross-examination. My impression of Mr Jerez was that he had a good recall of events and that he was doing his best to give accurate evidence. Mr Donaldson submitted that Mr Jerez had given differing accounts of events at different times and for different purposes. That may be so. But even if it be so, it does not prove that the conversation occurred in the terms alleged by Mr Kam.

156. I am not satisfied, on the balance of probabilities, that the words on which the misleading or deceptive conduct case is based were used.

157. I should also note that Mr Kam accepted that when he had the conversation with Mr Jerez in June 2006 on which this aspect of Illawarra's case it is based, he "never intended by this arrangement to deprive [Walton] of any legitimate entitlement to extensions of time under the contract", so that "if something happened after June 2006 which would legitimately entitle the builder to further time..., [he] wouldn't say [Walton] wasn't entitled to that time" (T 36.1-.12).

158. The significance of this is that, within a very short time after the bars were closed, delays occurred for which Illawarra (or Ms Indyk in her capacity as project architect) was solely responsible, and which had the effect of making it impossible for Walton to complete the works by October or November in any event. Further, there were substantial delays during the first half of 2007 for which again Illawarra (or Ms Indyk in her capacity as project architect) was solely responsible, and which had the effect of delaying completion further. It may be noted that the delays in the second half of 2006 and the first half of 2007 were in substance disallowed by Ms Indyk, but allowed by the referee, as entitling Walton to extensions of time for achieving practical completion. Indeed, I think, it is those delays that are substantially responsible for the starkly disparate conclusions to which Ms Indyk and the referee came on this topic.

159. As a matter of context, it seems to me, the parties must be taken to have understood that any representation made as to a completion date, or (more generally) as to the effect of reprogramming the works on expediting completion, would be subject to unforeseen future events that would delay completion and that would give Walton an entitlement to an extension of time for practical completion.

160. For those reasons, Illawarra's claim for damages for misleading or deceptive conduct must fail.

Nature of the claim for damages

161. In light of what I have just said, it is unnecessary to express a view on the quantification of the claim for damages for misleading or deceptive conduct. There are, however, two questions in relation to that which would require resolution.

162. The first question arises because, once again, Mr Krochmalik quantifies the loss by reference to the loss of turnover rent. If it is appropriate to calculate the loss, for the alleged misleading or deceptive conduct (assuming, contrary to what I have just said, that there was such conduct), by reference to the turnover rent payable in accordance with the lease, then I would accept Mr Krochmalik's calculations as substantially correct. If, however, the same problem of remoteness arises in relation to damages for misleading or deceptive conduct as, I have found, arises in respect of damages for breach of contract, then loss must be assessed on some other basis.

163. The other question is one of principle. Illawarra claims damages for the entire period during which the bars were closed. As I have just said, a very substantial part of that period represents delays that were entirely attributable to Illawarra or its architect Ms Indyk, for which one or other was responsible, and for which Walton (which bore no responsibility for those delays) was entitled to extensions of time. To my mind, there is a real question as to whether, bearing in mind what I have said at [157] above, Illawarra should be entitled to damages for the whole of the period during which both bars were closed notwithstanding that a substantial part of the delay in completion over that time was attributable only to it or its architect. Since it is not necessary that I deal with this point, I will do no more than flag it.

Conclusions and orders

164. Walton is entitled to damages for breach of cl 23(c), assessed in the manner outlined at [80] above. It is not entitled to damages for extra time incurred.

165. Walton is entitled to interest on such damages as it should recover. Since those damages stand in the place of the proper amounts that should have been paid for variations and provisional sum items, interest should run from the date when those amounts would have been payable had the Superintendent assessed the claims in accordance with her duty to do so either within the time prescribed under the contract or within a reasonable time.

166. Illawarra is entitled to damages for delay in achieving practical completion, in the sum of $4,980.00. Interest should run on that sum from the date of practical completion, 9 July 2007.

167. Illawarra is also entitled to damages for the cost of repair and making good defective and incomplete work, as assessed by the referee, in the sum of $123,895.20.

168. Since the referee assessed that sum in 2009 dollars, interest should run from the date of the assessment up until the date of judgment. Interest from the date of practical completion up until the date of the referee's assessment has effectively been brought to account because the referee made her assessment in 2009.

169. Illawarra's claim for damages for misleading or deceptive conduct fails.

170. In my view, damages should be set off and the net amount one way or another is all that should be payable. The retention sum of $138,948.36 [see at [32] above) should be brought to account in this process.

171. The parties should have an opportunity to address on costs. Assuming that there may be costs orders each way, prima facie costs should be set off. If there is to be a real dispute as to costs, any contentious evidentiary matters should be the subject of affidavit evidence, and the parties should provide brief written submissions.

172. I direct the parties to bring in short minutes of order to give effect to these reasons. Those orders should include reservation of liberty to apply on 14 days' notice in respect of GST on damages (see at [92] and [139] above). That is to be done at 10:00am on 4 November 2011. On that occasion, I will deal with any dispute as to the form of the orders, and with any application in relation to costs.

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