PROBUILD CONSTRUCTIONS (AUST) PTY LTD v DDI GROUP PTY LTD

[2017] NSWCA 151

Court of Appeal: Beazley ACJ, McColl and Macfarlan JJA

15 September 2016, 23 June 2017

Building and Construction — Resolution of disputes — Adjudication — Determinations — Prevention principle — Variations directed by principal after Date for Practical Completion — Where principal sought to reduce payment claim to bill on account of liquidated damages claim for delayed completion — Building and Construction Industry Security of Payment Act 1999 (NSW).

A head contractor and a subcontractor were parties to a subcontract relating to renovation works on a hotel. The Date of Practical Completion of the works, as defined in the subcontract, was 144 days later than the Date for Practical Completion as defined in the subcontract.

A clause in the subcontract provided a mechanism by which the subcontractor could seek an extension of time in the event that it envisaged a delay in carrying out the works, including delay caused by variation to the subcontracted works. A further clause in the subcontract conferred on the head contractor a discretionary power to extend time, notwithstanding that the subcontractor was not entitled to, or had not claimed, an extension of time.

The subcontractor served a payment claim pursuant to s 13 of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOP Act). The head contractor provided a payment schedule pursuant to s 14 of the SOP Act in which it said that the subcontractor's payment claim should be reduced to nil by reason of a set-off for liquidated damages calculated by reference to the 144 days between the Date for Practical Completion and the Date of Practical Completion. The head contractor asserted that the subcontractor had not been granted and was not entitled to an extension of time.

The subcontractor made an application for adjudication of its payment claim pursuant to s 17 of the SOP Act. The subcontractor asserted that it was the head contractor that instructed it to depart from the construction program and the head contractor was aware of the delays caused by the revised construction programs it issued. It denied that the head contractor's liquidated damages claim was reasonable and asserted that it was an invention of convenience.

The adjudicator rejected the head contractor's claim for liquidated damages. He noted that the head contractor had directed variations to the subcontract works well after the date for practical completion and concluded that it appeared "totally inconsistent and unreasonable" for the head contractor to be directing the subcontractor to perform significant additional work under the subcontract after the original Date for Practical Completion and then making a claim for liquidated damages against the subcontractor following the head contractor's express directions. The adjudicator held that while there may have been delays caused by the subcontractor, he was not satisfied that the head contractor was entitled to a liquidated damages claim for the total 144 days.

The head contractor commenced proceedings in the Supreme Court by way of summons seeking an order in the nature of certiorari quashing the adjudicator's purported determination. The head contractor argued that the determination was infected by a denial of procedural fairness because underpinning the adjudicator's rejection of its liquidated damages claim was the application of the prevention principle and the adjudicator had not notified either party of his intention to apply that principle. The head contractor asserted that if the adjudicator intended to apply the prevention principle, he should have invited the parties to make further submissions, as he was empowered to do under s 21(4) of the SOP Act.

The primary judge dismissed the head contractor's summons, finding that there had been no denial of procedural fairness and that the adjudicator had "dealt with [the head contractor's] arguments as made".

Held (dismissing the appeal): (1) The essence of the prevention principle is that a party cannot insist on the performance of a contractual obligation by the other party if it itself is the cause of the other party's non-performance. ([1]; [114]; [146])

Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd (No 2) (2012) 287 ALR 360; (2012) 28 BCL 282; [2012] WASCA 53, followed.

(2) The prevention principle applied to delays in practical completion caused by variations resulting from the act or default of the principal. In the context of delaying variations, whether ordered before or after the due date for completion, the prevention principle is grounded upon considerations of fairness and reasonableness. ([1]; [115]; [146])

Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd (No 2) (2012) 287 ALR 360; (2012) 28 BCL 282; [2012] WASCA 53, applied.

(3) The prevention principle may preclude an owner recovering liquidated damages for delay in the completion of works by the contractor where that delay has been caused by an act or omission of the owner in breach of the contract. ([1]; [116]; [146])

(4) The operation of the prevention principle can be modified or excluded by contract. ([1]; [117]; [146])

(5) A reserve power to grant an extension of time must be exercised honestly and fairly, having regard to the underlying rationale of the prevention principle. ([1]; [128]; [146])

Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd (2002) 18 BCL 322; [2002] NSWCA 211; *Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd (No 2)* (2012) 287 ALR 360; (2012) 28 BCL 282; [2012] WASCA 53; *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 2)* [2006] VSC 491, applied.

Discussion on the operation of the *Building and Construction Industry Security of Payment Act 1999* (NSW).

CASES CITED

The following cases are cited in the judgments:

620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 2) [2006] VSC 491
Abel Point Marina (Whitsundays) Pty Ltd v Uher [2006] QSC 295
Alcatel Australia Ltd v Scarcella (1998) 44 NSWLR 349
Built Environs Pty Ltd v Tali Engineering Pty Ltd [2013] SASC 84
Cardinal Project Services Pty Ltd v Hanave Pty Ltd (2011) 81 NSWLR 716; [2011] NSWCA 399

Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd (2010) 78 NSWLR 393; [2010] NSWCA 190
Clarence Street Pty Ltd v Isis Projects Pty Ltd (2005) 64 NSWLR 448; [2005] NSWCA 391
Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd (2005) 62 NSWLR 385; [2005] NSWCA 49
Gaymark Investments Pty Ltd v Walter Construction Group Ltd (1999) 16 BCL 449; [1999] NTSC 143
Gipping Construction Ltd v Eaves Ltd [2008] EWHC 3134 (TCC)
Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2) (2009) 26 VR 172; [2009] VSC 426
Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd [2002] NSWCA 136
Holme v Guppy (1838) 3 M&W 387; 150 ER 1195
John Holland Pty Ltd v Roads and Traffic Authority of New South Wales (2007) 23 BCL 434; [2007] NSWCA 140
Kioa v West (1985) 159 CLR 550; [1985] HCA 81
Minister for Immigration and Multicultural Affairs, Re; Ex parte Lam (2003) 214 CLR 1; [2003] HCA 6
Multiplex Constructions Pty Ltd v Luikens [2003] NSWSC 1140
Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2) [2007] EWHC 447 (TCC); [2007] BLR 195
Musico v Davenport [2003] NSWSC 977
Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq) (2005) 64 NSWLR 462; [2005] NSWCA 409
Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd [2012] 1 Qd R 525; [2011] QCA 22
Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd [1970] 1 BLR 111
Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd (2002) 18 BCL 322; [2002] NSWCA 211
Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd [2016] NSWSC 462
Refugee Review Tribunal, Re; Ex parte Aala (2000) 204 CLR 82; [2000] HCA 57
RJ Neller Building Pty Ltd v Ainsworth [2009] 1 Qd R 390; [2008] QCA 397
Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd (1979) 144 CLR 596; [1979] HCA 51
Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2) (2016) 95 NSWLR 157; [2016] NSWCA 379
Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd [2005] NSWSC 1152
SMK Cabinets v Hili Modern Electrics Pty Ltd [1984] VR 391
Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd (2016) 91 ALJR 233; [2016] HCA 52
Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd (No 2) (2012) 287 ALR 360; (2012) 28 BCL 282; [2012] WASCA 53
Stead v State Government Insurance Commission (1986) 161 CLR 141; [1986] HCA 54
TransGrid v Walter Construction Group Ltd [2004] NSWSC 21
Turner Corp Pty Ltd (rec and mgr apptd) v Austotel Pty Ltd (1994) 13 BCL 378
Turner Corporation Ltd (in prov liq) v Co-ordinated Industries Pty Ltd (1994) 11 BCL 202
Turner Corporation Ltd (in prov liq) v Co-ordinated Industries Pty Ltd (1995) 12 BCL 33
Watpac Constructions v Austin Corp [2010] NSWSC 168

APPEAL

This was an appeal against a decision refusing an application to quash an adjudication determination made under the *Building and Construction Industry Security of Payment Act 1999* (NSW).

S Robertson and *PF Santucci*, for the appellant.

M Galvin and *B Douglas-Baker*, for the first respondent.

The second respondent filed a submitting appearance.

Judgment reserved

23 June 2017

1 **BEAZLEY ACJ.** I have had the advantage of reading in draft the reasons of McColl JA. I agree with her Honour's reasons and proposed order.

2 **McCOLL JA.** The appellant, Probuild Constructions (Aust) Pty Ltd (Probuild), appeals against Meagher JA's decision refusing its application to quash an adjudication determination (Determination) made under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOP Act) by the second respondent, Ian Hillman (the adjudicator), in favour of the first respondent, DDI Group Pty Ltd (DDI).[1] Probuild contends Meagher JA erred in determining that the adjudicator did not deny Probuild procedural fairness (natural justice) in relation to the making of the Determination.

3 For the reasons that follow, I would dismiss the appeal with costs.

Statutory framework

4 The Determination was made as part of the process for which the SOP Act provides to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.[2]

5 The SOP Act ensures a person is entitled to receive those progress payments by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments,[3] and by establishing the procedure to which I refer in greater detail below.[4] The SOP Act does not limit any other entitlement that a claimant may have under a construction contract, or any other remedy that a claimant may have for recovering any such other entitlement.[5]

6 Construction contract is defined in s 4(1) to "mea[n] a contract or other arrangement under which one party undertakes to carry out construction work, or to supply related goods and services, for another party". Construction work is extensively defined in s 5 and includes, relevantly, "the construction, alteration, repair, restoration … or dismantling of buildings … forming … part

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1 *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2016] NSWSC 462.
2 SOP Act, s 3(1).
3 SOP Act, s 3(2).
4 SOP Act, s 3(3).
5 SOP Act, s 3(4).

of land (whether permanent or not)".[6] There is no controversy that the contract between the parties was a construction contract pursuant to which DDI carried out construction work.

7 Part 3 of the SOP Act deals with the procedure for recovering progress payments. Division 1 (Payment claims and payment schedules) relevantly enables a person as referred to in s 8(1) who is or who claims to be entitled to a progress payment (the claimant) to serve a payment claim on the person who, under the construction contract concerned, is or may be liable to make the payment (s 13(1)).[7] A payment claim must, relevantly, identify the construction work (or related goods and services) to which the progress payment relates, and must indicate the amount of the progress payment that the claimant claims to be due (the claimed amount) (s 13(2)(a) and (b)). A payment claim may be served only within the period determined by or in accordance with the terms of the construction contract, or the period of 12 months after the construction work to which the claim relates was last carried out (or the related goods and services to which the claim relates were last supplied), whichever is the later (s 13(4)).

8 A person on whom a payment claim is served (the respondent) may reply to the claim by providing a payment schedule to the claimant (s 14(1)). A payment schedule must identify the payment claim to which it relates, and must indicate the amount of the payment (if any) that the respondent proposes to make (the scheduled amount) (s 14(2)). If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment (s 14(3)). If a claimant serves a payment claim on a respondent, and the respondent does not provide a payment schedule to the claimant within the time required by the relevant construction contract, or within 10 business days after the payment claim is served, whichever time expires earlier, the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates (s 14(4)).

9 Part 3 Div 2 deals with the adjudication of disputes. Relevantly, a claimant may apply for adjudication of a payment claim (an adjudication application) if the respondent provides a payment schedule under Div 1 but the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim (s 17(1)(a)(i)). That was the basis of the adjudication application in this case as, rather than advising acceptance of any part of the progress claim, the payment schedule claimed DDI was indebted to Probuild in the amount of $2,635,725 by way of liquidated damages.

10 An adjudication application must be in writing, and must be made to an authorised nominating authority chosen by the claimant and, in the case of an

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[6] SOP Act, s 5(1)(a).

[7] The effect of the definition of "progress payment" in s 4 is that s 8(1) creates a statutory entitlement not only to a payment in the nature of an instalment but also to a final payment under a construction contract, to a single or one-off payment under a construction contract and to a payment of a type known in the construction industry as a "milestone payment" making it "clear that the Act is not concerned only with providing a statutory mechanism for securing payments that are to occur during the currency of an existing construction contract [but also] … that a claim for a progress payment might be made after the contract has expired": *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 91 ALJR 233; [2016] HCA 52 at [65] per curiam (Kiefel, Bell, Gageler, Keane and Gordon JJ).

application under s 17(1)(a)(i), must be made within 10 business days after the claimant receives the payment schedule, must identify the payment claim and the payment schedule (if any) to which it relates, and must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and may contain such submissions relevant to the application as the claimant chooses to include (s 17(3)). A copy of an adjudication application must be served on the respondent concerned (s 17(5)).

11 It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in s 18) as soon as practicable (s 17(6)).

12 Section 18 deals with eligibility criteria for adjudicators. The only one specified is that the adjudicator be a natural person (s 18(1)(a)). Other eligibility criteria were able to be prescribed by regulation (s 18(1)(b)) but no regulation to that effect has been made. An adjudicator to whom the adjudication application is referred may accept the adjudication application by causing notice of the acceptance to be served on the claimant and the respondent (s 19(1)).

13 Section 20 deals with adjudication responses. It relevantly provides that, only if the respondent has provided a payment schedule to the claimant within the time specified in s 14(4) or s 17(2)(b) the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the adjudication response) at any time within five business days after receiving a copy of the application, or two business days after receiving notice of an adjudicator's acceptance of the application, whichever time expires later (s 20(1) and (2A)). The adjudication response must be in writing, and must identify the adjudication application to which it relates, and may contain such submissions relevant to the response as the respondent chooses to include (s 20(2)). The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant (s 20(2B)). A copy of the adjudication response must be served on the claimant (s 20(3)).

14 Pursuant to s 21 (Adjudication procedures), an adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response, nor unless it was made before the end of the period within which the respondent may lodge such a response (s 21(1) and (2)). Subject to those subsections, an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case, within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application, or within such further time as the claimant and the respondent may agree (s 21(3)). For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, may set deadlines for further submissions and comments by the parties, and may call a conference of the parties (s 21(4)). If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation (s 21(4A)). The adjudicator's power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties (s 21(5)).

15 An adjudicator is to determine the amount of the progress payment (if any) to be paid by the respondent to the claimant (the adjudicated amount), and the date on which any such amount became or becomes payable, and the rate of interest payable on any such amount (s 22(1)). In determining an adjudication application, the adjudicator is only to consider the provisions of this Act, the provisions of the construction contract from which the application arose, the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim, the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule, and the results of any inspection carried out by the adjudicator of any matter to which the claim relates (s 22(2)).

16 The adjudicator's determination must be in writing, and include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination) (s 22(3)). If the adjudicator's determination contains a clerical mistake, or an error arising from an accidental slip or omission, or a material miscalculation of figures or a material mistake in the description of any person, thing or matter referred to in the determination, or a defect of form, the adjudicator may, on the adjudicator's own initiative or on the application of the claimant or the respondent, correct the determination (s 22(5)).

17 If an adjudicator determines that a respondent is required to pay an adjudicated amount, the respondent must pay that amount to the claimant on or before either the date occurring five business days after the date on which the adjudicator's determination is served on the respondent concerned, or if the adjudicator determines a later date under s 22(1)(b) — that later date (s 23).

18 If the respondent fails to pay the whole or any part of the adjudicated amount to the claimant in accordance with s 23, the claimant may, among other matters, request the authorised nominating authority to whom the adjudication application was made to provide an adjudication certificate under s 24.

19 An adjudication certificate may be filed as a judgment for a debt in any court of competent jurisdiction and is enforceable accordingly (s 25(1)). If the respondent commences proceedings to have the judgment set aside, the respondent is not, in those proceedings, entitled to bring any cross-claim against the claimant, or to raise any defence in relation to matters arising under the construction contract, or to challenge the adjudicator's determination, and is required to pay into the court as security the unpaid portion of the adjudicated amount pending the final determination of those proceedings (s 25(4)).

20 Pursuant to s 34, the statutory right to progress payments created by s 8 and s 9 of the SOP Act cannot be modified by contract.[8] Subject to s 34, nothing in Pt 3 affects any right that a party to a construction contract may have under the contract, or may have under Pt 2 in respect of the contract, or may have apart from this Act in respect of anything done or omitted to be done under the contract (s 32(1)). Nothing done under or for the purposes of Pt 3 affects any civil proceedings arising under a construction contract, whether under Pt 3 or

[8] *Chase Oyster Bar Pty Ltd v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393; [2010] NSWCA 190 at [4] (Spigelman CJ).

otherwise, except as provided by s 32(3) (s 32(2)). A court or tribunal which hears any matter arising under a construction contract must allow for any amount paid to a party to the contract under or for the purposes of Pt 3 in any order or award it makes in those proceedings (s 32(3)(a)), and may make such orders as it considers appropriate for the restitution of any amount so paid, and such other orders as it considers appropriate, having regard to its decision in those proceedings (s 32(3)(b)).

Factual background

21 Probuild was the head contractor for the renovation of the Tank Stream Hotel in Hunter Street, Sydney. The work involved the refurbishment of the existing 10-level building and works to add levels 11 to 14. On 19 May 2014 Probuild subcontracted with DDI to carry out works comprising the installation of ceiling and wall plasterboard.[9] The Subcontract was an amended form of the General Conditions of Subcontract for Design and Construct (AS4303–1995). It provided for a fixed lump sum price of $3,378,970 (excluding GST) for an agreed scope of works, to be undertaken in discrete blocks of time pursuant to a Construction Program annexed to the Subcontract.

22 Date for Practical Completion of the works was defined by reference to Annexure A of the Subcontract as 5 January 2015. Date of Practical Completion was defined to mean either the date certified by the Head Contractor in a Certificate of Practical Completion to be the date upon which Practical Completion was reached, or where another date was allowed pursuant to cl 41 as the date upon which Practical Completion was reached, that other date. Practical Completion was, relevantly, defined to mean that stage in the execution of the work under the Subcontract when the Subcontract Works were complete except for minor Omissions and minor Defects which did not prevent the Subcontract Works from being reasonably capable of being used for their stated or intended purposes.

23 Probuild contended that the Date of Practical Completion was 28 May 2015, 144 days late. DDI did not dispute that date.

24 Delaying Event was relevantly defined to mean "a *Variation* to the *Subcontract Works* (other than a *Variation* for the convenience of the *Subcontractor*)".

25 Clause 41 dealt with times for commencement and practical completion. Pursuant to cl 41.2, and without limiting the operation of cl 38,[10] the Subcontractor was required to execute the work under the Subcontract to Practical Completion by the Date for Practical Completion.

26 Various provisions of the Subcontract dealt with extensions of time.

27 Clause 41.5 (Notice of Delays) provided a mechanism for DDI to give Probuild notice of any delay in the progress of the Subcontract works and to claim an extension of time to the Date for Practical Completion. Clause 41.5(b)–(i) set out a list of the matters DDI was required to set out in a Delay Notice.

28 Clause 41.6 (Preconditions to Extension of Time) required DDI to comply strictly with the obligations cl 41 imposed (cl 41.6(b)(iv)). The effect of that obligation was that DDI was required to give Probuild notice as soon as

[9] The Subcontract was executed on 2 June 2014, but backdated to 19 May 2014.

[10] Clause 38 dealt with the Progress and Programming of the Works.

practicable if it considered "a delay in the progress of the *Subcontract Works* is likely to occur or has occurred" (Delay Notice) (see cl 41.5(a)).

29 Clause 41.6(b) described the "only" circumstances in which DDI was entitled to an extension of time. Pursuant to the clause, such an entitlement only arose where, among other matters, a delay was directly caused by a Delaying Event, DDI was or would be delayed in progressing the Subcontract Works such that it would not reach Practical Completion by the Date for Practical Completion, and DDI had not caused or contributed to the delay and had complied strictly with all obligations imposed on it by cl 41 (including giving Probuild notice of the delay). Clause 41.6(c) provided that the Head Contractor would not be liable on any Claim (including for an extension of time) which had not been made strictly in accordance with cl 41 and any such Claim was barred.

30 Clauses 41.8–41.10, also dealt with the extensions of time and provided:

"**41.8 Extension of Time Sole Remedy**

(a) The right of the *Subcontractor* to make a *Claim* for an extension of time pursuant to this clause is the *Subcontractor's* sole remedy under this *Subcontract* in respect of any delay or delays. The *Subcontractor* is not entitled to any increase or adjustment to the *Subcontract Sum* or any other monetary compensation or damages (including damages for breach of contract in respect of any such delay).

41.9 Extension of Time Otherwise

(a) Notwithstanding that the *Subcontractor* is not entitled to or has not claimed an extension of time, the *Head Contractor* may at any time and from time to time before the issue of the *Final Certificate* under this *Subcontract* by notice in writing to the *Subcontractor* extend the time for *Practical Completion* for any reason.

41.10 Time Not Set at Large

(a) A delay or failure by the *Head Contractor* to grant a reasonable, or any, extension of time shall not cause the *Date for Practical Completion* to be set at large."

31 Clause 42 dealt with liquidated damages for delay in reaching Practical Completion. Clause 42.1(a)(ii) provided that if the Subcontractor failed to reach Practical Completion by the Date for Practical Completion, then the Subcontractor was indebted to the Head Contractor for liquidated damages at the rate stated in Annexure A to the Subcontract for every day after the Date for Practical Completion to and including the Date of Practical Completion or the date the Subcontract was terminated pursuant to the Subcontract or otherwise whichever first occurred. The rate stated in Annexure Part A was $15,000 per calendar day. Clause 42.2(a)(i) entitled the Head Contractor to deduct from moneys otherwise due to the Subcontractor the amount in respect of which the Subcontractor was indebted to the Head Contractor for liquidated damages.

32 Clause 45.1 provided that work should not be varied except as directed by Probuild pursuant to cl 45. Such variations were to be made by the issue of a Variation Direction. If such a Direction was not issued in circumstances where DDI considered a communication to include a direction to commence works constituting a variation, it could make a Variation Claim to which Probuild was required to respond, including where appropriate by the issue of a Variation Direction (cl 45.3). Clause 45.2 also permitted Probuild to request that DDI prepare a Variation Effect Notice in relation to a proposed Variation.

Such a variation was required to explain, among other matters, the effect the Subcontractor anticipated the variation would have on the Date for Practical Completion (cl 45.2(a)(i)(B)). On receipt of that Notice, Probuild could issue a Variation Direction or withdraw any informal direction.

33 Pursuant to cl 45.8, the Subcontractor acknowledged and agreed, relevantly, that the Subcontractor would be absolutely and conclusively barred from making any Claim (including in respect of a Variation to the Subcontract Works) unless the Subcontractor had complied with cl 45.3(a) and the Head Contractor had issued a Variation Direction in respect of that Variation and that the Subcontractor's sole remedy for delays arising from, or in connection with, a Variation was a Claim under cl 41.

34 Clause 48.6 (Set Offs by the Head Contractor) provided that subject to a provision of Queensland legislation which the court was informed was not relevant, the Head Contractor may deduct from moneys due to the Subcontractor or from the retention money or from any security any money due or which may become due from the Subcontractor to the Head Contractor including amounts on account of anticipated liquidated damages.

The adjudication process

35 On 27 July 2015 DDI served a Payment Claim on Probuild for an amount of $2,175,267 (including GST) pursuant to s 13 of the SOP Act. That amount represented the Subcontract value ($3,378,970) plus variations of $2,715,243, less payments Probuild had already made. $1,413,872.89 of the variations (V43–V210A) related to work undertaken after the Date for Practical Completion. V210A (described as extra/over labour, profit and overheads on V43–V210) was for the difference between the sum of variations V43–V210 and the total cost of labour and materials (including profit and overhead) as incurred in relation to all work done after 5 January 2015.[11]

36 As the adjudicator noted, Probuild failed to provide a payment schedule within the time allowed in s 14 of the SOP Act.[12] DDI did not seek to rely on s 14(4) to hold Probuild liable for the amount claimed in the Payment Claim. Rather, on 23 September 2015 it notified Probuild of its intention to apply for adjudication of the Payment Claim.[13]

37 On 30 September 2015 Probuild provided a Payment Schedule to DDI pursuant to s 14 of the SOP Act in reply to DDI's Payment Claim, reducing the claimed amount to nil and claiming $2,328,998 by way of set-offs. Probuild claimed the works were not completed until 29 May 2015, 144 days late.[14]

38 Probuild's Payment Schedule took the form of a letter addressed to DDI in response to DDI's progress claim of 22 July 2015. The payment schedule asserted, among other matters, that DDI's submissions "set out a confusingly structured argument in support of its entitlement to a variation claim" and that, accordingly, Probuild provided general reasons for withholding payment in addition to those provided within a more detailed section of its Payment Schedule. The general reasons included:

> "9.7 Not once during the progress of the subcontract works did DDI inform Probuild (informally or otherwise) that it was being delayed by events that would

[11] Primary judgment at [5].
[12] Determination at [8].
[13] Determination at [9].
[14] Primary judgment at [4].

> entitle it to an extension of time. Further, in the payment schedule [sic] DDI has not evidenced that it was delayed in a manner which would entitle it to an extension of time, it has merely asserted that it ran late. DDI has not adhered to the terms of the Subcontract regarding procedures for claiming extensions of time being the sole remedy under the agreement in respect of delays. The Subcontractor has not provided Probuild with a notice of delay nor has it been granted an extension of time.
>
> 9.8 Should Probuild not provide an extension of time to DDI the parties have agreed by virtue of Cl 11.10 that time is not set at large."[15]

39 Probuild annexed a document also described as "Payment Schedule" to its letter. On the first page, it asserted it was entitled to set-offs of $2,328,998 being credits as per an attached progress claim working sheet. That working sheet included a table (Payment Schedule Table) in which Probuild set out the set-offs to which it contended it was entitled pursuant to cl 48.6, including a set-off or deduction (CC14) of $2,160,000 for "[DDI's] failure to meet [Subcontract] programme dates." Against this entry and under the heading "Reason Scheduled amount differs from Claimed Amount" Probuild inserted the following:

> "LDs applied at $15,000 per calendar day as stipulated in Annexure A of the subcontract for [DDI's] failure to meet the subcontract programme dates. Damages calculated from [DDI's] subcontract programme completion date of 5th Jan 2015 to Probuild's PC date 29th May 2015 which is 144 days. *DDI has not complied with Cl 45.2 of the Subcontract with regard to its obligation to notify the Contractor of any extensions of time for works related to variations.* The Subcontractor has not complied with Cl 41.5 in its obligation to notify the Contractor should it believe that it is in delay. DDI has not been granted nor is it entitled to any extension of time. DDI is not entitled to any extension of time under Cl 41.10. Probuild has suffered loss and damage as a result of DDI's delay and failure to meet its contractual obligations." (Emphasis added)

The adjudication application

40 On 15 October 2015 DDI made an application for adjudication of its Payment Claim pursuant to s 17 of the SOP Act. In support of the application, DDI served three folders comprising the Payment Claim and supporting documents, and four folders comprising the adjudication application and supporting documents. It also relied on three affidavits. Finally, it served four documents described as contract submissions, synopsis of issues (Synopsis), reply to Payment Schedule (Reply) and rebuttal to Payment Schedule (Rebuttal).

41 In the contract submissions (which were set out in tabular form), box 15 stated:

> "15. **Notices under the Contract**
>
> In addition and without prejudice the [sic, to the] Adjudication Application, The Claimant provides notice that his [sic, this] document and the supporting documents comprises:
>
> (i) a Notice of Delay pursuant to Clause 41.5 of the contract;
>
> (ii) Extension of time claim pursuant to Clause 41.8 of the contract."[16]

42 In the Reply, DDI set out and responded to paragraphs contained in the Payment Schedule.

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[15] The reference to cl 11.10 should clearly be a reference to cl 41.10 of the Subcontract.

[16] It was submitted in the course of the hearing that the reference to cl 41.8 should have been a reference to either cl 41.6 (Probuild) or cl 41.9 (DDI).

43 Paragraphs 10 and 12 of Probuild's letter, and DDI's Reply, were as follows:

"**10 Probuild Payment Schedule:**

The Subcontract notes at 0138[17] that the Subcontractor must ensure the work under the Subcontract is scheduled and carried out to be completed on or before the scheduled completion dates for the corresponding item or items of work in the Construction Program. DDI continuously failed to meet program dates and ultimately completed its works 144 days after it was obliged to in accordance with the Subcontract terms. At no time did DDI advise Probuild that it was being delayed. This delay is evidenced in the notices which were served on DDI in accordance with the Subcontract throughout the course of the works, Probuild has suffered loss and damage as a result of DDI's delay and as such has elected to apply liquidated damages in the payment schedule. This in [sic] accordance with Probuild's right to do so under Cl 42 of the Subcontract 'Liquidated Damages for Delay in Reaching Practical Completion'.

DDI response to payment schedule 10:

(i) DDI could not complete the works because of the large areas of inaccessible area on the levels.

(ii) Refer to outline of events in statutory declaration of Doug Ivanek.

(iii) DDI agrees with Probuild that works were late and that is the basis of the claim. Probuild continues to ignore the issue that the construction program does not address the in ability [sic] for DDI to proceed on the 'A, B, C' methodology set out in paragraph 39 to 42 of the Chronology.

(iv) DDI could never have completed the works in accordance with the program. Probuild did not disclose that the access to the level 1 to 14 would not be in accordance with the representations in the construction program.

(v) DDI does not know and cannot know whether Probuild has suffered damage and loss. Probuild has not particularised its alleged damages and had not identified any correspondence from Citadel Hotels Pty Ltd (Probuild's client).

(vi) Probuild makes generalised allegations but has not particularised its allegations by way of calculations. Probuild is disentitled to rely upon any reason for withholding payment under section 20(2B).

…

12 Probuild Payment Schedule:

Probuild's valuation of DDI's claim has resulted in a liability from DDI to Probuild in the amount of $2,635,725 (incl GST). Probuild has included a tax invoice with this payment schedule for this amount and demands that DDI provide payment in full within 10 business days.

DDI response to paragraph 12.0

(i) Probuild's claim is an invention for convenience to offset DDI's claim. There is no prior correspondence for a liquidated damages claim from Probuild until DDI issued the payment claim.

(ii) DDI denies that it has delayed the works.

(iii) DDI denies that it is indebted to Probuild in the amount of $2,635,725 or any amount at all.

…

(vii) DDI does not know and cannot know whether Probuild has suffered damage and loss. Probuild has not particularised its alleged damages

[17] Probuild accepted this was intended to be a reference to cl 38.1 of the Subcontract.

and had not identified any correspondence from Citadel Hotels Pty Ltd (Probuild's client)."[18]

44 DDI also made the following claims in the Synopsis:

"10. Almost immediately on being provided access to the works, [Probuild] restricted [DDI's] access to areas of the floor plates in which [DDI] was to install dry linings for walls and ceilings because those areas were allocated for toilets, materials storage, and landing points for materials and labour.

11. Also [Probuild] required [DDI] to undertake work on an ad hoc basis and not follow the construction program. This caused [DDI] to have to apply additional labour resources to the site because specific teams had been allocated for the three stages of dry lining works being: (1) erect wall and ceiling framing; (2) fix plasterboard sheets for dry lining; and (3) setting plasterboard and sanding for the following painting trade.

12. In addition to varying the programmed works and thereby requiring additional labour resources, [Probuild] expanded [DDI's] scope of works to include hanging doors (both internal doors and fire rated doors (totalling 412 doors)[)] and some insulation and feature timber walls on level 10.

13. The varied scope of work comprising the ad hoc work, arising from: (1) the interruption to works on the floors owing to vertical transport for (2) materials and (3) workers, (4) floor areas allocated for storage of materials, and (5) washout and toilets and (6) backpropping on site (delays from formworkers insolvency), caused [DDI] to be delayed in completing its scope fop [sic] contract works. …

…

22. [DDI] submits that the departure from the Contract construction program and the likelihood of delays was axiomatic to [Probuild] when *it was [Probuild] that instructed [DDI] to depart from the Contract construction program in the first instance*.

23. *[Probuild] issued further revised construction programs and so [Probuild] clearly was aware of the delays because it was [Probuild] that issued the revised construction programs.*

…

27. [Probuild] claims liquidated damages of $2,635,725.00 where there is no supporting evidence by way of letters from [Probuild's] client (the Owner of the development) or prior notice.

(i) The amount appears to be the claim of $2,370,540 including GST ($2,155,036.36 + $215,503.64)

(ii) DDI understands the arithmetic but denies that Probuild's claim is reasonable. DDI states here, as it has stated elsewhere, that Probuild's claim is an invention of convenience." (Emphasis added)[19]

45 In the Rebuttal, DDI in substance claimed that Probuild had abandoned the variation procedure set out in cl 45 (and inferentially clll 41.5 and 41.6) as "they deemed that the process of issuing DDI for [sic, with] a variation price for extra works … [was] to [sic] lengthy of a process and it would delay works in site [sic]". It also responded in detail to the Payment Schedule by reference to the variation numbers originally used in its Payment Claim. Insofar as the liquidated damages claim (item CC14 in the Payment Schedule Table) was concerned, DDI repeated its submission that this was an "invention of convenience" and added that it was "disingenuous".

46 On 21 October 2015 the second respondent was appointed as adjudicator.

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[18] The primary judge referred to these passages in the Reply at [15].

[19] The primary judge referred to these extracts from DDI's Synopsis at [6] and [14].

47 Probuild lodged its adjudication response on 23 October 2015 (Adjudication Response). It supported its response with documents described as the First Adjudication Response (three folders), its Adjudication Response Submissions (including two folders of supporting documents) and three statutory declarations (one of which included a folder of annexures).

48 Under the heading "Time and Delay", which addressed DDI's claim under V210A for costs incurred after the Date for Practical Completion, Probuild stated:

> "5.51 The Subcontract provides a detailed mechanism for [DDI] to make claims in relation to time related issues. This mechanism is set out in clause 41.0 of the Subcontract. In relation to prolonged project time periods, [DDI] may make a claim for an extension of time to mitigate the impacts on [DDI] which result from delays to the completion of the project and to protect itself from any exposure to liquidated damages.
>
> 5.52 Under the Subcontract, the Date for Practical Completion can be extended by an Extension of Time (EOT) granted under clause 41. Pursuant to clause 41.8:
>
> > '*The right of the Subcontractor to make a Claim for an extension of time pursuant to this clause is the subcontractor's sole remedy under this Subcontract in respect of any delay or delays. The Subcontractor is not entitled to any increase or adjustment to the Subcontract Sum or any other monetary compensation or damages (including damages for breach of contract) in respect of such delay)*.' (Emphasis added)
>
> 5.53 As such, if [DDI] was delayed it had the right to claim an EOT (which would provide relief from liquidated damages) and, if it was able to demonstrate that a delay had been suffered as contemplated by clause 41, it would be entitled to an EOT.
>
> …
>
> 5.57 In its Adjudication Application submission [DDI] again admits to having failed to issue a Notice of Delay prior to the making of the Payment Claim by stating at paragraph 15 … [of the Contract Submissions] … [the paragraph then set out the claim DDI made for an extension of time in box 15 of the contract submissions]."

49 The balance of that entry addressed reasons why Probuild contended DDI had failed to comply with various provisions of the Subcontract relating to extensions of time, and concluded with the assertion that DDI "has no entitlement to an EOT and is otherwise barred under the Subcontract from making a claim for an EOT."

50 The Adjudication Response addressed Probuild's claim to liquidated damages under cl 42.1 and its entitlements under cll 48.6 and 42.2(a) to deduct that amount from moneys otherwise due to DDI. The submissions repeated the contention that DDI had delayed completion past the Date for Practical Completion and continued:

> "11.9 To date, [DDI] was not awarded any [extension of time] and [DDI] is not entitled to an extension to the Date for Practical Completion under the Subcontract, being 5 January 2015.
>
> 11.10 Clause 41.8 of the Subcontract states that *'[t]he right of the Subcontractor to make a Claim for an extension of time pursuant to this clause is the Subcontractor's sole remedy under this Subcontract in respect of any delay or delays'*.
>
> 11.11 In the absence of any claim made by [DDI] for an extension of time in accordance with clause 41 of the Subcontract, [DDI] has no entitlement to extend the Date for Practical Completion.

11.12 As set out above, at paragraph 1.28 of these submissions, [DDI] has not made and does not intend to make a claim for an extension of time to the Date for Practical Completion under the Subcontract.[20]

11.13 Even if [DDI] had made an extension of time claim (which is denied) such claim would be time barred under clause 41.6(c) of the Subcontract because [DDI] did not give notice to [Probuild] within 48 hours of the commencement of any event which may or has given rise to a perceived delay which provided the nature, cause and likely extent of the delay and failed to comply with the obligations under clause 41 of the Subcontract.

11.14 Clause 41.6(b)(iv) of the Subcontract clearly states that

'*Without limiting the operation of clause 41.6(a), the Subcontractor is only entitled to an extension of time to the Date for Practical Completion of the Subcontract Works if:*

[…]

the Subcontractor has, in respect of the delay, complied strictly with all of the obligations imposed on it by this clause 41 […]'.

11.15 [DDI] has not complied with its obligations under clause 41 of the Subcontract and any claim or entitlement under clause 41 of the Subcontract for an extension of time to the Date for Practical Completion is time barred under clause 41.6(c) of the Subcontract which states:

'*The Head Contractor will not be liable on any Claim (including for an extension of time) which has not been made strictly in accordance with clause 41 and any such Claim will be barred*'."[21]

The Determination

51 The adjudicator published the Determination on 1 December 2015. He addressed in detail the disputed variation claims including those made for work DDI undertook after the Date for Practical Completion. At the conclusion of his reasons he rejected Probuild's claim for liquidated damages. After setting out Probuild's reasons for that claim,[22] he made the following findings:

"[185] Both parties have made significant, detailed and repetitive submissions on this issue. Whilst I have reviewed and considered the submissions I shall not be making reference to each and every aspect of those submissions. [Probuild] has claimed liquidated damages (LDs) from the original Date for Practical Completion being 5 January 2015 to the alleged Date of Practical Completion being 29 May 2015.

[Probuild] makes the above statement:

'*DDI has not complied with Cl 45.2 of the Subcontract with regard to its obligation to notify the Contractor of any extensions of time for works related to variations.*'

[Probuild] is claiming LDs up to 29 May 2015 and yet based on [DDI's] variation submissions there were contract variations being directed by [Probuild] and submitted for approval by [DDI] as late as 9 June 2015.

Based on the submissions it appears that 80% of the contract variations (approximately $1.4m) were directed by [Probuild] and executed by [DDI] after 5 January 2015. As the bulk of the contract variations were approved by [Probuild] it is assumed [DDI] performed the work as directed by [Probuild].

It appears totally inconsistent and unreasonable for [Probuild] to be directing [DDI] to perform significant additional work under the Subcontract after the

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[20] There was no paragraph 1.28 in these submissions.

[21] The primary judge set out these passages at [16].

[22] See [39] above.

> original Date for Practical Completion and then making a claim for LDs against [DDI] for following [Probuild's] express directions.
>
> [Probuild] also states:
>
> '*DDI has not been granted nor is it entitled to any extension of time*.'
>
> Under the Subcontract [Probuild] has the ability to extend time for any reason. Based on the significance of the volume of additional work being directed it is unreasonable of [Probuild] not to [have] granted additional time.
>
> Whilst there may have been [DDI] caused delays I am not satisfied [Probuild] is entitled to a claim for the total 144 days.
>
> In the absence of an alternative [Probuild] position I find in favour of [DDI]."

52 The adjudicator determined that Probuild was liable to DDI for payment of an amount of $475,716.20 (including GST), plus interest.

Primary judgment

53 On 10 December 2015 Probuild commenced proceedings in the Equity Division of the Supreme Court of New South Wales, by way of summons seeking an order in the nature of certiorari quashing the adjudicator's purported determination.[23] Probuild's essential complaint was that the Determination was infected by a denial of natural justice to Probuild.

54 It was not in dispute before the primary judge that the requirements of procedural fairness applied to the adjudicator's decision-making process. In respect of the content of those requirements in the context of an adjudication under the SOP Act, each party referred to the following statement of McDougall J in *Musico v Davenport*:[24]

> "[108] … where an adjudicator determines an adjudication application upon a basis that neither party has notified to the other or contended for, and that the adjudicator has not notified to the parties, there is a breach of the fundamental requirement of natural justice that a party to a dispute have 'a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it'. (See Lord Diplock in *O'Reilly* [*v Mackman* [1983] 2 AC 237] at 279.)"

55 The primary judge set out the history of the adjudication process, including recounting the explanation DDI proffered to the adjudicator for its delay in completing the works as set out in the Synopsis to which I have earlier referred.[25] His Honour also set out the relevant provisions of the Subcontract, the Payment Schedule, and the various extracts from the Synopsis, the Reply and the Adjudication Response as I have earlier explained.[26]

56 After setting out paragraphs 11.9–11.15 of the Adjudication Response, the primary judge observed that Probuild's submissions did not otherwise address DDI's "much less focussed submissions" to the effect that Probuild's claim to liquidated damages was not "reasonable" and that it was not possible for it to have completed the works by the Date for Practical Completion because of changes to the construction program and to the scope of the Subcontract works. His Honour also noted Probuild did not address why, taking account of those matters, it maintained that DDI was not entitled to an extension of time.[27]

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[23] On the same day, Probuild paid into court $495,473.20 being the amount for which it had been determined liable under the Determination and the costs of the adjudication.

[24] [2003] NSWSC 977 at [108]; cited in the primary judgment at [3].

[25] Primary judgment at [6]; see [44] above.

[26] Primary judgment at [11]–[16].

[27] Primary judgment at [17].

57 His Honour then summarised the Determination.[28]

58 Probuild contended before the primary judge that in paragraph [185] of the Determination, the adjudicator gave two reasons for rejecting its claim to a set-off for liquidated damages: first, that it appeared totally inconsistent and unreasonable for Probuild to be directing DDI to perform significant additional work under the Subcontract after the original Date for Practical Completion and then making a claim for liquidated damages against DDI for following those express directions; and secondly, that under the Subcontract Probuild had the ability to extend time for any reason, and based on the significance of the volume of additional work being directed, it was unreasonable of it not to have granted DDI additional time.[29] It also complained that the adjudicator had identified another basis on which Probuild might have been able to claim unliquidated damages caused by DDI's delay, but did not give it the opportunity to make submissions in that respect.[30]

59 Probuild also submitted that the adjudicator's first reason invoked aspects of what was referred to by Brooking J in *SMK Cabinets v Hili Modern Electrics Pty Ltd*[31] as the "doctrine of prevention". The primary judge summarised that doctrine in the context of a claim under a liquidated damages clause in a building contract, as being said to disentitle the principal from relying on the clause in the face of delay caused by its own acts or omissions. The second reason given by the adjudicator was said to imply that Probuild's power to grant extensions of time was to be exercised in good faith and reasonably.[32] Probuild argued that neither of those reasons was advanced by DDI or otherwise notified to or addressed between the parties and that, in those circumstances, procedural fairness required that the adjudicator invite Probuild to address those possible reasons before rejecting its claim.[33]

60 Probuild maintained that because the adjudicator did not raise these matters before making his Determination, it did not have a fair opportunity to address them by way of submission. Had it been given that opportunity and made further submissions, Probuild argued the adjudicator may well have accepted that it had an entitlement to a set-off in relation to damages for delay.[34]

61 DDI contended before the primary judge that the adjudicator had proceeded on the basis that 80% of the value of the variations it claimed concerned work directed by Probuild and executed by DDI, in each case after 5 January 2015. It noted that the adjudicator accepted that DDI must have performed those additional works as directed. DDI accepted that neither party specifically addressed the adjudicator as to the consequences of Probuild having directed variation work after the Date for Practical Completion. However, it denied it was liable for liquidated damages for any such delay. It argued that Probuild's claim was "unreasonable", "disingenuous" and "not … believable". DDI submitted that the facts upon which it relied for its assertion that the claim was unreasonable were obvious and were stated in support of its claimed variations:

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[28] Primary judgment at [18]–[22].
[29] Primary judgment at [23], [25].
[30] Primary judgment at [24].
[31] [1984] VR 391 at 395 (Starke and Kaye JJ agreeing).
[32] The primary judge referred at [26] to *Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd* (2002) 18 BCL 322; [2002] NSWCA 211 at [79]–[81] (Hodgson JA; Mason P and Stein JA agreeing).
[33] Primary judgment at [27].
[34] Primary judgment at [27].

it had been delayed in completing the works because it was denied the access anticipated by the construction program and directed to undertake additional work, in most cases, after the Date for Practical Completion.[35]

62 The primary judge succinctly disposed of Probuild's arguments as follows:

> "[29] In my view there was no denial of procedural fairness with respect to the way in which the adjudicator addressed and determined whether Probuild was entitled to a set-off for liquidated damages as claimed. That follows from a consideration of the argument made in support of that claim in the payment schedule, DDI's response to that argument and the adjudicator's reasons at paragraph 185. In short, Probuild argued that DDI had not been granted *and* was not entitled to any extension of time. The adjudicator considered otherwise, concluding that having regard to the 'volume of the additional work being directed', it was 'unreasonable' for Probuild not to have granted DDI 'additional time'. In so concluding the adjudicator was addressing whether DDI was entitled to the grant of an extension of time under cl 41.9, a matter expressly raised and denied by Probuild in support of its entitlement to liquidated damages.[36]
>
> [30] Probuild's argument for that entitlement being an answer to DDI's payment claim (see [12] above) proceeded as follows. First, there was a failure by DDI to complete the sub-contract works by the original Date for Practical Completion. Secondly, DDI had not complied with cl 45.2. It is likely this was intended to be a reference to cl 45.3(a)(iii) which required, in relation to any direction as to additional work which was not the subject of a Variation Direction, that DDI give notice as to any effect the asserted variation would have in delaying the Date for Practical Completion. Thirdly, DDI had not complied with cl 41.5 in relation to the notification of likely or actual delay, that notification being a pre-condition to any entitlement to an extension of time under cl 41.6. Fourthly, DDI had not been granted nor was it entitled to any extension of time. The reference to an extension of time being 'granted' is reasonably to be understood as including an extension of time granted under cl 41.9. That clause provides for the grant of an extension in circumstances were [sic, where] no entitlement arises under cl 41.6. Finally, it is said that 'DDI is not entitled to any extension of time under Cl 41.10'. That clause is not the source of any power to grant an extension of time. Rather it provides that any delay or failure by Probuild 'to grant a reasonable, or any, extension of time shall not cause the *Date for Practical Completion* to be set at large'. In context this last statement is to be understood as maintaining that DDI was not entitled to any extension of time by reason of any delay or failure on the part of Probuild to grant an extension of time.[37]
>
> [31] By making that argument Probuild acknowledged that it would be an answer to its liquidated damages claim that DDI was entitled to an extension of time. In reply DDI denied that claim was 'reasonable'; denied it had delayed the works; denied it was indebted to Probuild for liquidated damages; and asserted that because of the difficulties with access and the variations required it could never have completed the works by the original Date for Practical Completion. Each of those replies was made in documents served on Probuild with the adjudication application.[38]

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[35] Primary judgment at [28].

[36] Once it is understood that the reference to cl 41.10 in the Payment Schedule Table was clearly to cl 41.9, it can be seen that the last sentence of [29] refers to the penultimate sentence of Probuild's liquidated damages claim.

[37] As is apparent, his Honour's analysis in [30] was undertaken by reference to each sentence in Probuild's exposition of its liquidated damages claim in the Payment Schedule Table.

[38] Probuild accepted that paragraph [31] purported to be a summary of the material before the adjudicator, but submitted it was incorrect.

> [32] The adjudicator dealt with Probuild's argument as made. He noted that DDI had not requested any extensions of time on account of the variations. He considered it unreasonable for Probuild, on the one hand, to direct DDI to perform significant additional work after the original Date for Practical Completion and, on the other, to claim liquidated damages on the basis that those and the other works had not been completed by that date. I do not read the adjudicator's reasons to this point as indicating any separate or freestanding reason for rejecting the liquidated damages claim. Rather, the conclusion that Probuild's position was 'totally inconsistent and unreasonable' informs the next step in the adjudicator's reasoning, namely, that it was 'unreasonable' of Probuild not to have granted DDI additional time in accordance with its 'ability to extend time for any reason'; that being a reference to its power to do so under cl 41.9. That conclusion was also directed to, and rejected, Probuild's assertion that DDI was not 'entitled' to any extension of time.
>
> [33] Thus, Probuild maintained, as part of its argument, that DDI was not entitled to any extension of time, under cl 41.9 or otherwise. It did so seeking to discharge its onus of persuading the adjudicator of its right to a set-off. In response DDI denied that claim, at least partly on the basis that Probuild's position was unreasonable, although no argument was developed explaining why unreasonableness on the part of Probuild might provide an answer to its assertion that DDI was not entitled to any extension of time under cl 41.9. The adjudicator rejected the set-off claim for reason [sic, the reason] that DDI was entitled to an extension of time under that provision. *There was, in the circumstances, no denial of procedural fairness. Probuild's argument acknowledged that its set-off claim depended on DDI not having an entitlement to an extension of time under cl 41.9. That set-off claim was denied and Probuild had a reasonable opportunity to put forward its case as to why there was no entitlement under that clause.*
>
> [34] The third matter raised by Probuild can be dealt with briefly. The observation that there may have been an 'alternative' position which Probuild might have put in relation to unliquidated damages for delay was just that. Probuild did not make any alternative claim or raise an alternative reason for withholding payment in the payment schedule: s 14(3). In the absence of its having done so, Probuild was not entitled to rely upon such a reason before the adjudicator: s 20(2B). Nor was the adjudicator entitled to consider any argument supporting such a reason: s 22(2)(d)." (Emphasis added)

63 The primary judge dismissed Probuild's application with costs and ordered that the amount of $495,473.20 paid into court by Probuild be paid to DDI. That occurred on 25 May 2016.

Issues on appeal

64 Probuild contends the primary judge erred in holding that the adjudicator's Determination was not made in circumstances amounting to breach of the rules of natural justice, and that in so holding, his Honour proceeded on the false premise that the adjudicator had "dealt with Probuild's argument as made".

65 Probuild contends the primary judge should have:

(a) held that the Determination was purportedly decided upon a basis which neither party had notified to the other or contended for, and which the adjudicator had not notified to the parties;

(b) concluded that, in the circumstances, the Determination was made in circumstances amounting to a breach of the rules of natural justice;

(c) concluded that the Determination was void (in the sense of not being a valid determination for the purposes of s 22 of the SOP Act); and

(d) made an order in the nature of certiorari quashing the Determination.

Probuild's submissions

66 Probuild's first submission is that the primary judge's reasoning proceeded on the false premise that the adjudicator "dealt with Probuild's argument as made" and that in the light of that error, his Honour's conclusion that Probuild was not denied procedural fairness does not follow. It emphasises that his Honour reached that conclusion even though DDI had accepted that neither party specifically addressed the adjudicator as to the consequences of Probuild directing variation work after the Date for Practical Completion.

67 Probuild argued that underpinning the adjudicator's rejection of its liquidated damages claim was the application of the prevention principle. That principle disentitles a principal from obtaining liquidated damages where its conduct has been the cause of the delay which underpinned that claim.

68 Probuild submitted that as the adjudicator had not notified either party of his intention to apply that principle, there had been a breach of the fundamental requirement of natural justice of the right to a hearing.

69 Probuild argued that even though no submission was made to the adjudicator to the effect that DDI was entitled to an extension of time under cl 41.9 of the Subcontract, the primary judge nonetheless held that there was no denial of procedural fairness in the adjudicator finding that such an entitlement existed. Probuild contended that in reaching that conclusion, the primary judge misapprehended the submissions it made to the adjudicator. It also argued that his Honour misapprehended both the nature and purpose of provisions in building contracts which confer on a principal a discretionary power to extend time, and the distinction between provisions of that nature and provisions which confer an entitlement to an extension of time as of right.

70 Probuild contended that in order to understand the operation of provisions such as cl 41.9 it was necessary to understand the operation of the "prevention principle" as it applies to building contracts. It submitted the principle stands for the proposition that where a contractor is prevented from completing its work on time by an act of the principal, the contractor is not liable for the default. Probuild further submitted that an understanding of the prevention principle insofar as it applies to building contracts confirms that:

(a) discretionary powers to extend time such as that conferred by cl 41.9 of the Subcontract are, albeit counterintuitively, essentially conferred for the benefit of principals, in that they permit a principal to avoid the consequence that might otherwise follow from the operation of the "prevention principle" (that is, a disentitlement to claim liquidated damages for delay);

(b) generally speaking, it is wrong to regard a principal as being subject to any obligation to exercise a discretionary power to extend time for the benefit of a contractor and wrong to regard a contractor as having an entitlement to have such a power exercised; and

(c) in this context, Probuild's submissions before the adjudicator could not properly be understood as amounting to an admission that DDI would have an entitlement to the exercise of the discretionary power in cl 41.9 of the Subcontract, even if it were reasonable to do so.

71 Contrary to the primary judge's reasoning,[39] Probuild submitted it bore no "onus" to persuade the adjudicator that DDI was not entitled to an extension to

[39] Primary judgment at [33].

the Date for Practical Completion nor did its argument depend on DDI not having an entitlement to an extension of time under cl 41.9.

72 Rather, Probuild argued it fell to DDI to respond to Probuild's contention in paragraph 10 of its Payment Schedule, that DDI failed to meet construction program dates and did not advise Probuild that it was being delayed, or to demonstrate grounds on which the prima facie effect of cl 42 of the Subcontract could be avoided. However, DDI took neither of those courses. In particular, it made no submission either that it had been granted or was entitled to be granted an extension of time, or that the prevention principle operated to defeat Probuild's prima facie entitlement to liquidated damages.

73 Instead, as the primary judge held, DDI simply "denied that [Probuild's] claim was 'reasonable'; denied it had delayed the works; denied it was indebted to Probuild for liquidated damages; and asserted that because of the difficulties with access and the variations required it could never have completed the works by the original Date for Practical Completion."[40] Nor, as the primary judge recognised, did DDI develop an argument explaining why unreasonableness on Probuild's part might provide an answer to its assertion that DDI was not entitled to an extension of time under cl 41.9.[41] Indeed, Probuild argued none of DDI's submissions provided any answer to Probuild's contention that it was entitled to deduct liquidated damages for delay.

74 Accordingly, Probuild submitted there was no reason for its Adjudication Response to seek to demonstrate anything other than the matters identified in the first part of the Payment Schedule Table including the "thorny issue" as to when and how the prevention principle might apply.

75 Nonetheless, despite DDI making no submission to this effect, the adjudicator rejected Probuild's liquidated damages claim for the reason that DDI was *entitled* to an extension of time under cl 41.9 of the Subcontract.[42] However, the adjudicator did not invite the parties to make submissions, as he was empowered to under s 21(4) of the SOP Act, as to whether he should decide that aspect of the matter before him on that basis.

76 Probuild submitted that the primary judge's conclusion that the adjudicator's Determination did not amount to a denial of procedural fairness because the adjudicator had simply "dealt with Probuild's argument as made"[43] demonstrated that his Honour appeared to have misunderstood Probuild's argument. In particular, Probuild submitted that of the five steps the primary judge identified in his reasons,[44] Probuild's argument had only involved the first, namely that "there was a failure by DDI to complete the subcontract works by the original Date for Practical Completion".[45] Probuild contended establishing that matter was sufficient to make good its asserted entitlement to deduct $2.16 million on account of liquidated damages.

77 Probuild contended that it was apparent from the Payment Schedule and the entry in the Payment Schedule Table that its defence to the Payment Claim was that it had a right to deduct (or "apply") liquidated damages for delay. In

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[40] Primary judgment at [31].
[41] Primary judgment at [33].
[42] Primary judgment.
[43] Primary judgment at [32].
[44] Primary judgment at [30].
[45] Probuild accepted it also had to demonstrate the extent of DDI's failure, that is to say the number of days between the Date for Completion and the Date of Practical Completion, in order to quantify its liquidated damages.

the light of cl 42 of the Subcontract, it submitted that, as put in the first two sentences of the Payment Schedule Table, all it had to demonstrate to make good that defence was to work out the difference in days between the Date of Practical Completion and the Date for Practical Completion, then multiply it by the $15,000 per calendar day permitted for liquidated damages. Otherwise, Probuild argued that what appeared in the Payment Schedule Table was anticipatory of the kinds of replies which may be made in an adjudication application.

78 Further, Probuild submitted, contrary to the primary judge's reasoning, its argument did not "acknowledge" that it "depended on" Probuild discharging an "onus" of proving a negative, namely that "DDI [did] not hav[e] an entitlement to an extension of time under cl 41.9".[46] Rather, Probuild reiterated it was sufficient for it to prove that the Date of Practical Completion was after the Date for Practical Completion, an onus it contended it had discharged.

79 Accordingly, Probuild submitted, the primary judge's error infected and defeated his Honour's conclusion that there was no denial of procedural fairness in the making of the Determination.

80 The second limb of Probuild's argument is that the primary judge should have found that the Determination was purportedly made in circumstances amounting to a breach of the requirements of procedural fairness, given that the adjudicator decided the matter before him on the basis that DDI was entitled to an extension of time under cl 41.9, even though neither party had contended before the adjudicator that DDI had such an entitlement.

81 Probuild contended the adjudicator was not entitled to make such a finding without exercising the power afforded by s 21(4) of the SOP Act, first giving it an opportunity to put on submissions as to whether he ought to do so.

82 Probuild argued that if the adjudicator had requested submissions on the question whether DDI was entitled to the exercise of the discretionary power to extend time in cl 41.9 of the Subcontract, it could have made arguments countering DDI's purported entitlement to an extension. Probuild acknowledged it was neither necessary nor appropriate for this court to hypothesise as to whether any such arguments would have been accepted by the adjudicator. However, it contended it is sufficient to uphold the appeal if there could have been a different result.

83 Probuild contended that in the circumstances, the primary judge should have reached the conclusion reached in what it contended were closely analogous circumstances in *Built Environs Pty Ltd v Tali Engineering Pty Ltd*,[47] namely that Probuild was not given adequate notice that DDI was relying upon, or that the adjudicator might determine the adjudication application by applying, the prevention principle or related principles. If this was accepted, Probuild submitted that it follows that the Determination was made in circumstances amounting to a breach of the requirements of procedural fairness. Accordingly, it was not a valid determination for the purposes of the SOP Act and was void.

DDI's submissions

84 DDI submitted that its case before the adjudicator was that, in all the circumstances, Probuild was obliged to consider the discretionary extension of time cl 41.9 permitted. Accordingly, its fundamental submission is that the

[46] Cf primary judgment at [33].
[47] [2013] SASC 84 at [155].

adjudicator afforded Probuild procedural fairness, having regard to the totality of the material before him and the submissions made by the parties, and that the primary judge did not err in so finding. It argued that Probuild raised the issues which led to the adjudicator's findings in the Payment Schedule, and that those issues were addressed in DDI's adjudication application and submissions to the adjudicator, so that the substance and basis upon which the findings were open to be made was addressed without any necessity on the adjudicator's part to seek additional submissions from the parties.

85 Contrary to Probuild's first submission, DDI submitted that the submissions it made to the adjudicator addressed the issue on which it succeeded in the Determination. It argued that the adjudicator was entitled to have regard to the obvious reasons for the delay in completion of the works and the terms of the Subcontract in forming his view. In addition, DDI argued in the context of its liquidated damages claim, Probuild propounded the position that DDI was not entitled to any extension of time by specific reference to its ability to exercise a discretion to extend time where facts and circumstances were known to it which warranted such an extension.

86 DDI contended that Probuild's claim for set-off for liquidated damages had to be considered in the light of the factual matrix said to give rise to the additional costs DDI incurred. It submitted that the issue of an extension of time was squarely raised before the adjudicator when DDI provided Probuild with notice that its "Contract submissions for Adjudication Application" comprised a Notice of Delay and an extension of time claim pursuant to cll 41.5 and 41.8 of the Subcontract respectively. DDI submitted that the extension of time issue and the application of liquidated damages were both identified as issues in the Synopsis. DDI submitted that throughout the adjudication process, it consistently complained about Probuild's departure from the construction program and the likelihood of delays in it completing the works to justify its claim for additional costs by reason of delay as a contra argument to Probuild's set-off claim.

87 In this context, the issue of the unreasonableness of Probuild's conduct in administering the Subcontract and DDI's entitlement to an extension of time was agitated by both parties.

88 DDI submitted it had, albeit informally, sought an extension of time in its contract submissions. Accordingly, the primary judge did not err in holding there was no denial of procedural fairness in circumstances where the adjudicator found there was such an entitlement. DDI accepted that it was more accurate for the primary judge to say that the adjudicator determined he was not satisfied there was an entitlement to liquidated damages for all the days claimed, rather than saying the adjudicator found that DDI was entitled to an extension of time. It submitted that the primary judge correctly identified that it was open to the adjudicator to hold that it was unreasonable for Probuild not to grant an extension of time having regard to the additional work it directed. It was in this context that Probuild expressly raised DDI's lack of entitlement to an extension under cl 41 of the Subcontract.

89 DDI further argued the primary judge did not err in finding the adjudicator had dealt with "Probuild's argument as made" because Probuild itself had propounded parts of cl 41 in its Adjudication Response. It could not, on the one hand, lead the adjudicator to the clause but, on the other hand, resile from his observance of facts which indicated a necessity to apply the full effect of

the clause. Having raised the denial of entitlement, the issue was "on the table".

90 DDI also contended that the primary judge correctly identified that by Probuild maintaining that there was no entitlement to an extension of time under cl 41.10, it acknowledged that it would be an answer to its liquidated damages claim that DDI was entitled to an extension of time. Accordingly, his Honour did not err in determining that Probuild had a reasonable opportunity to put forward its case as to why DDI was not entitled to an extension of time.

91 DDI did not cavil with Probuild's submissions explaining the nature of the prevention principle. It reiterated that the issue of an entitlement to an extension of time under cl 41.9 was raised by Probuild in the adjudication. It also emphasised part of the adjudicator's reasons in which he pointed out how unreasonable it was that Probuild did not grant DDI additional time having regard to the significant volume of additional work it had directed be performed after the original date for Practical Date for Completion.[48] DDI contended that the primary judge was clearly addressing that part of the adjudicator's reasons in concluding that the adjudicator dealt with Probuild's argument as made. Viewed correctly, DDI contended the adjudicator did not find it was entitled to an extension of time, but, rather did not accept Probuild was entitled to claim the number of days sought for liquidated damages.

92 DDI submitted that the bare requirement of Probuild to act fairly must arise in the context of cll 41.9 and 41.10 of the Subcontract and in accordance with the principle established in *Peninsula Balmain*.[49]

93 Next, in response to Probuild's second submission that the adjudicator did not deal with Probuild's argument as made, DDI submitted that Probuild's contention oversimplified the analysis the primary judge undertook.

94 DDI accepted that Probuild's main defence was its right under the Subcontract to liquidated damages, but submitted it was not sufficient that Probuild merely identify the number of days the Subcontract ran over. Rather, cl 41.9 had to be considered and too, the facts that must have been known to Probuild in granting approval for variations in the period of the overrun. DDI argued that the exercise of any right of set-off pursuant to cl 48.6 of the Subcontract was required to be reasonable, and Probuild's unreasonableness in exercising that right formed the basis of DDI's complaint.

95 DDI also contested Probuild's submission that the primary judge found it had to persuade the adjudicator that DDI was not entitled to an extension of time. Rather, DDI argued his Honour had observed that Probuild raised the proposition that DDI was not entitled to an extension of time under cl 41.9 in the context of seeking to discharge its onus of persuading the adjudicator of its right to set-off.[50]

96 DDI contested Probuild's submissions that it was required to either traverse the matters raised in the Payment Schedule concerning the failure to seek extensions of time or demonstrate a basis on which the liquidated damages clause did not apply by way of a reply. It submitted that its statement in the Reply to paragraph 12 of the Payment Schedule that liquidated damages were not due and payable and that Probuild was acting unreasonably in making that claim was sufficient to join issue in this respect. It submitted that, in making

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[48] Determination at [185].
[49] At [71].
[50] Primary judgment at [33].

those submissions, it was raising Probuild's preventative acts. It accepted that it did not develop its unreasonableness argument, but submitted that did not involve any error on its part as raising those acts was sufficient to warrant the adjudicator to consider the position under the Subcontract. Accordingly, DDI submitted that there was no need for the adjudicator to seek submissions pursuant to s 21(4) of the SOP Act.

97 Next, DDI contested Probuild's submissions that, contrary to the primary judgment,[51] Probuild's argument in relation to liquidated damages involved only one step. DDI submitted that the five steps the primary judge identified had to be taken in the context of his Honour's consideration of the argument in support made by Probuild in its Payment Schedule referred to in the immediately preceding paragraphs of the primary judgment.

98 Finally, DDI submitted *Built Environs* was distinguishable. Rather, it was the well-established principle of requirements for natural justice encapsulated in *Musico v Davenport* which applied.

The SOP Act

99 It is uncontroversial that a denial of procedural fairness if made good, and if material, would establish jurisdictional error entitling Probuild to have the Determination set aside.[52]

100 As the primary judge observed, it is also uncontroversial that the requirements of procedural fairness applied to the decision-making process of the adjudicator. His Honour referred to that in contest here, most usually described as the right to be heard, or the hearing rule, namely the right of "a party to a dispute [to] have 'a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it'."[53]

101 The content of the requirement of procedural fairness (or natural justice) turns on the scheme of the SOP Act.[54] The statutory power must be exercised in accordance with procedures that are fair to the individual considered in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations.[55] What must always be borne in mind is that "[w]hether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice."[56]

102 The broad scheme of the SOP Act is to provide a coherent, expeditious and self-contained scheme for resolving disputes with respect to payment claims.[57] How it achieves that end deserves some exposition by reference to both its

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[51] At [30].

[52] *Shade Systems Pty Ltd v Probuild Constructions (Aust) Pty Ltd (No 2)* (2016) 95 NSWLR 157; [2016] NSWCA 379 at [3] (Basten JA; Bathurst CJ, Beazley P, Macfarlan and Leeming JJA agreeing); *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 145; [1986] HCA 54 per curiam (Mason, Wilson, Brennan, Deane and Dawson JJ); *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; [2000] HCA 57 at [104] (McHugh J); see also *Watpac Constructions v Austin Corp* [2010] NSWSC 168 at [142]–[145] (McDougall J).

[53] At [3]; citing *Musico v Davenport* at [108].

[54] *Kioa v West* (1985) 159 CLR 550 at 584–585; [1985] HCA 81 (Mason J (as his Honour then was)).

[55] *Kioa* at 585.

[56] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1; [2003] HCA 6 at [37] (Gleeson CJ).

[57] *Shade Systems* at [59].

legislative history and its provisions.[58] However, in short, it creates a "pay now, argue later" system for the prompt resolution of disputes concerning progress payments.[59]

103 The SOP Act was enacted "to reform payment behaviour in the construction industry",[60] by "stamp[ing] out the practice of developers and contractors delaying payment to subcontractors and suppliers".[61] It is designed "to ensure that a person who has carried out construction work under a construction contract can recover progress payments on an interim basis in circumstances of a protracted contractual dispute".[62] It confers "statutory rights on a builder to receive an interim or progress payment and enables that right to be determined informally, summarily and quickly, and then summarily enforced without prejudice to the common law rights of both parties which can be determined in the normal manner."[63]

104 Amendments effected to s 13 in 2002 by the addition of the phrases "or who claims to be" and "or may be liable" were intended "to ensur[e] that a person on whom the Act conferred an entitlement to a progress payment was to be able to make a valid payment claim even though it may ultimately be proved that no payment was due under the construction contract."[64]

105 Thus, the SOP Act operates to alter, in a fundamental way, the incidence of the risk of insolvency during the life of a construction contract by seeking to preserve the cash flow to a builder notwithstanding the risk that the builder might ultimately be required to refund the cash in circumstances where the builder's inability to repay could be expected to eventuate. The risk of inability to repay, in the event of successful action by the other party, is one that the legislature has assigned to that other party.[65]

106 As McDougall J observed in *Chase Oyster Bar*,[66] the SOP Act "operates in a way that has been described as 'rough and ready' or, less kindly, as 'Draconian' [by] impos[ing] a mandatory regime regardless of the parties' contract: s 34 [and] … provid[ing] extremely abbreviated time frames for the exchange of payment claims, payment schedules, adjudication applications and adjudication responses [and] … a very limited time for adjudicators to make their decisions on what, experience shows, are often extremely complex claims involving very substantial volumes of documents".

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[58] Cf *Southern Han Breakfast Point* at [48].

[59] *Multiplex Constructions Pty Ltd v Luikens* [2003] NSWSC 1140 at [96] (Palmer J); cited with approval in *John Holland Pty Ltd v Roads and Traffic Authority of New South Wales* (2007) 23 BCL 434; [2007] NSWCA 140 at [44] (Giles JA; Tobias and McColl JJA agreeing).

[60] *Southern Han Breakfast Point* at [3], referring to Second Reading Speech, Legislative Assembly, New South Wales, Building and Construction Industry Security of Payment Bill 1999 (No 2), *Parliamentary Debates* (Hansard), 8 September 1999, 104.

[61] *Southern Han Breakfast Point* at [4], referring to Second Reading Speech, Legislative Assembly, New South Wales, Building and Construction Industry Security of Payment Bill 2002, *Parliamentary Debates* (Hansard), 12 November 2002, 6542.

[62] *Southern Han Breakfast Point* at [51].

[63] *Falgat Constructions Pty Ltd v Equity Australia Corporation Pty Ltd* (2005) 62 NSWLR 385; [2005] NSWCA 49 at [22] (Handley JA; Santow JA and Pearlman AJA agreeing); referred to with approval in *Shade Systems* at [62]; see also *Shellbridge Pty Ltd v Rider Hunt Sydney Pty Ltd* [2005] NSWSC 1152 at [37]–[38] (Barrett J (as his Honour then was)).

[64] *Southern Han Breakfast Point* at [54], [57].

[65] *Chase Oyster Bar* at [207] (McDougall J; Spigelman CJ agreeing at [52]), referring to *RJ Neller Building Pty Ltd v Ainsworth* [2009] 1 Qd R 390; [2008] QCA 397 at [40] (Keane JA; Fraser JA and Fryberg J agreeing).

[66] *Chase Oyster Bar* at [208].

107 The exiguous time limit the SOP Act imposes on the adjudicator and the interim nature of an adjudication determination also inform the requirement of procedural fairness in any adjudication.[67] Having regard to the fact that the SOP Act provides for the "speedy, interim only determination by adjudicators of disputed claims under construction contracts … adjudications are not intended to be scrutinised in the same way as considered final determinations".[68]

108 The adjudicator's primary obligation is to make a decision on the material the parties have submitted.[69] However, s 21(4) confers a discretion on the adjudicator as to whether or not to take any of the steps referred to in s 21(4)(a)–(d). The adjudicator is not obliged to call for additional material under s 21(4).[70] Exercise of the s 21(4) discretion will depend upon the adjudicator's judgment as to whether or not he or she will be assisted by further submissions in reaching a decision within the constraints, particularly the time constraints, imposed by the Act.[71] The s 21(4) discretion is informed, in part, by s 21(5) which permits an adjudicator to determine an adjudication application notwithstanding the failure of either or both of the parties to make a submission or comment within time. However, at least one intended function of s 21(4) is to require an adjudicator "minded to come to a particular determination on a particular ground for which neither party has contended then … to give the parties notice of that intention so that they may put submissions on it".[72]

109 It is necessary to say something about the documents the parties bring into existence under the SOP Act. They are not pleadings in the sense of the documents brought into existence pursuant to the *Civil Procedure Act 2005* (NSW) and the Uniform Civil Procedures Rules 2005 (NSW). The requirements for the parties' documents should not be approached in an "unduly technical manner" but, rather, insofar as they "are used in relation to events occurring in the construction industry, they should be applied in a common sense practical manner."[73]

110 SOP Act documents should be read bearing in mind that they "are, in many cases, given and received by parties who are experienced in the building industry and are familiar with the particular building contract, the history of construction of the project and the broad issues which have produced the dispute as to the claimant's payment claim". Further, while "a payment claim and a payment schedule must be produced quickly; much that is contained therein in an abbreviated form which would be meaningless to the uninformed reader will be understood readily by the parties themselves". Nevertheless, while a payment claim and a payment schedule should not be required to be as precise and as particularised as a pleading, precision and particularity must be

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[67] See generally *Grocon Constructors Pty Ltd v Planit Cocciardi Joint Venture (No 2)* (2009) 26 VR 172; [2009] VSC 426 at [143] (Vickery J).

[68] *Northbuild Construction Pty Ltd v Central Interior Linings Pty Ltd* [2012] 1 Qd R 525; [2011] QCA 22 at [3] (M McMurdo P); applied in *Cardinal Project Services Pty Ltd v Hanave Pty Ltd* (2011) 81 NSWLR 716; [2011] NSWCA 399 at [58]–[59] (Basten JA).

[69] *Abel Point Marina (Whitsundays) Pty Ltd v Uher* [2006] QSC 295 at [20] (Wilson J).

[70] *TransGrid v Walter Construction Group Ltd* [2004] NSWSC 21 at [68]–[69] (McDougall J).

[71] *Luikens* at [88].

[72] *Musico v Davenport* at [107].

[73] *Hawkins Construction (Australia) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136 at [20] (Davies AJA; Handley and Stein JJA agreeing).

required to a degree reasonably sufficient to apprise the parties of the real issues in the dispute.[74]

111 In the present case, the parties' documents demonstrate either or both the lack of legal input to their drafting and/or the speed with which they were no doubt prepared, not least in the frequent erroneous references to provisions of the Subcontract. Thus, in the Payment Schedule Table in which Probuild identified its liquidated damages claim,[75] the reference to cl 41.10 in the context of the assertion that DDI was not entitled to any extension of time was clearly intended to be to cl 41.9. Clause 41.10 did not confer any entitlement to an extension of time, but dealt with the consequences of Probuild delaying or failing to grant one. An alternative, and available, view which DDI advanced was that where Probuild referred to cl 41.10, it was necessary to read that as also requiring cl 41.9 to be taken into account.

112 Similarly, in DDI's contract submissions which formed part of its adjudication application, it sought an extension of time under cl 41.8,[76] a reference, as I have said, the parties agree was incorrect, without agreeing on the clause to which it was intended to refer.

113 In my view, DDI's submission that this reference should be understood to be to cl 41.9 is more probable as that provision applied to the circumstances in which it found itself: seeking a discretionary extension of time as it had not hitherto sought an extension of time. In contrast cl 41.6, for which Probuild contended, concerned extensions of time to the Date for Practical Completion, a date which had long since passed by the time DDI served its contract submissions as part of the adjudication application.

The prevention principle

114 In *Spiers Earthworks Pty Ltd v Landtec Projects Corporation Pty Ltd (No 2)*,[77] McLure P (with whom Newnes JA agreed), by reference to *Hudson's Building and Engineering Contracts*,[78] observed that "[t]he essence of the prevention principle is that a party cannot insist on the performance of a contractual obligation by the other party if it itself is the cause of the other party's non-performance". As frequently observed, there is debate about the juridical basis for the principle.[79] In *Spiers Earthworks*, McLure P observed that it "may be regarded as a particular manifestation of the obligation to cooperate implied as a matter of law in all contracts", referring to *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd*.[80]

115 The prevention principle applies to delays in practical completion caused by variations resulting from the act or default of the principal.[81] Ordering variations after the due date which must substantially delay completion will, unless the contract provides otherwise, and in the absence of an applicable

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[74] *Luikens* at [76]; see also *Clarence Street Pty Ltd v Isis Projects Pty Ltd* (2005) 64 NSWLR 448; [2005] NSWCA 391 at [31] (Mason P; Giles and Santow JJA agreeing); *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)* (2005) 64 NSWLR 462; [2005] NSWCA 409.

[75] See [39] above.

[76] See [41] above.

[77] (2012) 287 ALR 360; (2012) 28 BCL 282; [2012] WASCA 53 at [47]. Her Honour's observations about the prevention principle were not essential to the conclusion as she had already held that the liquidated damages clause in the building contract was a penalty.

[78] (12th ed, 2010, Sweet & Maxwell) at pars 6-025–6-035.

[79] See generally, *SMK Cabinets* at 394–395.

[80] (1979) 144 CLR 596 at 607; [1979] HCA 51 (Mason J).

[81] *Spiers Earthworks* at [48].

extension of time clause, disable the proprietor from recovering or retaining liquidated damages which might otherwise have accrued after the giving of the order.[82] In the context of delaying variations, whether ordered before or after the due date for completion, the prevention principle "is grounded upon considerations of fairness and reasonableness".[83]

116 The prevention principle may preclude an owner recovering liquidated damages for delay in the completion of works by the contractor where that delay has been caused by an act or omission of the owner in breach of the contract.[84] This is because, if it applies, the contractual date for practical completion ceases to be the proper date for the completion of the works and, if there is no contractual mechanism for the substitution of a new date in the events which have occurred, then there is no date from which liquidated damages can run and the right to liquidated damages will be lost.[85] In other words, the time for performance is "at large",[86] although it should be undertaken within a reasonable time.[87]

117 The operation of the prevention principle can be modified or excluded by contract.[88] The manner in which this can be done, as relevant to the present case, is by extension of time provisions such as cll 41.5–41.6. Those clauses established a procedure by which, in the event of an actual or likely delay caused as provided in cl 41.6(b)(i), DDI could advise Probuild of the matters set out in cl 41.5, including whether it sought an extension of time to the Date for Practical Completion.

118 In the event, which Probuild contends occurred, that DDI failed to seek an extension of time pursuant to that provision, it is arguable (depending upon the proper construction of the Subcontract) that the prevention principle did not operate. This is, in essence, because, as Cole J explained in *Turner (No 1)*, DDI failed to exercise a contractual right which would have negated the effect of the preventing conduct.[89]

119 Probuild submitted such extension of time provisions were inserted for the benefit of the principal to a building contract. That is only true in part. Clearly they are capable of having that effect to the extent they preclude the operation of the prevention principle. But they are also capable of operating for the contractor's benefit, by enabling an extension of time to be granted and thus meaning the contractor is not exposed to a liquidated damages claim.[90]

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[82] *SMK Cabinets* at 397–398; applied in *Turner Corp Pty Ltd (rec and mgr apptd) v Austotel Pty Ltd* (1994) 13 BCL 378 at 384 (*Turner (No 1)*) (Cole J (as his Honour then was)); see also *Multiplex Constructions (UK) Ltd v Honeywell Control Systems Ltd (No 2)* [2007] EWHC 447 (TCC); [2007] BLR 195 at [61] (*Multiplex Constructions*) (Jackson J).

[83] *SMK Cabinets* at 397.

[84] *Built Environs* at [152(1)] (Blue J), referring to, among other cases, *SMK Cabinets* at 394.

[85] *Spiers Earthworks* at [49].

[86] *Holme v Guppy* (1838) 3 M&W 387 at 390; 150 ER 1195 at 1196 (Parke B); *Hudson's Building and Engineering Contracts* (13th ed, 2015, Sweet & Maxwell) at par 6-028.

[87] *Multiplex Constructions* at [48]; *Hudson's* (13th ed) at par 6-028.

[88] *SMK Cabinets* at 395.

[89] *Turner (No 1)* at 384–385; see also *Turner Corporation Ltd (in prov liq) v Co-ordinated Industries Pty Ltd* (1994) 11 BCL 202 at 217 (*Turner (No 2)*) (Rolfe J), upheld on appeal *Turner Corporation Ltd (in prov liq) v Co-ordinated Industries Pty Ltd* (1995) 12 BCL 33; *SMK Cabinets* at 394–396; *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* [1970] 1 BLR 111 at 121 (Salmon LJ); at 127 (Phillimore LJ).

[90] In *Multiplex Constructions* at [49] Jackson J also expressed the view, albeit without discussion, that extension of time clauses exist for the protection of both parties to a construction contract or subcontract.

120 In *Spiers Earthworks*,[91] McLure P observed that there was a conflict of authority between the two *Turner* decisions as to the consequence of a principal relying on a contractor's failure to comply with the notice requirements as a ground for rejecting the contractor's claim for an extension of time and Bailey J's decision in *Gaymark Investments Pty Ltd v Walter Construction Group Ltd*.[92] Her Honour also observed that the Court of Appeal upheld the correctness of the *Turner* cases in *Peninsula Balmain*,[93] a decision the Western Australian Court of Appeal was obliged to follow unless convinced *Peninsula Balmain* was clearly wrong. Her Honour did not need to determine this issue as she resolved the case via a different route.[94]

121 Neither party invited this court to resolve the "conflict" between the *Turner* decisions and *Gaymark*, a "conflict" which may be more apparent than real, as the latter case, in my view, turned on the construction of the contract in question,[95] rather than a rejection of the principle in the *Turner* decisions. Further, as Jackson J observed in *Multiplex Constructions*,[96] Professor Wallace, the late editor of *Hudson's Building and Engineering Contracts*, argued that *Gaymark* was wrongly decided in an article with which Hodgson JA agreed in *Peninsula Balmain*, implicitly rejecting *Gaymark*.[97]

122 More important than resolving that debate, in my view, is the fact that neither *Turner* case considered the effect of the discretionary power present in each of the contracts being considered to grant an extension of time. *Turner (No 1)* relevantly concerned the construction of the JCCA form of contract, in particular, cll 9.01, 9.02 and 9.07 permitting extensions of time at the builder's behest,[98] which bore some similarity to cll 41.5 and 41.6 of the Subcontract. Cole J described them as "entitl[ing] the Builder to apply for a contractual variation extending time for performance".[99] It was the fact that those provisions permitted the builder to apply for an extension of time which led his Honour to conclude the prevention principle had no operation. Significantly, his Honour did not consider the effect on the builder's submissions concerning the operation of the prevention principle on cl 9.05 which empowered the architect, notwithstanding that the builder had not given either of or both notices pursuant to cll 9.01 and 9.02, at any time by notice in writing addressed to the builder to extend the time for practical completion of the works if in his opinion the builder would otherwise be entitled to such an extension.[100]

123 *Turner (No 2)* concerned a building contract, the general conditions of which conformed with NPWC Edition 3 (1981) and, in particular, cl 35.4 which bore some similarity to cl 41.5 of the Subcontract. Rolfe J referred to, but did not consider, the effect of a provision which his Honour described as providing for "the Superintendent's determining … whether additional time for practical

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[91] At [53].
[92] (1999) 16 BCL 449; [1999] NTSC 143.
[93] *Spiers Earthworks* at [54]–[55]; *Peninsula Balmain* at [78].
[94] *Spiers Earthworks* at [57]ff.
[95] See *Gaymark* at [69]–[71].
[96] At [100]–[101].
[97] IND Wallace, "Prevention and liquidated damages: a theory too far" (2002) 18 *Building and Construction Law* 82.
[98] See *Turner (No 1)* at 381, 384.
[99] *Turner (No 1)* at 385.
[100] *Turner (No 1)* at 381.

completion should be allowed notwithstanding the Contractor has made no such claim".[101]

124 Such a clause was considered in *Peninsula Balmain*. That case concerned a clause in a building contract which incorporated the Australian Standard General Conditions of Contract (AS2124–1992) with certain modifications and additions provided by special conditions. Clause 35 dealt with times for commencement and practical completion and bore some broad resemblance to cll 41.5–41.6 in requiring the contractor to make a written claim for an extension of time in the event of possible delay of the work under the Contract.[102] It also included a provision that "[n]otwithstanding that the Contractor is not entitled to an extension of time the Superintendent may at any time and from time to time before the issue of the Final Certificate by notice in writing to the Contractor extend the time for Practical Completion for any reason" (reserve power).[103] As can be seen that provision is conceptually similar to cl 41.9 in that it permits an extension of time to be granted, notwithstanding that the contractor was not entitled to one.

125 The contractor failed relevantly to seek extensions of time. Hodgson JA held that, absent the reserve power, if an extension of time claim had not been made within time, that failure would have precluded the operation of the prevention principle and rendered the contractor liable for liquidated damages.[104] However, in his Honour's view, the reserve power was "capable of being exercised in the interests both of the owner and the builder, and … the Superintendent is obliged to act honestly and impartially in deciding whether to exercise [it]".[105]

126 In *Spiers Earthworks*, McLure P thought it "arguable that the prevention principle is a relevant consideration in the exercise of the superintendent's discretion to extend time in relation to the 'non-breach' causes of delay specified in cl 35.5" and that "[i]f a court or another decision-maker concludes that the superintendent should have exercised the power and granted an extension of time, the principal will be prevented from claiming liquidated damages for the relevant (proven) delay".[106]

127 Osborn J followed *Peninsula Balmain* in *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 2)*[107] in relation to a provision almost identical to cl 41.9 save that, as in *Peninsula Balmain*, the reserve power was vested in the Superintendent. In his Honour's view, the reserve power was to be exercised "effectively where it [was] just and equitable to do so; … [was] expressly directed to situations where 'the contractor is not entitled to or has not claimed an extension of time …'; … is expressed to arise on a separate and distinct basis from the provision for the extension of time pursuant to the

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[101] *Turner (No 2)* at 205. His Honour did discuss cases (at 215–216) such as *Peak Construction* which appeared to concern an extension of time provision not dependent on the builder's application, but when he resolved the case considered that part of cl 35.4 which gave the contractor a contractual right to seek extensions of time, the mechanism for determining which was established by the contract, and which his Honour held meant there was no room for the prevention principle to operate: at 217.

[102] *Peninsula Balmain* at [9].

[103] *Peninsula Balmain* at [9].

[104] *Peninsula Balmain* at [78].

[105] *Peninsula Balmain* at [79].

[106] At [62].

[107] [2006] VSC 491. The discretionary extension power is set out in [20].

primary mechanism; … [and] [t]he grounds for exercise of the reserve power [were] expressed in the broadest possible terms".[108]

128 In my view, and contrary to Probuild's submissions, Probuild was obliged to exercise the reserve power to grant extensions conferred by cl 41.9 honestly and fairly having regard to the underlying rationale of the prevention principle to which I have earlier referred or, if necessary, because there is an implied duty of good faith in exercising the discretion cl 41.9 conferred.[109]

129 It needs hardly be said that whether there have been relevant acts of prevention, and whether, in all the circumstances, Probuild was entitled to liquidated damages, or DDI was entitled to an extension of time for the entire period encompassed by Probuild's liquidated damages, turned on the terms of the Subcontract in the events which had happened.[110] However, as a matter of general principle, both the liquidated damages and extension of time clauses in printed forms of contract must be construed strictly *contra proferentem*.[111]

Conclusion

130 It is important in considering the content of the procedural fairness requirement in the context of the SOP Act to bear in mind that a valid payment claim may be made under the SOP Act "even though it may ultimately be proved that no payment was due under the construction contract". This underscores the rough justice the adjudication procedure entails.[112] There is no, or little, time for fine arguments about legal principle. Indeed, having regard to the fact that there is no requirement that adjudicators have legal qualifications, and, again the constrained time period for adjudications, it might be concluded the legislature intended such matters are left to the courts to which the parties may in due course resort, after the adjudication process is complete.

131 When the operation of the prevention principle is understood as I have explained it, it is apparent in my view that its application was squarely an issue in the adjudication process. Its inferential application by the adjudicator could not, or should not, have come as a surprise to Probuild.

132 From the outset in its Payment Schedule, Probuild raised the question whether any events delayed DDI performing the Subcontract in a manner which would entitle it to an extension of time. This was apparent in the general reasons set out in its Payment Schedule which noted, proleptically, that should it "not provide an extension of time to DDI the parties have agreed by virtue of [cl 41.10] that time is not set at large."[113] That reference is clearly capable of being understood to refer to all provisions of the Subcontract by virtue of which DDI might be entitled to an extension of time, including cl 41.9. A similar statement appears in the Payment Schedule Table albeit, in this context, by reference, again, incorrectly, to cl 41.10, clearly intended to be, or capable of being read to be, a reference to cl 41.9. It was open to the adjudicator to conclude it was the latter.

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[108] *620 Collins Street* at [26].

[109] *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349 at 369 (Sheller JA; Powell and Beazley JJA agreeing).

[110] *Turner (No 1)* at 384; *Turner (No 2)* at 222.

[111] *Peak Construction* at 121; see also *Multiplex Constructions* at [56] as to an ambiguous extension of time clause.

[112] Cf *Gipping Construction Ltd v Eaves Ltd* [2008] EWHC 3134 (TCC) at [8] (Akenhead J).

[113] See [38] above.

133 Thus, in my view, from the outset, Probuild's submissions reflected a recognition that by virtue of the fact it sought to claim liquidated damages in respect of the period after the Date for Practical Completion during which it had directed DDI to undertake variations, such directions were capable of being regarded as acts of prevention invoking the prevention principle which would, or could, disentitle it to its liquidated damages claim. It was in that context that it sought to avoid the operation of the prevention principle by invoking the principle Cole J articulated in *Turner (No 1)* by submitting, in effect, that it was DDI's failure to seek an extension of time which prevented performance of the contractual obligations within time.[114]

134 DDI responded to that contention in its adjudication application documents by both submitting a notice of delay pursuant to cl 41.5 and seeking an extension of time pursuant, in my view, to cl 41.9 of the Subcontract.[115] It asserted that the variation procedure for which the Subcontract provided had been abandoned by Probuild. It also asserted, as Probuild had anticipated, that Probuild had engaged in what might prima facie be regarded as acts of prevention in restricting DDI's access to areas where it was supposed to work, not following the construction program and varying the program work all of which caused DDI to be delayed.[116]

135 In this way and explicitly in response to paragraph 10 of the Payment Schedule, and contrary to Probuild's submissions,[117] DDI clearly asserted that it was Probuild which had varied the construction program in such a manner that it was inevitable that it was aware that program was being delayed. In its Synopsis (at par 27(ii)) and in those circumstances it denied that the liquidated damages claim was reasonable.[118] Albeit expressed in lay language, the contention that Probuild had so acted invoked the underlying rationale of the prevention principle to which I have referred.

136 In its Adjudication Response, when dealing with its liquidated damages claim, once again Probuild referred to the various ways in which an extension of time might be granted. That submission referred generally to the fact that DDI had not made a claim for an extension under cl 41,[119] albeit at this stage in its submissions it appears to have lost sight of the fact that it had earlier recognised that DDI had sought an extension of time in box 15 of its contract submissions.[120] However, it should have been apparent to Probuild that the claim for an extension of time in box 15 of DDI's contract submissions by reference to "cl 41.8" was, in fact, an application for Probuild to exercise the reserve discretionary power found in cl 41.9.

137 More to the point is the fact that Probuild was clearly on notice of the following matters. First, that the adjudicator was being asked to determine its liquidated damages claim in the face of a strong claim by DDI that its acts of prevention had caused the performance of the Subcontract to be delayed past the Date for Practical Completion. Secondly, that it had abandoned the variation procedure in the Subcontract such that it could not place reliance on assertions that DDI was not entitled to extensions of time under those

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[114] See *Turner (No 1)* at 385.
[115] See [41] above.
[116] Synopsis at pars 10–13; see [44] above.
[117] See [72] above.
[118] Synopsis at pars 22–23; see [44] above.
[119] See [50] above.
[120] See [48] above.

provisions by virtue of failing to comply with the time periods they prescribed. Thirdly, in any event, that there was a freestanding, albeit discretionary, extension of time provision which DDI had, or could arguably have been understood to have, invoked.

138 In such circumstances, *Built Environs* is, as DDI submitted, readily distinguishable. In that case, Built Environs sought to set aside an adjudication determination as a nullity on a number of grounds, one of which was that it was denied natural justice insofar as the adjudicator determined that the prevention principle negated Built Environs' entitlement to liquidated damages. Blue J upheld that contention in circumstances where he found Tali had not sought, or suggested an entitlement to, an extension of time, nor articulated any reliance upon the prevention principle before the adjudication application.[121] Further, while Tali's submissions in the adjudication application were not inconsistent with its invoking the prevention principle, they did not expressly do so, nor did they identify the issues and its contentions which, according to Blue J, it would necessarily air if it was invoking the prevention principle.[122] As is apparent, that is not this case.

139 It is apparent in my view that the adjudicator most probably formed the view that Probuild's acts of prevention were such that, acting honestly and fairly in exercising the cl 41.9 power, it ought to have extended the Date for Practical Completion. As the primary judge found at paragraph [31] of his reasons, each of the matters which underpinned paragraph [185] of the Determination had been raised by DDI in its adjudication application documents.

140 In concluding that Probuild was not entitled to liquidated damages for the period of 144 days as sought in its Payment Schedule Table, it is apparent that the adjudicator did, as the primary judge found, deal "with Probuild's argument as made".[123] In short, the adjudicator found Probuild had not made good its liquidated damages claim because, as it had anticipated might be found, Probuild should have granted DDI an extension of time.

141 It is also apparent that on the adjudication materials, the adjudicator could not determine the date to which Probuild ought to have granted the extension. His remark that he found in DDI's favour "absent an alternative [Probuild] position" was not a recognition that Probuild had such a position. Rather it was a statement that Probuild had not made a fallback submission. Contrary to Probuild's submissions in this court, he was not required to give it another chance to formulate its set-off claim.

142 Probuild's argument that it needed only to demonstrate the difference between the Date for Practical Completion and the Date of Practical Completion to make good its claim for liquidated damages begs the point. It raised, and sought to kill off, the prospect of DDI being entitled to any extension of time in the Payment Schedule. It is untenable in the light of the process in which it was engaged and, too, in the light of its own submissions. Paragraph [30] of the primary judgment succinctly, and correctly in my view, sets out the matters Probuild recognised it had to make good in order to succeed in its claim to liquidated damages. But, in any event, it simply fails to recognise the fact the adjudicator also had to deal with DDI's submissions.

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[121] *Built Environs* at [132].
[122] *Built Environs* at [138].
[123] Primary judgment at [32].

143 It is clear that in the adjudicator's conclusion that Probuild's conduct was "unreasonable",[124] the adjudicator was summarising DDI's submissions to which I have earlier referred. However, as the primary judge made clear, the adjudicator's conclusion that Probuild's position was "totally inconsistent and unreasonable" was extracted from DDI's submissions, but applied to reject Probuild's consistent assertion that DDI was not "entitled" to any extension of time.

144 In such circumstances, the second limb of Probuild's argument can be dealt with briefly. As it is apparent that the issues referred to in paragraph [185] of the Determination were on the table before the adjudicator, there can be no denial of procedural fairness.

Orders

145 I would dismiss the appeal with costs.

146 **MACFARLAN JA.** I agree with McColl JA.

Orders as per [145]

Solicitors for the appellant: *Maddocks*.

Solicitors for the first respondent: *Lou Baker & Associates*.

JG SIMPKINS

Barrister

[124] Determination at [185].