Gaymark Investments Pty Ltd & Anor v Walter Construction Group Ltd
[1999] NTSC 143

PARTIES:	GAYMARK INVESTMENTS PTY LIMITED and DARWIN CENTRAL NOMINEES PTY LTD v WALTER CONSTRUCTION GROUP LIMITED (FORMERLY CONCRETE CONSTRUCTIONS GROUP LIMITED) AND WALTER CONSTRUCTION GROUP LIMITED (FORMERLY CONCRETE CONSTRUCTIONS GROUP LIMITED) v GAYMARK INVESTMENTS PTY LIMITED and DARWIN CENTRAL NOMINEES PTY LTD
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT EXERCISING TERRITORY JURISDICTION
FILE NO:	Nos. LA5 of 1999 (9907030) and LA6 of 1999 (9910874)
DELIVERED:	20 December 1999
HEARING DATES:	21-22 October 1999
JUDGMENT OF:	BAILEY J

CATCHWORDS:

APPEAL - COMMERCIAL ARBITRATION ACT - CROSS-APPEALS - APPLICATIONS FOR LEAVE TO APPEAL - DECISION OF ARBITRATOR

Commercial Arbitration Act (1985)- s38(5)(a) and (b)

Carpaolo Nominees Pty. Ltd. v Marossan Nominees Pty. Ltd. (1997) 112 NTR 1, applied.
White Constructions (NT) Pty. Ltd. v Mutton (1988) 57 NTR 8, referred.
Abignano Ltd. v Electricity Commission of NSW (1986) 3 BCL 290, referred.
Promenade Investments Pty. Ltd. v State of New South Wales (1992) 26 NSWLR 203, applied.
Australian Gasfields Ltd. v Phillips Oil Company Australia (Atkinson J, Supreme Court of Queensland, unreported, 1 October 1998), referred.
Natoli v Walker (NSW Court of Appeal, unreported, 26 May 1994),referred
Kleerstyle Homes, Dickson and Dickson v Wilde (Williams J, Supreme Court of Queensland, unreported, 24 September 1997), referred.

APPEAL - COMMERCIAL ARBITRATION ACT - APPLICATION FOR LEAVE TO APPEAL - DECISION OF ARBITRATOR - INTERIM AWARD - ELEMENTS OF AWARD - ERRORS OF LAW - CONTRACTUAL REMEDIES - CLAIM FOR QUANTUM MERUIT - CLAIM FOR DAMAGES FOR NEGLIGENT MISSTATEMENT - CLAIM FOR RELIEF UNDER THE TRADE PRACTICES ACT

Trade Practices Act (1974) (CW) - s52(1)
Consumer Affairs and Fair Trading Act (1990) (NT)
Commercial Arbitration Act (1985)- s39

Pavey and Matthews Pty. Ltd. v Paul (1987) 162 CLR 221, applied.
Update Constructions v Rozelle Child Care Centre (1990) 20 NSWLR 251, considered.
Hedley Byrne and Co. Ltd. v Heller and Partners Ltd. (1964) AC 465, considered.
Mutual Life and Citizens Assurance Co. Ltd v Evatt (1968) 122 CLR 556, referred.
Sutton v A J Thompson Pty. Ltd. (1987) 73 ALR 233, considered.

APPEAL - COMMERCIAL ARBITRATION ACT - APPLICATION FOR LEAVE TO APPEAL - DECISION OF ARBITRATOR - INTERIM AWARD - QUESTION OF LAW – CONTRACT - ENTITLEMENT TO LIQUIDATED DAMAGES - PREVENTION PRINCIPLE - WHETHER CONTRACTORS ARE ENTITLED TO AN EXTENSION OF TIME FOR COMPLETION - GROUNDS ON WHICH EXTENSION OF TIME WOULD BE GRANTED

Peak Construction (Liverpool) Ltd. v McKinney Foundations Ltd. (1970) 1 BLR, applied.
Turner Corporation Ltd. v Co-ordinated Industries Pty. Ltd. (1994) 11 BCL 202, considered.
Turner Corporation Pty. Ltd. v Austotel Pty. Ltd. [1994] 13 BCL 378, considered.

Turner Corporation Ltd. v Co-ordinated Industries Pty. Ltd (1995) 12 BCL 33, referred.

REPRESENTATION:

Counsel:

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Respondent (LA5 of 1999) / Appellant (LA6 of 1999) : W. Cochrane

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Judgment category classification:	C
Judgment ID Number:	bai99023
Number of pages:	38

IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
IN DARWIN

Gaymark Investments Pty Ltd & Anor v Walter Construction Group Ltd
[1999] NTSC 143

BETWEEN:

No. LA5 of 1999 (9907030)

GAYMARK INVESTMENTS PTY LIMITED and DARWIN CENTRAL NOMINEES PTY LTD
Appellant

AND

WALTER CONSTRUCTION GROUP LIMITED (FORMERLY CONCRETE CONSTRUCTIONS GROUP LTD)
Respondent

AND

No. LA6 of 1999 (9910874)

WALTER CONSTRUCTION GROUP LIMITED (FORMERLY CONCRETE CONSTRUCTIONS GROUP LTD)
Appellant

AND:

GAYMARK INVESTMENTS PTY LIMITED and DARWIN CENTRAL NOMINEES PTY LTD
Respondent

CORAM: Bailey J

REASONS FOR JUDGMENT

(Delivered 20 December 1999)

Background

[1] These two applications for leave to appeal, pursuant to s.38 of the *Commercial Arbitration Act* ("the Act"), from an interim award made by an arbitrator were heard together.

[2] The arbitration arose out of the construction by Walter Construction Group Ltd (formerly Concrete Constructions Group Ltd) ("Concrete Constructions") of the Darwin Central Hotel between October 1996 and April 1997. The hotel, retail and office complex was constructed for Gaymark Investments Pty Ltd and Darwin Central Nominees Pty Ltd ("Gaymark") as principals under an agreement dated 12 October 1995.

[3] Claims were made by Concrete Constructions for $4,900,341 pleaded on a number of bases, but principally for variations, prolongation and disruption/acceleration. Gaymark counter-claimed for $1,545,059, principally arising through the application of liquidated damages in accordance with the contract.

[4] The arbitrator, Mr T M McDougall, a consulting construction engineer, delivered an interim award on 1 March 1999 in favour of Concrete Constructions in the amount of $1,440,486 exclusive of interest and costs. The arbitrator rejected Gaymark's counter-claim for liquidated damages. In reaching that conclusion, the arbitrator expressly indicated that Gaymark would have had an entitlement to 87 days of liquidated damages at $6,500

per day ($565,500) except for the view which he had taken on a particular question of law.

[5] Gaymark applied for leave to appeal from the arbitrator's decision on that particular question of law. Gaymark's notice of appeal seeks an order that the interim award be varied to insert an order that Concrete Constructions pay Gaymark liquidated damages in the amount of $565,500 or alternatively that the award be remitted to the arbitrator for reconsideration.

[6] Concrete Constructions applied for leave to appeal from the arbitrator's rejection of its (alternative) claims for a *quantum meruit*, for damages for negligent misstatement and for relief under the *Trade Practices Act* (Cmth).

[7] On 22 October 1999, at the conclusion of submissions, I refused the application of Concrete Constructions for leave to appeal and indicated that I would publish my reasons at a later date. In the case of Gaymark's application for leave to appeal, I reserved my decision. I now set out my reasons with respect to both applications.

Section 38 of the Act

[8] Section 38 of the Act relevantly provides:

> "(2) Subject to subsection (4), an appeal shall lie to the Court on any question of law arising out of an award.
>
> (4) An appeal under subsection (2) may be brought by any of the parties to the arbitration agreement –

(a) with the consent of all the other parties to the arbitration agreement; or

(b) subject to section 40, with the leave of the Court.

(5) The Supreme Court shall not grant leave under subsection (4)(b) unless it considers that –

(a) having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more parties to the arbitration agreement; and

(b) there is –

(i) a manifest error of law on the face of the award; or

(ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law."

[9] Gaymark and Concrete Constructions have not consented to either of the present applications and accordingly each sought to persuade the Court with respect to their own application that the criteria of sub-section (5) of section 38 were satisfied.

[10] Section 38(5)(a) and (b) provide cumulative restrictions on the grant of leave to appeal. If an applicant meets the threshold test of section 38(5)(a) then the further restrictions prescribed by section 38(5)(b) apply in the alternative. Finally, an applicant must persuade the Court that as a matter of judicial discretion leave to appeal should be granted.

[11] It is apparent that section 38(5) presents a substantial barrier to a grant of leave to appeal from an arbitrator's award. Kearney J in *Carpaolo v Marrosan* (1997) 112 NTR 1 at 11-12 referred to the legislative background to the provision in the following terms:

> "In its present form, s38(5) reflects amendments introduced between 1990 and 1993 to the uniform scheme for commercial arbitration introduced throughout most of Australia by State and Territory legislation of the 1980s, and embodied in the Act. The purpose of the amendment effected by s38(5) was to further limit intervention by the courts in the arbitration process. Prior to the amendments, principles to be observed in the discretionary grant of applications for leave to appeal under provisions akin to s38 (4) in similar legislation in the United Kingdom, had been spelled out in *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 (*The 'Nema'*). Some of the '*Nema'* guidelines were subsequently applied in some Australian jurisdictions applying the uniform scheme, but not in all. The 1990s amendments were introduced to achieve greater uniformity between the States and Territories on whether the discretion to grant leave to appeal under s 38(4) was at large, or limited. The amendments pointed to limitation: see *Promenade Investments Pty Ltd v New South Wales* (1991) 26 NSWLR 184 at 188-9. The policy behind them was '…to promote the finality of arbitral awards even at the price of denying a party its usual entitlement to the determination of the dispute by a court of law': *Natoli v Walker* CA(NSW), 26 May 1994, unreported per Kirby P at p 2."

[12] In determining whether the threshold test set out in section 38(5)(a) is met, it is relevant to consider whether the amount in issue is substantial: see Kearney J in *Carpaolo v Marrosan*, supra, at p.12, *White Constructions (NT) Pty Ltd v Mutton* (1988) 57 NTR 8 at 22-3 and *Abignano v Electricity Commission of NSW* (1986) 3 BCL 290 at 297.

[13] In the case of the present applications, the amount in issue in Gaymark's appeal is $565,600 and affidavit evidence on behalf of Concrete

Constructions puts the effect of the arbitrator's rejection of its claims as precluding Concrete Constructions from recovering damages of up to a maximum of $4,330,000 : see para. 13 of Mr Kennedy's affidavit of 14 May 1999. It is not a matter of dispute that these are substantial sums. I am satisfied that the amounts in issue are substantial and that the requirement of section 38(5)(a) is satisfied with respect to the applications by both Gaymark and Concrete Constructions.

[14] The first alternative test for leave to appeal provided by section 38(5)(b) is that there is:

> "(i) a manifest error of law on the face of the record;"

[15] Various courts throughout Australia have considered what is necessary to meet this criterium: see *Promenade Investments Pty Ltd v State of New South Wales* (1992) 26 NSWLR 203; *Australian Gasfields Ltd v Phillips Oil Company Australia and Sun Oil Export Company,* Supreme Court of Queensland 1 October 1998, unreported per Atkinson J, *Natoli v Walker* CA 40351 of 1993, NSW Court of Appeal, 26 May 1994, unreported, *Kleerstyle Homes, Dickson and Dickson v Wilde,* Supreme Court of Queensland, 24 September 1997, per Williams J, unreported and *Carpaolo v Marrosan,* supra, at 12-14.

[16] There authorities indicate a good deal of unanimity as to the correct approach to section 38(5)(b)(i) which is illustrated by Sheller JA in *Promenade Investments,* supra at 225-226:

"The expression 'error of law on the face of the award' is one of a type well-known to courts. The award having been examined the question is whether there is apparent (and such is the denotation of the word 'manifest') an error of law. 'Manifest error' is an expression sometimes used in reference to reasons given by judges or the approach taken by juries: see, eg, s 107(c)(iii) of the *Supreme Court Act* 1970 and the judgments of Kirby P in *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139 at 151 and *Otis Elevators Pty Ltd v Zitis* (1986) 5 NSWLR 171 at 181. It is used to indicate something evident or obvious rather than arguable: see generally per McHugh JA in *Larkin v Parole Board* (1987) 10 NSWLR 57 at 70-71. Nothing more is to be learnt from the language used but of course the discretion of the court as to whether or not it will grant leave remains and regard must be had to the requirement of subs (5)(a). The matters referred to by Lord Diplock in *the Nema* remain important factors in determining whether leave should be given.

However, I have difficulty in defining the significance of an error of law by reference to whether it is apparent to a judge upon a mere perusal of the reasoned award itself without the benefit of adversarial argument. I understand the views expressed that decisions on questions of law should be left to the arbitrator with minimal interference by the courts unless the arbitrator may be establishing an erroneous precedent on a matter of law which may affect other cases between other parties as for example where the question concerns the construction of a contract in standard terms. But the paragraph requires a determination as to whether or not there is a manifest error on the face of the award and I do not see why a judge should be required to do that without adversarial argument. If the judge concludes after argument that there is not such an error of law an application based on this ground fails. If there is such an error of law, a question arises as to whether as a matter of discretion leave should be granted and the point made by Brownie J in *Graham Evans & Co Pty Ltd v SPF Formwork Pty Ltd* Supreme Court of NSW, unreported, 9 April 1991, per Brownie J would, for example, have to be taken into account (at 5):

> '…if an appellant asserts that an arbitrator committed an error of law, in that the reasons for the award omit any reference to some essential ingredient in the chain of reasoning necessary to support the award, it would be wrong to exclude evidence showing that the matter not mentioned in the arbitrator's reasons was conceded on the hearing of the arbitration. To exclude that evidence would be to convert a correct decision into one which would then be presumed to be incorrect, and

> would impose upon the arbitration system a need for arbitrators to frame their reasons for making awards with a degree of formality which is quite foreign to the spirit of the Act.'
>
> There is nothing, in my opinion, in the language of the subsection or in any other material, to which consideration can appropriately be given pursuant to the terms of the *Interpretation Act* which would allow the judge to proceed to determine the application without hearing argument. However as McHugh JA pointed out 'manifest', in the context of the subsection, which contemplates the grant of leave before an appeal can be pursued, connotes an error of law that is more than arguable. There should, in my opinion, before leave is granted be powerful reasons for considering on a preliminary basis, without any prolonged adversarial argument, that there is on the face of the award an error of law."

[17] With respect I would agree with these observations of Sheller JA and also with those of Kearney J in *Carpaolo v Marrosan*, supra, at 14:

> "The Court must be swiftly and easily persuaded of the existence of the error suggested, and must rapidly recognise it without embarking upon detailed scrutiny of the case. So the error relied on must be evident or obvious or perceptible, rather than merely arguable…. It appears that an error of law is 'manifest' if it is one which has no rational basis, is obvious, and is capable of being readily perceived."

[18] The second alternative test for leave to appeal provided by section 38(5)(b) is:

> "(ii) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law."

[19] The second aspect of this requirement is self-explanatory. It requires that the issue to be resolved has wider implications than for the particular parties to the relevant case and that those implications be for the greater certainty

of commercial law. While it is not possible nor even desirable to identify all relevant considerations to meet this aspect of section 38(5)(b)(ii), it will clearly be of significance whether the issue sought to be raised on an appeal concerns construction of a standard form or a "one-off" contract and whether the relevant question of law is of general rather than narrow importance.

[20] As to the question of what amounts to "strong evidence" of an error of law, I agree, with respect, with the following observations of Kearney J in *Carpaolo v Marrosan*, supra, at 15:

> "What is 'strong evidence' of an error of law remains imprecise; in the absence of any Australian authorities which usefully add precision to this expression, I consider it appropriate to have regard to the English authorities which deal with the test of a strong prima facie case of error, flowing from the decision in '*The Nema'*. In doing so I note the similarity between the tests propounded in s38 (5) and those in the *The 'Nema'*.
>
> In *Ipswich Borough Council v Fisons PLC* [1990] 1 Ch 709 at 724-5 Lord Donaldson MR, with whom Woolf and Beldam LJJ agreed, said:
>
> > 'What, as I see it, underlies the philosophy expounded in *The 'Nema'* and *The 'Antaios'* [*Antaios Campania Naviera SA v Salen Rederierna AB* [1985] AC 191] is that there is always a presumption in favour of finality and that, where there is nothing to rebut it, the application should be unceremoniously refused. Rebuttal must always be based upon at least a suspicion that the arbitrator has gone wrong. Being left in the frame of mind that the arbitrator may or may not have been right – being left in real doubt in that sense – is not sufficient. But the degree of suspicion which is requisite may vary according to the seriousness of the consequences of error to the parties and to a wider public.

The House of Lords' guidelines with regard to one-off contracts, that an obvious case of error should be shown, I think assumed that the effect would also be one-off. This might well be true of the last rent review, particularly if the remainder of the lease were relatively short. It would not, however, be true of earlier rent reviews. There the long-term effect on subsequent reviews would be analogous to the effect of decisions on standard terms, the only difference being that the same, rather than different, parties might be affected.

Accordingly it may well be that in most rent review disputes the 'standard terms' approach will be justified: a strong prima facie case of error should be shown. But 'strong' is an imprecise term and I do not think that the House of Lords intended that the same degree of strength should be called for in every case. This is, after all, a matter which parliament has left to the exercise of judicial discretion, Consistency of approach is important, but it must not negative a discretion based upon the facts of individual cases.

So how strong is strong? No meter can be applied or indeed devised. It is a matter of relative values. If the chosen arbitrator is a lawyer and the problem is purely one of construction, the parties must be assumed to have had good reason for relying upon his expertise and the presumption in favour of finality or, to put it the other way round, the strength needed to rebut it will be greater. So too if the dispute really centres upon an issue calling for non-legal expertise, albeit with some underlying question of law, and the chosen arbitrator has that expertise. But if the chosen arbitrator is not a lawyer and the whole dispute centres upon a difficult question of law, less strength may be required.

Similarly, the degree of strength will be affected by whether the clause in question is one of a class commonly encountered, so that others would benefit from an authoritative decision on its meaning or application, and I see no reason why some account should not be taken of the seriousness of the consequences to the parties of the arbitrator's error, if error there be. But the bottom line must always, I think, be that the judge concludes that there is a more or less strong, but still 'strong', prima facie case that the arbitrator has erred in law. To adopt any other approach would be to fly in the face of the legislative preference for finality.'"

[21] It is against this background of clear legislative intent to promote finality of arbitral awards that applications for leave to appeal are to be considered. I have indicated earlier in these reasons that both the present applications pass the threshold test provided by section 38(5)(a). I turn first to the application by Concrete Constructions for which I refused leave to appeal at the close of submissions.

Application for leave to appeal by Concrete Constructions

[22] Before the arbitrator, the primary basis of Concrete Constructions' claims was the contract of 12 October 1995 entered into between Gaymark and Concrete Constructions. The claims were summarised as follows:

Variations	$1,721,614
Damages for delay	$1,626,250
Sub-contractors' costs for delay	$ 542,567
Costs for acceleration/disruption	$1,010,000
TOTAL	$4,900,431

[23] The arbitrator awarded Concrete Constructions the following amounts:

Variations	$679,464
Damages for delay	$264,469
Sub-Contractors' costs for delay	$ 57,276
Costs for acceleration/disruption	NIL
TOTAL	$1,001,209

[24] These amounts were awarded by the arbitrator in accordance with the contract of 12 October 1995. (I note the total amount awarded to Concrete Constructions was $1,440,486 after taking into account outstanding payments due and damages awarded in favour of Gaymark.)

[25] As an alternative to its claims under the contract, Concrete Constructions advanced its claims on the basis of *quantum meruit*, negligent misstatement and under the *Trade Practices Act* (Cmth.) and *Consumer Affairs and Fair Trading Act*.

[26] On behalf of Concrete Constructions, Mr Cochrane submitted that with respect to each of the elements of the award dealing with:

a) *quantum meruit*;

b) negligent misstatement; and

c) the *Trade Practices Act*,

errors of law made by the arbitrator were "manifest… on the face of the record". In the alternative, Mr Cochrane submitted that with respect to each of these three elements of the award there was strong evidence that the arbitrator had made an error of law and that clarification of the issues raised would add substantially to the certainty of commercial law.

[27] I will address the three alternative bases for Concrete Constructions' claims in turn.

Quantum Meruit

[28] The arbitrator's reasons for rejecting Concrete Constructions claim for a *quantum meruit* were as follows:

> "R2 The quantum meruit claim cannot, in my view, succeed, for various reasons. One principal one is the statement in the Gaymark submissions of October 98 (page 13) which says 'The contract between CCG and Gaymark has been substantially performed (the building has reached practical completion) …' which is true as a fact. This seems to me to put it out of the reach of the remedy sought.
>
> R3 The other is in the CCG Reply Volume 1 of August 98, page 74, paragraph 196, where it is submitted that appropriate restitution payable to CCG would be the amounts claimed for:
>
> | | |
> |---|---|
> | Variations | $1,721,614 |
> | Delay | $1,626,250 |
> | Disruption/acceleration | $1,010,000 |
>
> R4 These remedies were, however, always available to CCG in contract, subject to the latter complying with the terms of the contract on notification, and, as always, subject to proof of the amounts claimed.
>
> R5 The reason that they are not available to CCG now, to the extent desired, is not the result of some external act which has made the contract impossible of performance in any practical sense. Rather it is because CCG has failed to comply with the clearly expressed requirements of the contract as to notification."

[29] The brevity of these reasons is in marked contrast to the detailed and extensive analysis by the arbitrator in dealing with the claims of Concrete Constructions and Gaymark under the contract and his reasons for accepting some of those claims and rejecting others.

[30] However, while it cannot be doubted that the arbitrator might have expressed his reasons more clearly for summarily dismissing Concrete Constructions claim to recover on a *quantum meruit* the gravaman of that rejection is clear enough from what he did say, namely that no basis existed for a claim in restitution or one based on unjust enrichment.

[31] In *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 the High Court examined the basis on which a builder might recover on a *quantum meruit* where he had performed work under an unenforceable contract. Deane J at 256 observed:

> "…if there was a valid and enforceable agreement governing the claimant's right to compensation, there would be neither occasion nor legal justification for the law to superimpose or impute an obligation or promise to pay a reasonable remuneration. The quasi-contractual obligation to pay fair and just compensation for a benefit which has been accepted will only arise in a case where there is no applicable genuine agreement or where such an agreement is frustrated, avoided or unenforceable. In such a case, it is the very fact that there is no genuine agreement or that the genuine agreement is frustrated, avoided or unenforceable that provides the occasion for (and part of the circumstances giving rise to) the imposition by the law of the obligation to make restitution."

[32] In his reasons, the arbitrator makes clear (paras. R3 – R5) that the "restitution" sought by Concrete Constructions was always available to it under its contract with Gaymark **provided** Concrete Constructions complied with the terms of that contract. In short, the arbitrator ruled that the contract had not been frustrated, avoided or become unenforceable and accordingly, there was no basis for Concrete Constructions to claim on a *quantum meruit*. The point is reinforced in paragraph R2 of the Arbitrator's

reasons where he notes that the contract between the parties had been "substantially performed (the building having reached practical completion)". In such circumstances, there could be no basis for a claim in restitution.

[33] There is no "manifest error of law" in the arbitrator's reasons and nor is there is any "strong evidence" that the arbitrator made an error of law. Mr Cochrane did not suggest that the contract between the parties had been frustrated, avoided (repudiated) or become unenforceable for any reason. It is difficult to see how he could have done so given the fact, as found by the arbitrator, that Darwin Central Hotel had reached practical completion.

[34] In *Update Constructions Pty Ltd v Rozelle Child Care Centre Ltd* (1990) 20 NSWLR 251, Priestley J in a footnote at 275 observed that aside from the area of employment contracts:

> "I know of no cases .... where an existing enforceable contract governs specific relations between two parties and yet one has recovered against the other in respect of a matter governed by the contract, on the basis of quantum meruit, quasi contract, or restitution. As Mason CJ said of the situation in *Foran v Wight* (1989) 168 CLR 385; 64 ALJR 1: '... so long as the contract continued on foot, it governed the relations between the parties and there is no basis in these circumstances for an appeal to the law of quasi-contract' (at 143 (*sic 413*); 13)."

[35] Similarly, I am unaware of any such cases. In the circumstances, I am satisfied that Concrete Constructions has failed to overcome the hurdle of section 38(5)(b) of the Act and leave to appeal must be refused for this aspect of Concrete Constructions' application.

Negligent Misstatement

[36] The arbitrator's reasons for rejecting the claim by Concrete Constructions for damages based on negligent misstatement are set out in Paragraphs R6 to R11 of his reasons. Mr Cochrane submitted, with some validity, that the arbitrator appears to have misdirected himself that a claim in contract and a claim in tort (negligent misstatement) could not exist concurrently and/or that the measure of damages in contract and tort are necessarily the same. However, I do not consider that it is necessary to canvass such issues having regard to paragraphs R5 and R6 of the arbitrator's reasons:

> "R6 The stamping of the Tender Drawings as 'Construction Issue' was clearly a misstatement, in terms of the normal trade interpretation of that term, or similar ones.
>
> R7 What the consequences of that might have been, I cannot say. I cannot accept that CCG, even so, expected to perform the work based solely on the tender drawings, with no amendments and no variations. To accept that requires a suspension of belief."

[37] In order to succeed in a claim for negligent misstatement, Concrete Constructions would need to establish:

(a) That the duty of care arose in the circumstances because of a "special" relationship between Gaymark and Concrete Constructions: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* (1964) AC 465;

(b) That a representation was made;

(c) That the representation was wrong;

(d) That Concrete Constructions relied on the representation in circumstances where it was reasonable to do so: *Mutual Life & Citizens Assurance Co Ltd v Evatt* (1968) 122 CLR 556; and

(e) That damage was suffered by Concrete Constructions as a result of such reliance.

[38] Assuming that all other requirements for a successful claim in negligent misstatement were met, it is apparent from the arbitrator's reasons at para R7 above that he found as a fact that Concrete Constructions did not rely on any representation to the effect that the Darwin Central Hotel could and would be built without any variation to the tender drawings. Whatever other criticisms may be made of the Arbitrator's reasons in the present context, this finding is fatal to Concrete Constructions' claim in negligent misstatement and similarly fatal to Concrete Constructions' application for leave to appeal an error of law under Section 39 of the Act. In the circumstances, leave to appeal must be refused for this aspect of Concrete Construction's application.

Trade Practices Act

[39] As with the alternative claims by Concrete Constructions for a *quantum meruit* and in negligent misstatement, the arbitrator's reasons for rejecting Concrete Constructions' claim under section 52 of the *Trade Practices Act* (Cmth) were brief. He stated:

"R12 There appear to be two limbs to this argument. The first is that the misleading and deceptive conduct lay in the stamping of the tender drawings as 'construction issue'. There is no doubt that to so describe them as wrong in some important respects (pace Messrs Wilkins and Brears). This is particularly so as to the roof drainage design, on the evidence of Mr Graham, and (if you accept that the design had to conform to the BCA) as to the fire rating, on the evidence of Mr Wilkins himself.

R13 However, as I said earlier, in my view it is quite unrealistic for a contractor to conclude at the outset that 'These are the drawings, there will be no changes and I can go for my life'.

R14 But, even if one did, one would only, in consequence, be misled if the contract did not provide for extensions of time, delay costs and recovery of the cost of variations. If it does, the effect of such conduct is a matter of degree only and the effect can be recovered under the contract. The fact that the claim based on false and misleading conduct cannot be time barred under the contract, if it be so, is one thing – the remedy for it lies in claims under the contract and is presumably still caught by the limitation provisions.

R15 The second limb of the argument is that Gaymark warranted that the Superintendent would provide proper, fair and impartial administration of the contract.

R16 There are two difficulties with this argument. One is that for much of the time, the Superintendent acts as the agent of the Principal and is both entitled to, and expected to, look primarily after the Principal's interests. That leaves the Superintendent with a wide area of discretion in much of what he/she does.

R17 The other difficulty is that, as a result, if you could classify Superintendents into the categories of 'Good', 'Bad' and 'Indifferent', the latter category would (in my experience and by my standards, anyway) contain the vast majority of them, and with no two persons agreeing to the boundary between the classes.

R18 Essentially, in my experience, you take what you get by way of Superintendent and keep your fingers crossed, hoping that whoever is appointed is prepared to exercise a reasonable amount of discretion.

R19 For a claim based on the Superintendent's conduct to have a reasonable chance of success, the latter has to be unrelievedly awful.

R20 In short, I do not think that a claim based on these Acts can succeed."

[40] Section 52(1) of the Commonwealth Act provides:

> "(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive".

[41] The starting point for a successful claim under section 52(1) is, or course, conduct that is "misleading or deceptive or is likely to mislead or deceive". I consider that on a fair reading of the arbitrator's reasons it is perfectly apparent that he found that Concrete Constructions failed this threshold requirement. In short, the arbitrator found as a fact that Gaymark's conduct was not misleading or deceptive or conduct likely to mislead or deceive.

[42] In relation to the stamping of the tender drawings as "construction issue", while the arbitrator found that to be "wrong in some important respects" (para R12 above) he also found that such conduct was not misleading or deceptive or likely to mislead or deceive.

[43] In *Sutton v A J Thompson Pty Ltd* (1987) 73 ALR 233 at 240, the Full Court of the Federal Court (Forster, Woodward and Wilcox JJ) held:

> "… in a case such as the present, where the allegedly misleading conduct consists in representations directed specifically towards a particular person or group of people, with a view to making a single specific sale, it is more helpful to recall the principles of law restated by Wilson J in *Gould v Vaggelas* (1984) 56 ALR 31 at 46. Although

these related to the common law action of deceit, they are, in our view, equally applicable to breaches of s52 of the Act. The principles are:

> '(i) Notwithstanding that a representation is both false and fraudulent, if the representee does not rely upon it he has no case.
>
> (i) If a material representation is made which is calculated to induce the representee to enter into a contract and that person in fact enters into the contract there arises a fair inference of fact that he was induced to do so by the representation.
>
> (ii) The inference may be rebutted, for example, by showing that the representee, before he entered into the contract, either was possessed of actual knowledge of the true facts and knew them to be true or alternatively made it plain that whether he knew the true facts or not he did not rely on the representation.
>
> (iii) The representation need not be the sole inducement. It is sufficient so long as it plays some part, even if only a minor part in contributing to the formation of the contract.'

In this formulation, the possibility that a foolish person might be misled by some representation which no normal person would take seriously, is covered by the exclusion of representations which are not 'calculated to induce' entry into the contract – the rest is objective, but must take into account the respective positions of the parties, including such matters as their knowledge of each other through previous dealings and their respective familiarity with the subject-matter of the contract."

[44] At para R13 of his reasons, the arbitrator makes clear that notwithstanding the falsity of the tender drawings being stamped "construction issue" it is quite unrealistic for an experienced contractor, such as Concrete Constructions, to suggest that it was induced to contract with Gaymark

because of an implied representation that the Darwin Central Hotel could and would be built without variation to the tender drawings. At para R14, the arbitrator goes on to say that even if a contractor was misled by such an implied representation this could occur only in the case of a contract which did not provide for extensions of time, delay costs and recovery of the costs of variations (which was not the case here). As with the claim in negligent misstatement, such findings of fact are fatal to Concrete Constructions' claim under section 52 of the *Trade Practices Act* and similarly fatal to an application for leave to appeal an error of law.

[45] The second limb of Concrete Constructions' claim under section 52 of the *Trade Practices Act* is dealt with by the arbitrator at paras. R 15 – R19 (above). As with the first limb, a fair reading of the arbitrator's reasons leaves no room for doubt that he found as a fact that any warranty by Gaymark that the Superintendent would provide proper, fair and impartial administration of the contract was not misleading or deceptive conduct or conduct likely to mislead or deceive. In reaching this finding it is clear that the arbitrator took into account Concrete Constructions' familiarity with construction contracts, the customary role of a Superintendent and the terms of the contract entered into with Gaymark. It may well be that, as with the arbitrator's reasons for rejecting Concrete Constructions' claims for a *quantum meruit* and in negligent misstatement, he might have given more detailed reasons for his findings. However, in the circumstances, I consider that the arbitrator's reasons (being based on findings of fact) were

sufficient. Leave to appeal must be refused for this aspect of Concrete Constructions' application.

Application for leave to appeal by Gaymark

[46] Gaymark seeks leave to appeal from the arbitrator's conclusion that it was not entitled to anything by way of liquidated damages in accordance with clause 35.5 of the contract between Gaymark and Concrete Constructions.

[47] The contract between the parties was a standard form of building contract – NPWC Edition 3 (1981) ["general conditions" or "GC"] – amended in a substantial number of respects by a schedule of special conditions of contract ["special conditions" or "SC"].

[48] Clause 35.5 of the general conditions provided for payment by Concrete Constructions to Gaymark of liquidated damages of $6,500 per calendar day (to a maximum of $2,300,000) that completion of the building was delayed beyond the period or by the date fixed for practical completion or "within any extended time granted or allowed by the Superintendent pursuant to sub-clause 35.4".

[49] The arbitrator found that:

(a) Concrete Constructions was entitled to extensions of time up until 14 January 1997 for inclement weather and for delays for which Gaymark was responsible either directly or through the Superintendent;

(b) Concrete Constructions was delayed for a further 77 working days by causes for which Gaymark was responsible either directly or through the Superintendent but its application for extension of time was barred because of the failure of Concrete Constructions to meet the notification requirements of the contracts extension of time clause (SC 19.2);

(c) the delays referred to in (b) above actually prevented Concrete Constructions from achieving practical completion by 14 January 1997;

(d) in fact the date of practical completion achieved by Concrete Constructions was 11 April 1997, a date which was some 87 calendar days after the (extended) date for practical completion.

[50] Gaymark does not seek to appeal the above findings. However, Gaymark does seek leave to appeal the arbitrator's further finding that the 77 working days (87 calendar days) delay constituted "acts of prevention" by Gaymark with the result that there was no date for practical completion and Concrete Constructions was then obliged to complete within a reasonable time (which the arbitrator found that it in fact did).

[51] The arbitrator expressly acknowledged that the consequence of his approach to the "prevention principle" was that on the facts as he found them Gaymark lost an entitlement to 87 days of liquidated damages at $6,500 per day, namely a total amount of $565,500.

[52] It is submitted on behalf of Gaymark that the arbitrator erred in law in concluding that Gaymark could have no entitlement to liquidated damages under the contract in consequence of the application of the "prevention principle". It is further submitted that the arbitrator erred in law in concluding that Concrete Constructions' obligation to complete the work under the contract by the date specified in the contract had on the facts which he found been replaced with an obligation to complete within a reasonable time.

[53] The concept of prevention (or the so-called "Peak" principle: *Peak Construction (Liverpool) Ltd. V McKinney Foundations Ltd.* (1970) 1 BLR 111) has been described by Rolfe J in *Turner Corporation Ltd v Co-ordinated Industries Pty Ltd*. (1994) 11 BCL 202 at 212 in the following terms:

> "Essentially it is that a party to the contract has been prevented from fulfilling its contractual obligations by virtue of conduct of the other party. The consequence is said to be that the 'preventing party' cannot rely upon the failure by the other party to comply with its contractual obligations, even if the other party is otherwise in breach so that it could not have complied with its contractual obligations in any event. It is said this flows from a generally stated principle that a party cannot benefit from its own wrong. Whilst the so-called principle may be stated in general terms it seems to me it can only have that application, usually, in circumstances where the contract does not provide for the effect of breach causing prevention."

[54] Where the concept of prevention is applicable, the practical consequence is that the "preventing party" is prevented from further insisting upon strict contractual times which are replaced by whatever is a reasonable time in all

the facts and circumstances (Building and Construction Contracts in Australia, Dorter & Sharkey, 2nd Edit at p. - 4551).

[55] The gravamen of Mr Bond's submission on behalf of Gaymark is that the concept of prevention had no application to the 77 working days delay for which Gaymark was responsible because the terms of the parties' contract provided for extensions of time for such delays and Concrete Constructions had failed to meet the notification requirements for such extensions.

[56] Clause 35.2 of the general conditions relevantly provided:

> "The Contractor (Concrete Constructions) shall execute the work under the Contract to Practical Completion within the period or by the date stated in the Annexure hereto or within any extended time granted or allowed by the Superintendent pursuant to sub-clause 35.4."

[57] Clause 35.4 of the NPWC Edit.3 (1981) contract in standard form is an extension of time clause which allows the Superintendent to grant extensions to the date fixed for Practical Completion where (*inter alia*) the Principal is the cause of the delay. This power is available where the Contractor notifies the Superintendent of his claim for an extension within 28 days after the cause of the delay arising. Clause 35.4 includes the further provision that:

> "Notwithstanding that the Contractor has not given notice of a claim for an extension of time for Practical Completion of the Works pursuant to this sub-clause, the Superintendent may, at any time and from time to time and for any reason he thinks sufficient, by notice addressed to the Contractor extend the time for Practical Completion of the Works by nominating a date specified in the notice as the date

for Practical Completion of the Works and the date so specified in the notice shall, for the purpose of the Contract, be deemed to be the date for Practical Completion of the Works."

[58] In the contract between Gaymark and Concrete Constructions, the standard-form Clause 35.4 was deleted and replaced by SC19 which provided:

"SC19 EXTENSION OF TIME FOR COMPLETION

SC 19.1 Extension of Time

"The Contractor hereby accepts the risk of liability for completion of the Works strictly in accordance with the provisions of the Contract notwithstanding encountering delay or disruption in the execution of the Works except to the extent provided in this clause.

Where during the performance of the work under the Contract the progress of the Works is delayed by any cause or causes (including causes for which the Contractor is not entitled to an extension of time for Practical Completion of the Works) in such a manner which might reasonably be expected to result in a delay to the Works reaching Practical Completion the Contractor shall, as soon as practicable and in any event not later than 14 days after the cause of delay first arose give a notice in writing to the Superintendent:

(a) stating with as much detail as is possible the nature of the cause of the delay and, where possible, the extent of the delay; and

(b) stating the steps being taken to alleviate or otherwise deal with the delay and/or the cause thereof.

As soon as practicable and in any event not later than twenty-one (21) days after giving the notice under the preceding paragraph, the Contractor shall where it wishes to claim an extension of time, give a further notice in writing to the Superintendent stating a fair and reasonable time by which in its opinion the Date for Practical Completion of the Works should be extended and

(c) stating all relevant details of the nature of the cause of the delay and the extend of the delay;

(d) making reference to the critical activities of the Approved Construction Program and clearly showing how the critical activity has actually been delayed to such an extend so as to delay the achievement of Practical Completion by the due date; and

(e) stating the effect of the steps which have been taken to alleviate and otherwise deal with the delay and/or the cause thereof.

SC 19.2 Contractor's Entitlement to Extension of Time

The Contractor shall only be entitled to an extension of time for Practical Completion where:

(a) the cause of the delay is beyond the control of the Contractor and arises only out of one or more of the following:

(i) any breach of the provisions of the Contract or other act or omission on the part of the Principal, the Superintendent, any agent or employee of the Principal;

(ii) the execution of a Variation that has been instructed in writing by the Superintendent in accordance with the Contract:

(iii) a Latent Condition;

(iv) proceedings being taken by adjacent or neighboring owners or occupiers where such proceedings cause an actual delay to activities on the critical path and where such proceedings do not arise out of or are the result of a breach of the Contract or failure to comply with the Contract by the Contractor; or

(v) inclement weather;

(vi) industrial disputation which is not confined to the Contractor, any subcontractor or to the site or the Works.

(b) the Contractor:

(i) has complied strictly with the provisions of sub-clause SC 19.1 and in particular has given the notices required by sub-clause SC 19.1 strictly in the manner and within the times stipulated by that sub-clause;

(ii) (Deleted)

(iii) shall have taken all proper and reasonable steps necessary and within its control both to preclude the occurrence of the cause of the delay and/or to avoid or minimize the consequences thereof and shall have demonstrated this to the satisfaction of the Superintendent; and

(iv) demonstrates to the satisfaction of the Superintendent that the Contractor has been actually delayed in achieving Practical Completion of the Works by the Date for Practical Completion."

[59] The structure of SC19 assumed considerable significance in the arbitrator's reasons for rejecting Gaymark's claim to liquidated damages pursuant to GC 35.5. In particular, despite the references in GC 35.2 (see para 56 above) and GC 35.5 (see para 48 above) to extensions of time "granted or allowed by the Superintendent pursuant to sub-clause 35.4", SC 19 (which replaced GC 35.4 in the parties' contract) contains no reference to the Superintendent having power to **grant** or **allow** an extension of time. Assuming that the cause of delay was one falling within SC19.2(a) and that Concrete Constructions had met the two notice requirements of SC 19.1, Concrete Constructions would be **entitled** to an extension of time provided it

demonstrated to the satisfaction of the Superintendent the matters referred to in SC 19(b) (iii) and (iv).

[60] In a colourful, but in my view, accurate turn of phrase, the arbitrator observed (G23):

> "As far as I am concerned (and to use a colloquial expression), you can read Special Condition 19 till you're blue in the face and you won't find any reference to a power given to the Superintendent either to grant or allow on EOT (extension of time).:

[61] In short, the arbitrator adopted the view that, in contrast to the deleted GC 35.4, the substituted provision for extensions of time, SC19 provided an entitlement (or right) to an extension of time provided Concrete Constructions complied strictly with its requirements. However, SC19 afforded the Superintendent no general discretion to extend time in the absence of such strict compliance notwithstanding that Concrete Constructions had been actually delayed by an act, omission or breach of contract for which Gaymark was responsible.

[62] The arbitrator took the view that there are three possible constructions of GC 35.2 and SC19. He stated:

> "G30 It seems to me that there are only three options open. One is to argue for the implication of a term similar to the fourth paragraph of the original Clause 35.4, giving the Superintendent the power to allow an extension in this situation. I would be surprised if that could be done, given the apparent care taken in amending the EOT provisions of NPWC3. Certainly the Superintendent took the view on more than one occasion, in dealing with other time barred situations, that his power was exhausted once the time barrier had been hit.

G31 The second is to say that it is too bad for the contractor. His own carelessness in not observing the conditions of SC19 has simply cost him the right to recover the delay costs involved, in addition to exposing him to the risk of liquidated damages, and that cannot be an absurd result. Looked at from the other side, though, the principal has, if it was responsible for the delay, not only been absolved from the need to pay the contractor's costs of the delay, but is also able to recover liquidated damages for a delay of its own causing. The first of these consequences is not, in my view, absurd (having regard to the responsibilities of the contractor)..... However, the second one, I think, is an absurd one (namely that it is possible to be paid for one's own errors) ...

G32 (The Gaymark submission also contends that "no logical distinction can be drawn between the avoidance of the payment of delay costs and the impositions of liquidated damages: both result in a benefit or 'profit' to the owner". However I think there is a distinction. The first means that the owner does not have to pay costs, as a result of the contractor's lack of competence in pursuing his rights – the second means that the owner gets paid for his own lack of competence.)

G33 This leaves really only the third alternative. This is that the principal, in re-drafting the EOT provisions, is deemed to have elected to take the risk that it would not cause an actual delay to the contractor such as actually to delay the latter in achieving Practical Completion of the works by the due date, or that, if it did, that the contractor would apply for an extension within the stipulated times. In consequence, it did not provide for the possibility that this might happen, with the further risk that, if it did, the obligation to finish by a date which could be determined would be replaced by one only to complete within a reasonable time...".

[63] In Mr Bond's submission, the approach adopted by the arbitrator is wrong in law in a number of respects. In written submissions, Mr Bond summarised his submissions as follows:

"(a) His approach to the application of the so-called "prevention principle" did not properly apply the *ratio decidendi* of *Turner*

Corporation Limited v Austotel Pty Limited [1994] 13 BCL 378 per Cole J at 384-385, namely –

> "If the Builder having a right to claim an extension of time fails to do so, it cannot claim that the act of prevention which would have entitled it to an extension of the time for Practical Completion resulted in its inability to complete by that time. A party to a contract cannot rely upon preventing conduct of the other party where it failed to exercise a contractual right which would have negated the effect of that preventing conduct."

(b) He wrongly distinguished *Turner Corporation Limited v Austotel Pty Limited*, supra, on the grounds that the extension of time clause in the contract there considered gave the Architect the power to extend time notwithstanding the absence of a claim by the Builder for an extension of time, when the existence of that term was irrelevant to the reasoning of Cole J in arriving at the *ratio* of the case.

(c) He ignored the significance of the allocation of risk identified by the first paragraph of special condition clause 19.1 of the contract between Gaymark and Concrete Constructions namely –

> "The Contractor hereby accepts the risk of liability for completion of the Works strictly in accordance with the provisions of the Contract notwithstanding encountering delay or disruption in the execution of the Works except to the extent provided in this clause.",

which, properly construed, supported the application of the principle in *Turner Corporation Limited v Austotel Pty Limited*, supra, to the contract and the rejection of Concrete Constructions' argument based on the so-called 'prevention principle'; and

(d) wrongly construed special condition clause 19 read with general condition clause 35 (as amended) as reflecting a contractual intention that Gaymark elected to take the risk that if –

A. it caused an actual delay to Concrete Constructions such as to delay Concrete Constructions in achieving practical completion by the contractual due date; and

B. the contractor failed to apply for an extension of time within the times specified in special condition clause 19,

Concrete Constructions' obligation to finish by a date which could be determined would be replaced by one only to complete within a reasonable time, when such a conclusion was directly contrary to the explicit allocation of risk identified in the first paragraph of special condition clause 19.1.

The conclusion which the arbitrator should have reached was as follows:

(a) The arbitrator made an unchallenged finding of fact that after taking into account all of the extensions of time to which Concrete Constructions was entitled, the date on which Concrete Constructions was obliged to bring the works to practical completion if it was not to suffer the imposition of liquidated damages (i.e. the Date for Practical Completion) was 14 January 1997.

(b) The actual Date of Practical Completion was 11 April 1997.

(c) This gave rise to an entitlement in Gaymark to liquidated damages which could only be defeated if by some reason the contractual mechanism did not apply.

(d) The so-called prevention principle did not apply to render the contractual mechanism inapplicable for the reasons adverted to by Cole J in *Turner Corporation Limited v Austotel Pty Limited*, supra."

[64] For Concrete Constructions, Mr Cochrane submits that the arbitrator's construction of GC 35.2 and SC 19 is correct. He emphasised that the arbitrator distinguished *Turner Corporation Ltd v Austotel Pty Ltd*, supra, on the basis that:

(a) that was not a case, such as the present, where the acts of the principal in person or through the Superintendent had been responsible for **actually** preventing the contractor from achieving the date for completion; and

(b) the standard form contract under consideration in that case ("Building Works Contract – JCCA 1985 with Quantities : Third Print August 1988) expressly reserved a power (clause 9.05) to the Architect/Superintendent to allow an extension of time, despite the loss by the builder of the right to such an extension by failure to comply with notice provisions.

[65] Clause 9.05 of the JCCA contract was in this regard substantially similar to the NPWC contract between Gaymark and Concrete Constructions in standard form – but the relevant provision, GC 35.4 had been deleted in favour of SC 19 (which permitted no discretion to the Superintendent to grant or allow any extensions of time where Concrete Constructions had failed to meet the notice requirements of SC 19).

[66] In Mr Cochrane's submission, the presence of a clause equivalent to GC 35.4 in the JCCA contract was vital to the reasoning of Cole J in *Turner Corporation Ltd v Austotel Pty Ltd*, supra and similarly determinative of the outcome in the later case of *Turner Corporation Ltd v Co-ordinated Industries Pty Ltd* (1995) 11 BCL 202. In that case, Rolfe J considered a NPWC Edit 3 (1981) contract in which GC 35.4 was still operative. At p.217, Rolfe J observed:

> "Mr Gyles (for the principal) submitted that where one finds in a building contract a clause in terms of cl.35 and, in particular, one containing a clause such as cl. 35.4, there is no room for the prevention principle to operate because it is, in effect, excluded by the express provision. The authorities to which I have referred support, in my opinion, this submission."

[67] The New South Wales Court of Appeal upheld Rolfe J's decision: *Turner Corporation Ltd v Co-ordinated Industries Pty Ltd* (1995) 12 BCL 33.

[68] I consider that the arbitrator was correct to distinguish both the *Co-ordinated Industries Case*, supra and the *Austotel Case*, supra. In neither case were acts for which the principal was responsible the cause of actual

delay in preventing the contractor from achieving the date for practical completion. As the arbitrator observed:

> "G43 The situation then, as I see it, is that in none of the cases to which I have been referred has the precise situation being considered here been looked at. (Hence I do not regard the decisions as being relevant to the present matter.)
>
> G44 That situation is one where, if it proves that the acts of the owner either in person or through the Superintendent, have been responsible at least in part for actually preventing the contractor from achieving the date for completion, this is in the context of a contract in which, if the detailed requirements for notifications of EOTs have not been met, the Superintendent has no independent power to extend time."

[69] Acceptance of Gaymark's submissions would result in an entirely unmeritorious award of liquidated damages for delays of its own making (and this in addition to the avoidance of Concrete Constructions delay costs because of that company's failure to comply with the notice provisions of SC 19). The effect of re-drafting GC 35 of the contract (to delete GC 35.4 and substitute SC 19) has been to remove the power of the Superintendent to grant or allow extensions of time. SC 19 makes provision for an extension of time for delays for which Gaymark directly or indirectly is responsible – but the right to such an extension is dependent on strict compliance with SC 19 (and in particular the notice provisions of SC 19.1). In the absence of such strict compliance (and where Concrete Constructions has been actually delayed by an act, omission or breach for which Gaymark is responsible) there is no provision for an extension of time because GC 35.4 which

contains a provision which would allow for this (and is expressly referred to in GC 35.2 and GC 35.5) has been deleted.

[70] In *Peak Construction (Liverpool) Ltd v McKinney Foundations Ltd* (1970) 1 BLR 111, Salmon LJ held:

> "The liquidated damages and extension of time clauses and printed forms of contract must be construed strictly contra preferentum. If the employer wishes to recover liquidated damages for failure by the contractors to complete on time in spite of the fact that some of the delay is due to the employer's own fault or breach of contract, then the extension of time clause should provide, expressly or by necessary inference, for an extension on account of such a fault or breach on the part of the employer."

[71] In the circumstances of the present case, I consider that this principle presents a formidable barrier to Gaymark's claim for liquidated damages based on delays of its own making. I agree with arbitrator that the contract between the parties fails to provide for a situation where Gaymark caused actual delays to Concrete Constructions achieving practical completion by the due date coupled with a failure by Concrete Constructions to comply with the notice provisions of SC 19.1. In such circumstances, I do not consider that there was any "manifest error of law on the face of the award" or any "strong evidence" of an error of law in the arbitrator holding that the 'prevention principle' barred Gaymark's claim to liquidated damages.

[72] For the sake of completeness, I add that had it been necessary to address the issue, I would also hold that the issue in Gaymark's appeal is not one which "may add, or may be likely to add, substantially to the certainty of

commercial law" (section 38(5)(b)(ii) of the Act). The contract between the parties is based on a standard form contract, NPWC Edit 3 (1981), but the substantial amendments by the deletion of standard clauses and substitution of special clauses makes it a "one-off" contract, particularly having regard to the form of SC 19 while retaining the references (GC 35.2 and GC 35.5) to the deleted GC 35.4.

[73] An affidavit of Julie Ann Waters (sworn 25 March 1999) states (para 13) that SC 19 is "substantially the same as general conditions 35.4 and 35.5 in the Commonwealth of Australia, Department of Defence 'Trade Contracts for the Construction of Facilities'" and are "mirrored" in other Defence Department Contracts. Copies of such contracts were not made available and, accordingly, there has been no opportunity to assess the degree of similarity between such contracts and that between Gaymark and Concrete Constructions. Even assuming a high degree of similarity between SC 19 and clauses 35.4 and 35.5 of the Defence Department contracts, it would seem highly unlikely that the latter contracts would have retained any reference to the deleted GC 35.4 of NPWC Edit 3 (1981). I am not persuaded that there would by any substantial gain to the certainty of commercial law by further consideration of the issue raised by Gaymark in the present case.

[74] For the foregoing reasons, the application by Gaymark for leave to appeal is refused.

[75] In all the circumstances, having regard to the refusal to grant leave to appeal in both applications and the time occupied by submissions in each of the applications, there will be no order as to costs.