JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	:	RALMANA PTY LTD -v- BGC CONTRACTING PTY LTD [2016] WASC 131
CORAM	:	KENNETH MARTIN J
HEARD	:	23 FEBRUARY 2016
DELIVERED	:	28 APRIL 2016
FILE NO/S	:	CIV 1156 of 2015
BETWEEN	:	RALMANA PTY LTD Plaintiff AND BGC CONTRACTING PTY LTD Defendant

Catchwords:

Practice and procedure - Strike out application - Construction contract - Subcontract - Statement of claim - Liquidated claims - Extensions of time to be applied for and granted by Head Contractor's Representative - Delay costs claim based on grant of extension of time by Head Contractor's Representative - No plea as to extension of time being applied for or granted - Contended reliance on *Rules of the Supreme Court 1971* (WA) O 20 r 8(4) to the effect that unnecessary to plead conditions precedent - No plea of material facts as to extension of time being refused by Head Contractor's Representative - Assumption Court may allow an extension of time *de novo* on a delay costs claim - Pleading defective and core components struck out

Legislation:

Nil

Result:

Parts of statement of claim struck out

Category: B

Representation:

Counsel:

Plaintiff	:	Mr D S Ellis & Mr C Sullivan
Defendant	:	Mr M D Cuerden SC & Mr M G Lundberg

Solicitors:

Plaintiff	:	HopgoodGanim
Defendant	:	King & Wood Mallesons

Case(s) referred to in judgment(s):

Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd (1996) 12 BCL 317
Baese Pty Ltd v RA Bracken Building Pty Ltd (1990) 6 BCL 137
Bahr v Nicolay (No 2) [1988] HCA 16; (1988) 164 CLR 604
Barclay Mowlem Construction Ltd v Dampier Port Authority [2006] WASC 281; (2006) 33 WAR 82
Body Corporate Strata Plan Number 4303 v Albion Insurance Co Ltd [1982] VR 699
Day v William Hill (Park Lane) Ltd [1949] 1 KB 632
Decor Ceilings Pty Ltd v Cox Constructions Pty Ltd (No 2) [2005] SASC 483; (2007) 23 BCL 347
Jennings Construction Ltd v QH & M Birt Pty Ltd (1986) 8 NSWLR 18
Leighton Contractors Pty Ltd v South Australian Superannuation Fund Investment Trust (1995) 12 BCL 38
Opat Decorating Service (Aust) Pty Ltd v Hansen Yuncken (SA) Pty Ltd (1994) 11 BCL 360
WMC Resources Ltd v Leighton Contractors Pty Ltd [1999] WASCA 10; (1999) 20 WAR 489
Zuk v Miller [1957] SASR 25

KENNETH MARTIN J:

Introduction

1 The defendant, BGC, applies by chamber summons to strike out portions of the plaintiff's (Ralmana's) further reamended statement of claim (FREASOC) of 29 October 2015.

2 Prior to the hearing of the application the parties exchanged extensive written submissions - raising a number of arguments and responses. Essentially, the basal contention of the applicant (defendant) BGC, by its application, is that the FREASOC, particularly as regards Ralmana's liquidated claim for approximately $33 million, is conceptually deficient and hence unarguable, by reason of a lack of required material facts to support the claim.

3 General Conditions within the parties' subcontract agreement (Subcontract) are pivotal to Ralmana's liquidated claim.

4 It is permissible to examine the pleaded Subcontract documentation governing the contractual relationship between these parties for the purposes of resolving this strikeout application, contending Ralmana's failure to disclose a reasonably arguable cause of action: see ***Day v William Hill (Park Lane) Ltd*** [1949] 1 KB 632, 639.

The rival positions of Ralmana and BGC

5 At the heart of the parties' pleading disputation are two significant conceptual issues. First, is the expressed reliance of Ralmana on *Rules of the Supreme Court 1971* (WA) (RSC) O 20 r 8(4), contending that the effect of the rule is that Ralmana does not need to plead satisfaction of a 'condition precedent' to legitimately advance the present cause of action to pursue contractual entitlements. Ralmana, relying on case authorities, particularly a decision of Besanko J in ***Decor Ceilings Pty Ltd v Cox Constructions Pty Ltd (No 2)*** [2005] SASC 483; (2007) 23 BCL 347, argues that it does not need to affirmatively plead, to align with the General Conditions of the Subcontract (particularly, as will be seen, cl 34 and cl 41 of the General Conditions), that Ralmana applied to an entity who is nominated under those General Conditions (namely, the person referred to in the General Conditions as 'BGC's Representative') to seek and obtain from that person an extension of time (referred to by the General Conditions as an 'EOT'), as a pre-requisite to Ralmana advancing a delay costs monetary claim against BGC under the Subcontract.

6 In other words, the first key contention of Ralmana appears to be that showing its request for an extension of time made to BGC's Representative is only a precondition - the satisfaction of which (ie, the making of a request for an EOT) can effectively be assumed in its favour. Hence, Ralmana argues its FREASOC pleading ought be interpreted on a basis that Ralmana had indeed applied for, but had not been able to obtain, EOT(s) from BGC's Representative.

7 Ralmana's first core premise is erroneous, as we shall see.

8 Secondly, building on the false premise just discussed, Ralmana next contends that it may proceed to a trial on the basis of its pleaded FREASOC carrying the assumption that this court would, and should, assume for itself the task of, in effect, de novo assessing whether or not Ralmana was entitled to reasonable EOTs - from time to time, across the multiple and diverse temporal and contextual circumstances which Ralmana schedules to that pleading (there being 99 different occasions mentioned in Schedule 1 to the FREASOC upon which it is contended Ralmana was entitled, given then prevailing circumstances, to EOTs).

9 BGC contends Ralmana's attempted invocation of RSC O 20 r 8(4) is conceptually misconceived. It says Ralmana must in orthodox fashion plead all necessary underlying material facts to establish its causes of action, in accord with normal pleading principles. In short, it says that there are no 'short cuts' open to Ralmana to excuse it from properly pleading out its case for asserted contractual entitlements.

10 BGC contends that what Ralmana needs to plead, but has not, is that Ralmana satisfied the requirements of all the relevantly applicable General Conditions to properly advance a claim for an EOT, including to show that it did request EOTs from BGC's Representative within the applicable time periods, as specified under the General Conditions. That would include Ralmana giving notice within the time limits specified under cl 34.3 to BGC's Representative. Timeous notice is required by the conditions. The policy underlying such a requirement is obvious. It is a matter of forensic fairness, to allow the representative at a remote location to render an on-the-spot, at-site determination about a reasonable EOT in the circumstances then observed to be prevailing at any particular time at site (ie, at Roy Hill). BGC says that what this involves at minimum is, in effect, for Ralmana to identify:

- when and how its request(s) for EOT(s) came to be made to BGC's Representative;

- the response (ie, positive or negative) of BGC's Representative to Ralmana's EOT request(s);

- to the extent that a liquidated claim for money by Ralmana by its FREASOC is advanced, a delay cost that was incurred by Ralmana, occasioned by events or matters underlying the EOT, supporting the allowance of an amount of extra money, as is also assessed by BGC's Representative; and

- that there be a plea as to the notice given to BGC's Representative in accord with Ralmana's contractual obligations under cl 34.9 and cl 41.2.

11 BGC says that none of those events constituting the required material facts needed are addressed to date by the FREASOC.

12 Even more fundamentally however, and emerging from the same analysis, is BGC's second core objection of principle. This challenge is based on its contention that the framing of Ralmana's FREASOC effectively rewrites unilaterally, at Ralmana's whim, the terms of the parties' written subcontract.

13 BGC argues that Ralmana's FREASOC seeks, in effect, to wholly ignore the pivotal contractual assessment role of BGC's Representative under the General Conditions, in terms of that person rendering their own timeous EOT determinations within fixed time limits (a 35-day period) following requests for EOTs by Ralmana. Then, to the extent that such EOTs are claimed by Ralmana to give rise to and support a claim for extra delay costs, it is once again a contractual role given to BGC's Representative to assess and to render what is a second (related) financial compensation determination - as to the validity and amount of Ralmana's extra money delay claims. The determinations of BGC's Representative then, pursuant to the terms of the Subcontract, effectively become binding upon the parties. BGC argues that Ralmana, in effect, just ignores those contractual provisions and pretends they do not exist.

14 The essence of the submission on behalf of BGC is that Ralmana has constructed a FREASOC pleading that attempts the pretence of eliminating any role for BGC's Representative under the parties' relevant subcontract. It is said Ralmana has drawn a pleading which effectively assumes that Ralmana can circumvent the role of BGC's Representative to seek directly from the court its de novo determinations in relation to all EOT and delay cost quantification tasks - effectively cutting out and reallocating to the court the very carefully constructed and agreed

contractual responsibilities that both parties agreed to entrust to BGC's Representative under their bargain found in the General Conditions. BGC says that this is no small or pettifogging pleading point: see ***Barclay Mowlem Construction Ltd v Dampier Port Authority*** [2006] WASC 281; (2006) 33 WAR 82. It goes to the whole basis of how Ralmana gets to a court to seek over $33 million as a liquidated claim.

15 It is necessary to consider in more detail the following aspects of this interlocutory strikeout application by BGC, including:

(a) BGC's chamber summons attacking identified paragraphs (not all) in Ralmana's FREASOC;

(b) Ralmana's FREASOC;

(c) RSC O 20 r 8(4) and cases which have considered it (in particular, I mention, in the context of a party's readiness, willingness and ability to perform for the purposes of obtaining relief, the observations of Mason CJ and Dawson J in ***Bahr v Nicolay (No 2)*** [1988] HCA 16; (1988) 164 CLR 604, 620 - 621, where their Honours then said, referring to RSC O 20 r 8(4):

> We have some difficulty in seeing how a plaintiff's readiness and willingness to perform his future obligations under a contract is a thing that has been done or an event that has occurred within the meaning of the Order 20, rule 8(4) …);

(d) provisions from the parties' Subcontract, particularly General Conditions cl 34 and cl 41;

(e) a line of South Australian cases, particularly a Full Court decision in ***Zuk v Miller*** [1957] SASR 25 and then the subsequent decision of Besanko J in ***Decor***; and

(f) a decision of the Western Australia Full Court in ***WMC Resources Ltd v Leighton Contractors Pty Ltd*** [1999] WASCA 10; (1999) 20 WAR 489.

BGC's chamber summons to strike out parts of the FREASOC

16 By proposed order 1 of the chamber summons of 10 November 2015, BGC invokes RSC O 20 r 19(1) and (3) to attack (only) paragraphs 17, 24B, 26, 27 to 32, 32A and 32B of Ralmana's FREASOC. The pleading challenge is advanced on the basis that those paragraphs either:

1.1 fail to disclose a reasonable cause of action; further and alternatively

1.2 may prejudice, embarrass or delay the fair trial of the action.

17 The application is supported by a solicitor's affidavit of Tamica Anne D'Uva, sworn 9 November 2015. It attaches, as attachment TAD-1, a copy of a Subcontract entered between Ralmana Pty Ltd trading as R J Vincent & Co and BGC Contracting Pty Ltd - seen to be a subcontract document of 13 December 2013 (but minus a DVD/CD ROM, which is irrelevant for the purposes of the present application).

18 The Subcontract is numbered 22035-804.

19 The parties' formal instrument of agreement lying within is seen to be dated 12 December 2013.

20 The recitals to the instrument refer to the engagement of Ralmana as a subcontractor by BGC, to 'construct the WUSC in accordance with the Subcontract'. The acronym 'WUSC' is a defined reference to the 'works under subcontract'.

21 There follows within the Subcontract, Special Conditions and then the General Conditions.

22 The General Conditions of the Subcontract are described as amended AS4902-2000 General Conditions of Subcontract. I will examine relevant provisions from the General Conditions in a discrete section of these reasons.

Ralmana's FREASOC of 29 October 2015

23 The essence of BGC's pleading challenge arises from a broad based attack on paragraphs 27 and 28 of the FREASOC. Both these paragraphs need to be read closely, in accordance with the accompanying Schedule 1 attached to the FREASOC.

24 In broad terms, FREASOC par 27 lists seven categories of alleged 'delaying events', relevant to a 'critical path' for the performance of the subcontract works (explained at FREASOC par 15).

25 FREASOC par 15 says that Ralmana was required under the scope of works to carry out 'excavation load haul and filling of earthworks for approximately 65 kilometres of rail embankment and approximately 65 kilometres of roads and associated works for the stockyard and building

pads for the purpose of building the roads and rail for the [Roy Hill] Project'.

26 The WUSC was to be done in accord with 'milestones' for the completion of components of the works under the Subcontract - identifying six different milestone completion dates, with a final date for required practical completion of the WUSC of 10 May 2015.

27 Paragraph 27 of the FREASOC then identifies by subpars (a), (b), (ba) and (c) a number of alleged access problem grievances of Ralmana to various locations, including to the Site, Stockyard area, and Project Site, and also complains of so-called inadequately prepared ground in the Stockyard area of the Project Site.

28 FREASOC par 27(d) contends BGC failed to carry out embankment improvement works, necessary for Ralmana to perform its obligations, in accord with the Subcontract and with a so-called 'Method'.

29 FREASOC par 27(e) complains of a failure by BGC to provide Ralmana with instructions and completed design documents in accord with a 'Program'.

30 FREASOC par 27(f) complains of BGC's failure to provide adequate supplies of water to carry out the WUSC.

31 Further details concerning the FREASOC par 27 subparagraph references are then to be found in Schedule 1 which, by tabular form, identifies what are asserted by Ralmana to be multiple instances of alleged 'qualifying cause(s) of delay' (for the purposes of meeting a definition of that term - which is itself found within the definition clause (cl 1.1) of the General Conditions). One species of a 'Qualifying Cause of Delay' is defined in cl 1.1 in terms:

> (a) any of the following causes whether happening before or after the Date for Practical Completion:
>
> ...
>
> (v) any other act or omission of BGC or BGC's Representative, or its consultants or agents except to the extent that the act or omission is due to a breach of the Subcontract by the Subcontractor or a default by a Sub-subcontractor[.]

32 The vitally important proper noun, 'BGC's Representative', is also defined and explained within the definitions under the General Conditions cl 1.1 and further at cl 20.

33 Schedule 1 to the FREASOC is set out in columns, including columns headed: Delaying Event Number (seen as numbered from 1 to 99); Statement of Claim Reference (referring back, in most instances, to a particular subparagraph in par 27 of the FREASOC, but sometimes also or alternatively to par 28); Delaying Events (containing a brief description of the particular circumstance); and Qualifying Cause of Delay (referring, it appears, to the definition for that term in cl 1.1 of the General Conditions - see ts 72 - 73).

34 The qualifying cause of delay in Schedule 1 is most frequently identified as '(a)(v)', but occasionally also as '(a)(xiv)'. That latter cause is defined in cl 1.1 of the General Conditions as 'BGC's failure to provide Design Documents to the Subcontractor in accordance with the Program'.

35 Elaborating further on Schedule 1 to the FREASOC, it can be seen that a relevant 'Milestone Area' is also identified. So also is then articulated a claimed duration of the delay, by reference to an asserted start date and finish date of the alleged delay.

36 Following the asserted daily cost of the delay in Schedule 1, there follows a claimed 'days of delay' calculation by Ralmana. That amount reflects a multiplication of a daily asserted cost of delay, by the asserted number of days. This delay cost calculation arithmetically then delivers what is seen to be ultimately claimed as the liquidated amount(s) by Ralmana for 'cost of impact of delay'. That sum is found in the end right-hand column of Schedule 1. The claimed amounts are then tabulated across five pages and can be seen to produce, when added, the subtotal of $28,740,517.67, plus some more claimed indirect costs of $4,305,447.68.

37 By that arithmetic process, Ralmana, under its FREASOC Schedule 1, assembles its total liquidated claim of $33,045,965.35 cost of impact of delay which it claims as a liquidated amount (ie, not as breach damages) due to it, by the workings of the parties' Subcontract.

38 That last mentioned figure aligns to the same amount then seen claimed at prayer 1 of the FREASOC against BGC for '$33,045,965.35 (excluding GST) delay costs pursuant to paragraph 32 hereof'. (I will explain the content of par 32 of the FREASOC in due course.)

39 So it may now be seen that FREASOC par 27 identifies what may be described as a multitude of alleged delaying events, all allegedly inhibiting Ralmana's WUSC progress, so it claims, on the so-called 'critical path'.

40 FREASOC par 27 is to be contrasted with ensuing par 28, which contends BGC gave directions to Ralmana (further or in the alternative) from time to time:

(a) altering the order and time at which various stages and portions of the WUSC were to be carried out;

(b) with which Ralmana was required to comply, pursuant to General Condition 2.1; and

(c) with which Ralmana complied.

41 Particulars provided by FREASOC par 28 mention asserted directions by BGC to Ralmana given at (alleged) daily meetings. BGC is said to have instructed Ralmana which areas were then available and at which Ralmana could perform WUSC. Reference is also given to three so-called 'tracker reports', then to more circumstances under Schedule 1.

42 The significance of the FREASOC par 28 alleged directions, emanating from BGC to Ralmana, altering the order and time(s) at which various stages or portions of the subcontract works were to be carried out, is that by ensuing par 29, Ralmana claims that such directional conduct by BGC (along with as seen par 27 delaying events by reference to issues concerning restricted access and the like), falls under a definition of that term 'qualifying causes of delay', to accord with cl 1.1 of the Subcontract - to which I have already referred.

43 That assertion, in turn, leads to FREASOC par 30, at which Ralmana asserts that as a result of BGC's conduct pleaded in paragraphs 27 plus 28, the progress of the WUSC was delayed. Ralmana then says it is thereby entitled to reasonable extensions of time, adjusting the milestones as particularised in Schedule 1. Ralmana's claim appears to be that the date for completion for each of the milestones is, essentially, to be pushed back, displaying the amended milestone table Ralmana has set out as part of par 30.

44 So Ralmana by FREASOC par 30 claims, in effect, that milestones B - G came to be pushed back from 1 October 2014 to 3 April 2015 - ie, an extension of time claim of approximately six months.

45 Ralmana's culminating contention as seen under FREASOC par 31 is that, in consequence of BGC's alleged conduct, complained about under both par 27 and par 28, the progress of Ralmana's WUSC was delayed. This all led finally to Ralmana's consequentially claimed entitlement to an extension of time for practical completion - that is seen to be pushed back from a date seen at the end of milestone G in par 16 (ie, 10 May 2015) to a FREASOC par 31 date of 14 June 2015.

46 To this point (ie, up to FREASOC par 31) Ralmana's pleading appears to be mainly addressing a temporal issue. This is the claimed extensions of time by reason of alleged delays suffered by Ralmana in performing its WUSC with BGC and, consequently, to the asserted entitlement via par 30 to what it claims as 'reasonable' extensions of time. Then a perusal of Ralmana's Schedule 1 identifies some 99 different listed occasions on which extension of time and delay (by day) allowances are all claimed, across a period between January 2014 (item 2) and 21 May 2014 (item 99).

47 The extension of time claims seen as emerging out of FREASOC par 27, par 28 and Schedule 1 in combination are then attempted to be tied by Ralmana to what is its increased costs claim put against BGC, as seen articulated under FREASOC par 32. This plea contends:

> 32. As a result of BGC's conduct as pleaded in paragraphs 27 and 28 above:
>
> (a) RJV has incurred direct delay costs in the amount of $33,045,965.35 (excluding GST) as at 27 July 2015 as particularised in Schedule 1, which costs are still ongoing, further particulars of which will be provided prior to trial;
>
> (b) further or in the alternative, RJV has incurred direct costs as a result of complying with the Directions pleaded in par 28 above as particularised in Schedule 1; and
>
> (c) is entitled to have these costs added to the Subcontract Sum and paid by BGC in accordance with the terms of the Subcontract.

48 What is significant about Ralmana's FREASOC pleas seen at between par 27 and par 32 is that they proceed on an assumption that all the 99 Schedule 1 assessments, as regards EOTs being granted to it, and then the ensuing calculation and allowance of what is its increased direct cost, would be first assessed and determined on a de novo basis by this court at a trial.

49 In other words, Ralmana's claims against BGC for EOTs and the claimed increased delay costs allowances as calculated thereby, seen under Schedule 1 - in combination via FREASOC par 27 and par 28 - ignore all input towards these assessments being rendered under the workings of the Subcontract by BGC's Representative. That premise, on my assessment, delivers a consequence that Ralmana claims as articulated (in respect of all such amounts claimed) on a basis that wholly ignores the force of the express terms of the General Conditions under the parties' Subcontract to which they agreed under their bargain. It is necessary, therefore, to turn to examine some relevant provisions from the General Conditions in the Subcontract to evaluate that observation and to assess its consequences (if any).

General Conditions: provisions of the parties' Subcontract

50 The parties accept that references to so-called 'Pass Through Provisions' in the following clauses are irrelevant to the present analysis. Noting that, I propose to set out for exposition cl 34 of the General Conditions to the Subcontract. It presents under the heading '**Time and progress**'. Of significance are the conjoint provisions of cl 34.3(a) and (b) and the expressly designated assessment functions of BGC's Representative under most of the subclauses of cl 34.

51 Clause 34 of the General Conditions says:

> **34.1 Progress**
>
> The Subcontractor shall proceed with the WUSC with due expedition and without delay, except as may be permitted or Directed by BGC or BGC's Representative in accordance with the Subcontract, to ensure that WUSC reaches Practical Completion by the Date for Practical Completion, and so as not to cause any delay in the Main Contract Works.
>
> **34.2 Notice of delay**
>
> Upon becoming **aware of anything** which will probably cause delay to WUSC or the Main Contract Works, the Subcontractor shall promptly **give BGC's Representative** and BGC **written notice** of that cause and the estimated delay.
>
> **34.3 Claim**
>
> … the Subcontractor shall be entitled to such **reasonable extension of time** to the Date for Practical Completion and any relevant Date for Milestone Completion as **BGC's Representative assesses** ('EOT') in respect of a Qualifying Cause of Delay, if:

(a) the Qualifying Cause of Delay delays or will delay a Critical Path Activity;

(b) the Subcontractor **gives BGC's Representative**:

(i) within 2 days of the date the Subcontractor became aware, or the date it should reasonably have become aware, of the first occurrence of the Qualifying Cause of Delay, **a written notice of the occurrence** of the Qualifying Cause of Delay; and

(ii) where the Subcontractor wishes to make a claim for an EOT:

(A) if the Subcontractor is delayed for a period of delay less than 14 days then within 14 days of the date the Subcontractor issuing a notice under clause 34.3(b)(i), **a written notice** which contains full details of all the facts and matters on which the claim is based, including the cause of the delay, the date that the delay commenced, the date that the delay ceased and the claimed period of the EOT; or

(B) if the Subcontractor is actually delayed by one cause for a period of 14 days or more the Subcontractor must:

(1) within 14 days of the date the Subcontractor issuing a notice under clause 34.3(b)(i), issue a written notice which contains full details of all the facts and matters on which the claim is based, including the cause of the delay, the date that the delay commenced;

(2) issue an update notice complying with the requirements of clause 34.3(b)(ii)(A) (other than the requirement to notify the date that the delay ceased and the claimed period of the EOT) at the expiration of each 14 days from the date or the notice under clause 34.3(b)(i) for so long as the delay continues; and

(3) within 4 days of the date that the delay ceases, issue a notice which contains details of the notices already provided by the Subcontractor in relation to that delay and which otherwise complies

with the requirements of clause 34.3(b)(ii)(A).

Compliance with each of the requirements in clauses 34.3(a) and 34.3(b) is a **condition precedent** to the Subcontractor's entitlement to an EOT to the Date for Practical Completion or a relevant Date for Milestone Completion.

Except as provided in clause 32.5(c)(ii), the Subcontractor will not be entitled to an EOT for an occurrence other an a Qualifying Cause of Delay.

The Subcontract is a code of the Subcontractors entitlements to EOTs and the Subcontractor waives all rights at law or in equity to claim any relief due to an act of prevention by BGC otherwise than in accordance with the Subcontract.

34.4 Assessment

When both non-qualifying and Qualifying Causes of Delay overlap, BGC's Representative shall apportion the resulting delay to WUSC according to the respective causes' contribution.

In assessing each EOT BGC's Representative shall have regard to what prevention and mitigation of the delay has not been effected by the Subcontractor. If the Subcontractor (or a Sub-subcontractor or a Consultant) has caused or contributed to the delaying event, then the Subcontractor's entitlement to an extension of time will be reduced in proportion to the extent or [sic] such cause or contribution.

…

34.5 Extension of time

(a) Subject to clause 34.3 … within 35 days after receiving the Subcontractor's claim for an EOT, **BGC's Representative shall give** to the Subcontractor and BGC a written Direction evidencing the extension of time to the Date for Practical Completion and any relevant Date for Milestone Completion so assessed.

(b) Notwithstanding that the Subcontractor is not entitled to or has not claimed an EOT, **BGC's Representative may at any time** and from time to time before issuing the Final Certificate Direct an extension of time to the Date for Practical Completion or a relevant Date for Milestone Completion for any reason whatsoever. BGC's Representative is not under any obligation to exercise the discretion under this clause fairly, reasonably, for the benefit of the Subcontractor or at all and BGC's Representative may exercise or refrain from exercising this discretion as instructed by BGC.

34.5A Time not at large

No delay (including a delay caused by any one or more of the Qualifying Causes of Delay) nor a failure by BGC's Representative to grant an EOT or a reasonable EOT under clause 34.5 or to do so in the time stated in that clause, nor the giving of a Direction to accelerate under clause 32.5(b) nor any acceleration by agreement under clause 32.5(b) or 32.6(b), will:

(a) set the Date for Practical Completion, any date for Milestone Completion or any other time at large; or

(b) render clause 34.7 unenforceable,

but nothing in this clause 34.5A prejudices any right of the Subcontractor to damages for any breach of the Subcontract by BGC or an EOT or delay costs.

34.6 Practical completion

The Subcontractor shall give BGC at least 28 days' written notice of the date upon which the Subcontractor anticipates that Practical Completion will be reached.

When the Subcontractor is of the opinion that Practical Completion has been reached, the Subcontractor shall in writing request BGC's Representative to issue a Certificate of Practical Completion. Within 30 days after receiving the request, BGC's Representative shall give the Subcontractor and BGC either a Certificate of Practical Completion evidencing the Date of Practical Completion or written reasons for not doing so.

If BGC's Representative is of the opinion that Practical Completion has been reached, BGC's Representative may issue a Certificate of Practical Completion even though no request has been made.

The issue of a certificate of practical completion shall not constitute approval of any work nor shall it prejudice any Claim by BGC.

34.7 Liquidated damages

If Practical Completion is not achieved by the Date for Practical Completion, the Subcontractor shall be indebted to BGC, for the liquidated damages in Item 29 for every day after the Date for Practical Completion to and including the earliest of the Date of Practical Completion or termination of the Subcontract.

If Milestone Completion is not achieved in respect of any Milestone by the relevant Date for Milestone Completion, the Subcontractor shall be indebted to BGC, for the liquidated damages in Item 29A for every day after the relevant Date for Milestone Completion to and including the earliest of Milestone Completion for the relevant Milestone or termination of the Subcontract.

If an EOT is Directed after the Subcontractor has paid or BGC has set off liquidated damages, BGC shall forthwith repay to the Subcontractor any liquidated damages paid or deducted in respect of the period to and including the revised Date for Practical Completion or the relevant revised Date for Milestone Completion.

The Subcontractor's maximum aggregate liability to BGC for liquidated damages under this clause 34.7 shall be limited to the amount stated in Item 29B. Subject to clause 34.7A, if the Subcontractor is liable for liquidated damages under this clause, BGC shall not be entitled to claim common law damages in respect of the relevant period of delay.

34.7A Common law damages

The Subcontractor agrees that if clause 34.7 is found for any reason to be void, invalid or otherwise inoperative or unenforceable so as to disentitle BGC from recovering liquidated damages, BGC will be entitled to recover common law damages as a result of the Subcontractor failing to achieve Practical Completion by the Date of Practical Completion or failing to achieve Milestone Completion in respect of any of the Milestones by the relevant Date for Milestone Completion (singly or any combination).

34.8 Liquidated damages a genuine pre-estimate

(a) The Subcontractor acknowledges and agrees that BGC will suffer and incur loss and damage if Practical Completion is not achieved by the Date for Practical Completion or if Milestone Completion in respect of any of the Milestones is not achieved by the relevant Date for Milestone Completion.

(b) The parties agree that the loss and damage referred to in clause 34.8(a) is difficult to determine and that the liquidated damages provided for in clause 34.7 are fair, reasonable and genuine pre estimates of the loss and damage which BGC is likely to suffer and incur as a result of the breach referred to in clause 34.8(a) and does not constitute a penalty.

(c) The Subcontractor agrees that it will not assert in any proceedings under clause 42 or in any court, arbitration or other proceedings that any of the liquidated damages provided for in clause 34.7 are a penalty or that clause 34.7 or the obligation thereunder to pay liquidated damages is void or unenforceable (whether in whole or in part).

34.9 Delay costs

… for every day the subject of an EOT for a Compensable Cause and **for which the Subcontractor gives BGC a claim for delay costs pursuant to clause 41.2,** the Subcontractor will be entitled to be paid such direct delay costs (including an amount for overheads,

> but excluding profit or loss of profit) as are directly incurred by the Subcontractor in respect of the period for which an EOT is granted for the Compensable Cause, **such costs to be assessed by BGC's Representative**.
>
> The Subcontractor shall use its best endeavours to minimise the delay costs referred to in clause 34.9.
>
> BGC shall not be obliged to pay any costs under clause 34.9 which have already been included in the value of a Variation or any other payment under the Contract. (my emphasis in bold)

52 As seen in respect of cl 34.9 above, for a claim seeking delay costs, there is an expressly linked interrelationship and connection to General Condition cl 41.2. So, I will set out below some relevant components from that General Condition as well, dealing with Notice of Claims to BGC's Representative.

53 As seen, cl 41.2 (and thereby the requirement for notice under cl 41.3) is expressly excluded in its application to an EOT claim per se. But this notice is mandated for a delay cost claim by cl 34.9.

54 Clause 41 of the General Conditions says:

> **41 Notice of claims**
>
> **41.1 Notice of unacknowledged variations**
>
> If the subcontractor considers that a Direction by BGC's Representative constitutes a Variation Direction under clause 36.1, but BGC's Representative has not expressly identified it as a Variation Direction, the Subcontractor shall, if it wishes to make a Claim against BGC arising out of, or in any way in connection with, that Direction:
>
> (a) within 4 days of receiving the Direction and before commencing work on the subject matter of the Direction, give written notice to BGC's Representative that the Subcontractor considers the Direction constitutes or involves a Variation Direction under clause 36.1;
>
> (b) within 7 days of giving the written notice under clause 41.1(a), submit a written Claim to BGC's Representative which includes the details required by clause 41.3(b)(i), (iii) and (iv); and
>
> (c) continue to carry out WUSC in accordance with the Subcontract and all Directions of BGC's Representative, including any Direction in respect of which notice has been given under this clause 41.1.

41.2 Notice of other claims

Except for Claims for:

(a) an EOT under clause 34.3;

…

(d) **a Direction by BGC's Representative** to which clause 41.1 applies,

the Subcontractor shall give BGC's Representative the notices **required by clause 41.3** if it wishes to make any Claim against BGC in respect of any Direction by BGC's Representative or any other fact, matter or thing (including a breach of the Subcontract by BGC) under, arising out of, or in any way in connection with, WUSC or the Subcontract, including anything in respect of which:

(e) the Subcontractor is otherwise given an express entitlement under the Subcontract; or

(f) the Subcontract expressly provides that:

(i) specified costs or amounts are to be added to the Subcontract Sum; or

(ii) the Subcontract Sum or the Rates and Prices will be otherwise increased or adjusted;

as determined by BGC's Representative.

41.3 Prescribed notices

The notices referred to in clause 41.2 are:

(a) **a written notice within 2 days** of becoming aware of, or ought reasonably have become aware the Direction or other fact, matter or **thing upon which the Claim is based**, expressly specifying:

(i) that the Subcontractor proposes to make a Claim; and

(ii) the Direction or other fact, matter or thing upon which the Claim will be based; **and**

(b) **a written Claim within 2 days of giving the written notice** under clause 41.3(a), which must include:

(i) detailed particulars concerning the Direction or other fact, matter or thing upon which the Claim is based;

(ii) the legal basis for the Claim, whether based on a term of the Subcontract or otherwise, and if based on a term of the Subcontract, clearly identifying the specific term;

(iii) the facts relied upon in support of the Claim in sufficient detail to permit verification; and

(iv) details of the **amount claimed** and **how it has been calculated**.

41.4 Continuing events

If the Direction or fact, matter or thing upon which the Claim under clause 41.1(b) or clause 41.2 is based, or the consequences of that Direction or fact, mater or thing, are continuing, the Subcontractor shall continue to give the information required by clause 41.3(b) every 21 days after the written Claim under clause 41.1(b) or 41.3(b) (as applicable) was submitted or given to BGC's Representative, until after the Direction or fact, matter or thing upon which the Claim is based has, or the consequences thereof have, ceased.

41.5 Time bar

If the Subcontractor **fails to comply with clauses 41.1, 41.2, 41.3 or 41.4**:

(a) **BGC will not be liable** upon any Claim by the Subcontractor; and

(b) the Subcontractor will be absolutely barred from making any Claim against BGC,

arising out of, or in any way in connection with, the relevant Direction or fact, matter or thing (as applicable) to which clause 41.1 or 41.2 applies.

41.6 Other provisions unaffected

Nothing in clause 41.1 to 41.5 will limit the operation or effect of any other notice provision, time bar provision, condition precedent or limitation or exclusion clause in the Subcontract. (my emphasis in bold)

Observations upon cl 34 and cl 41 of the Subcontract General Conditions

55 Having set out those General Condition provisions from the Subcontract, a number of preliminary observations may now be made.

56 First, as is apparent from cl 41.2(a), claims for EOTs under cl 34.3 are the very subject matter of what Ralmana seeks in present proceedings, particularly under its par 27 averments, as seen in the FREASOC.

57 Second, a mere claim for an EOT made to BGC's Representative will not need to be the subject of notice under cl 41.2 and cl 41.3. This is

clearly because notice requirements for an EOT claim notice to BGC's Representative are already dealt with - under cl 34.3(b)(i) and (ii). The compliance with each of the notices to be given to BGC's Representative under cl 34.3(a) and (b) is expressed as '**a condition precedent**' to a subcontractor's entitlement to an EOT, to the Date of Practical Completion, or a relevant Date for Milestone Completion.

58 Third, except as provided under cl 32.5(c)(ii), 'the Subcontractor will not be entitled to an EOT for an occurrence other than a qualifying cause of delay'.

59 Fourth, the concluding paragraph to cl 34.3 expressly says that the subcontract provisions are to be a 'code of Subcontractor's entitlements' for EOTs.

60 Fifth, by cl 34.3, there is a waiver of all rights at law and equity to claim relief by Ralmana as Subcontractor due to an act of prevention by BGC other than in accordance with the Subcontract.

61 Sixth, whilst notice provisions of cl 41.2 (and cl 41.3) are not made applicable in respect of a mere claim for an EOT advanced under cl 34.3 (with EOT claims being exclusively dealt with under cl 34.3(b)), where a subject claim by an EOT is to advance further, to become a claim for a payment by BGC of 'delay costs', then cl 41.2 applies and the giving of notices to BGC's Representative meeting cl 41.3 are then required to be given: see cl 34.9.

62 Seventh, obtaining an EOT from BGC's Representative is necessary in order to advance within cl 34.9, so as to pursue a delay costs claim for a compensable cause.

63 In summary then, it should be apparent now that FREASOC par 27, in respect of claims to EOTs and FREASOC par 28 (by reference to claims arising out of alleged directions given by BGC) are either EOT claims falling under the regulation of General Condition cl 34.3, or if they are claims more generally, then under cl 41.2.

64 Such liquidated claims can now be seen as being the subject of what are carefully constructed written notice provisions - required to be given by Ralmana to the entity known as BGC's Representative. Moreover, the assessments in terms of an entitlement both to an EOT, and then to any delay costs, are explicitly nominated to be the assessments that are made by BGC's Representative. Compliance by the Subcontractor with these provisions is not optional. To the contrary, failure to comply carries what

are called 'lock out' consequences: see cl 34.5 (and provisos) and cl 41.5(a) and (b).

65 A carefully constructed notice and assessment regime, grounded upon at-site timeous assessments following the giving of written notice to BGC's Representative, is, in effect, just ignored by paragraphs 27 through 32 of Ralmana's FREASOC. Indeed, during oral arguments Ralmana's case was explicitly put (see ts 65) through its counsel as being to the effect that such provisions were no obstacle at all to the required role of a court at a trial to, in effect, render for itself de novo all the EOT and delay cost assessments that the entity called BGC's Representative is otherwise called upon to make under the General Conditions. On my assessment, that submission of Ralmana is unsupportable in principle, or from case authority. It effectively seeks to airbrush out of existence the agreed role of BGC's Representative under the General Conditions. As such, it effectively rewrites the parties' bargain at Ralmana's behest, well after the event. This is conceptually impermissible, in my view.

66 The basis on which Ralmana seeks to support that approach is to invoke RSC O 20 r 8(4). It says that it does not need to plead by its FREASOC a satisfaction of a condition precedent. It argues it should just be assumed that Ralmana has complied with cl 34.3(b) to seek an EOT. It further invokes the same panacea to explain why it did not grapple with pleading a satisfaction of cl 41.2 requirements (see ts 64) (and so cl 41.3).

RSC Order 20 rule 8(4) and South Australian cases relied upon by Ralmana

67 During the course of oral argument my attention was drawn to two South Australian cases. The first was the South Australian Full Court decision ***Zuk v Miller***. I was directed particularly to observations in the Full Court on that appeal from Reed J by Napier CJ and Abbott J, commencing at (34). Focus in particular was directed to the observations of members of that Full Court at (37 - 38) concerning rules of pleading and, in particular, the distinction between a condition precedent and an essential fact. That was all in a context of rules of court for South Australia, somewhat similar to RSC O 20 r 8(4). I repeat that the significance of the 'condition precedent' in terms of a non-pleading obligation is invoked by Ralmana, given a reference to a condition precedent in the antepenultimate proviso to cl 34.3 of the General Conditions canvassed earlier.

68 Members of the South Australian Full Court observed in ***Zuk v Miller***:

> It seems to us that, on a strict application of our rules of pleading, the statement of claim was open to objection in point of law for want of this material averment (38).

69 The observation in ***Zuk v Miller*** was rendered in respect of a requirement of the then South Australian motor vehicle insurance legislation, requiring a plaintiff who could not identify the driver of a vehicle that had caused injury and who wished to pursue an action against the South Australian nominal defendant under that legislation, to prove not just that the identity of the vehicle could not be ascertained but, beyond that, also to prove that such lack of identity knowledge was a position that had been reached '*after due enquiry and search*'. The decision in ***Zuk v Miller*** does not assist Ralmana's arguments.

70 But ***Zuk v Miller*** came to be invoked years later, in 2005, before Besanko J in the Supreme Court of South Australia in ***Decor***. This was the case particularly relied upon by counsel for Ralmana (see ts 60). I was taken to the observations of Besanko J at [82] - [86] concerning r 46.07 of the *Supreme Court Rules 1987* (SA). The rule concerns an implication in a pleading as to the performance or occurrence of all conditions precedent necessary for the case of the party to be implied in the pleading and a correlative obligation on the other party to distinctly plead any contest over the performance or occurrence of such a condition precedent.

71 In ***Decor***, concerning what was, relevantly, a cl 46 in those parties' contract, the delay and additional hours as claimed had not there been the subject of any notice given before the claim - to accord with cl 46 of those contractual conditions.

72 Nevertheless, Besanko J upheld a submission by the claimant party to the effect that pleading a compliance with cl 46 was a condition precedent and, therefore, it did not need to be pleaded. Besanko J looks to have accepted this submission, on a basis that cl 46 was properly described as being a condition precedent: see [86]. In other words, it was up to the other party to raise a compliance challenge by its pleaded defence.

73 Besanko J rendered some further observations (see [64] and following) concerning an arbitrator's ruling in relation to what was a claim to general damages for breach of contract. In observations at [68] - [81] his Honour considered a series of cases, including ***Jennings Construction Ltd v QH & M Birt Pty Ltd*** (1986) 8 NSWLR 18; ***Opat Decorating Service (Aust) Pty Ltd v Hansen Yuncken (SA) Pty Ltd*** (1994) 11 BCL 360; ***Leighton Contractors Pty Ltd v South Australian Superannuation***

Fund Investment Trust (1995) 12 BCL 38; ***Australian Development Corporation Pty Ltd v White Constructions (ACT) Pty Ltd*** (1996) 12 BCL 317; and finally, ***Baese Pty Ltd v RA Bracken Building Pty Ltd*** (1990) 6 BCL 137.

74 As is apparent from [77] of his Honour's reasons, those cases were all discussed in the local context of a necessary precondition to a claim for damages for breach of contract. But that claim (ie, for breach damages) is not the present claim brought as regards FREASOC paragraphs 27, 28, 29, 30, 31, 32 and Schedule 1. Here a liquidated monetary entitlement, arising upon an alleged engagement with and application of the terms of the contract, is being pursued - not a breach of a contractual term and resultant breach damages.

75 Ralmana submits that because the term 'condition precedent' is seen as used in cl 34.3, as regards claims for an EOT, Ralmana ought, in turn, now be assumed as having complied with cl 34.3(b) (and also, it would seem, complied with cl 41.2 and thereby cl 41.3). What this all means is left unclear.

76 It seems to mean that Ralmana is saying that it has wrongly been refused an extension of time by BGC's Representative, after Ralmana gave notice under cl 34.3(b). I refer to this exchange with counsel for Ralmana (ts 60 - 61) in illustration of the uncertainty:

> **KENNETH MARTIN J:** So what am I to assume as the fulfilment? That you actually asked for an extension of time?
>
> **ELLIS, MR:** I'm sorry. What you - - -
>
> **KENNETH MARTIN J:** What should the court assume? Let's assume I go down your line and I assume you don't have to plead it.
>
> **ELLIS, MR:** Yes.
>
> **KENNETH MARTIN J:** What am I assuming? That you asked for an extension of time and didn't get it?
>
> **ELLIS, MR:** That the procedural requirements set out in 34.3(b) have been complied with. We would say those - - -
>
> **KENNETH MARTIN J:** So you gave BGCs [sic] representative the claim in accordance with that clause for an extension of time?
>
> **ELLIS, MR:** And it may well be that that's disputed. But we would say that that's a condition precedent. It falls within the rule and it's not necessary for the plaintiff to specifically plead out all those steps. Now, it

> may be that the defendant denies them and there then arises an issue in relation to them, and the plaintiff accepts that, in accordance with the Strata Title 4303 case, the plaintiff then has an obligation to prove compliance, but, as a matter of pleading, we would say that it's not necessary for the plaintiff to plead all those matters out.

77 By paragraphs 27 and 28 of the FREASOC, in combination with Schedule 1, Ralmana is not seeking damages for breach of contract. Rather, Ralmana is claiming liquidated amounts for delay or other costs, on a basis of contended entitlements to extensions of time of fixed days' duration.

78 Having ascertained the claimed days under its Schedule 1, Ralmana then multiplies the days by a daily delay cost, in order to arithmetically derive, by multiplication, numerous liquidated amounts which it then aggregates, in order to reach its total liquidated claim of $33,045,965.35.

79 At minimum, this is confusing and thereby there is a legally embarrassing pleading. But beyond that, in my view, the analysis of the liquidated claims seen under the FREASOC, assessed in combination with the terms of the relevant General Conditions, displays such a level of misconception as to Ralmana's contractual entitlements vis-a-vis BGC under the Subcontract, that there is a demonstrated failure to disclose any reasonably arguable cause of action to obtain these liquidated amounts as seen in Schedule 1.

80 General Conditions cl 34 and cl 41 require a plea by Ralmana that notice seeking EOTs had been given by it to BGC's Representative as a necessary material fact, essential to advance a claim for a liquidated amount. If there is instead a claim for breach damages, then some proper basis for a claim of breach ought to be identified. Currently there is not: FREASOC par 32B. That is apparently accepted by Ralmana (see ts 72) as regards breach damages. The same deficiency considerations apply, in my view, in respect of par 32A.

81 My attention was also drawn by counsel for BGC to ***Body Corporate Strata Plan Number 4303 v Albion Insurance Co Ltd*** [1982] VR 699. Mr Cuerden SC submitted that case was distinguishable from present circumstances, as regards that scenario of a condition precedent towards the third party's liability to indemnify. I agree. On my assessment, that decision does not assist Ralmana's arguments.

82 I add three further observations.

83 First, I accept the submission of senior counsel for BGC to the effect that this analysis reveals that Ralmana is seeking to, in effect, silently assert, for reasons never really forthcoming, that BGC's Representative has acted **wrongly** in some way, by not issuing EOT(s) to Ralmana. This would appear to be a wrong implicitly complained of (possibly a slightly embedded claim of breach) in respect of most, if not all, of the 99 instances seen catalogued under Schedule 1. Only by a sustained probing of counsel for Ralmana during oral arguments was I able to divine that Ralmana's case actually is that it does not hold any EOTs from BGC's Representative (see ts 60 and 63 - 64). Such obscurity as to the issues is not acceptable.

84 Second, a delay costs claim for a liquidated amount, based on a 'compensable cause', proceeds via cl 34.9, on a basis of there being an anterior grant of an EOT from BGC's Representative (not from anyone else). If the position of Ralmana is truly that it never obtained any EOTs from BGC's Representative (see ts 64), then a cornerstone of a liquidated claim seeking delay costs under cl 34.9 is missing. This is not a technical deficiency capable of being glossed, by saying that there should be some starting assumption about satisfaction of all conditions precedent from a pleading perspective. In truth, as senior counsel for BGC correctly points out (see ts 79 - 80) Ralmana's case as regards it meeting preconditions presents as being exactly the opposite - ie, there is an actual non-fulfilment of a condition precedent, once Ralmana discloses that it actually holds no EOTs from BGC's Representative.

85 Last, the attempted elimination of the role and function of BGC's Representative under the Subcontract from making the assessments as regards the temporal duration of an EOT claim, and next a quantification of delay costs, would seek, in effect, to have those very functions performed de novo, by this court at trial. Contract terms aside, from a pragmatic perspective, this court is simply not forensically and temporally placed to try to replicate in 2016 or beyond the prevailing on-site daily or hourly physical access conditions at a remote mining location, to render such determinations years later. The underlying policy of the General Conditions in allocating such assessment tasks to a person located on the spot, who is nominated as BGC's Representative, is both functional and pragmatically inescapable. Quick and timeous notice to that on-site person is needed from a subcontractor to facilitate what would then be a knowledgeable, on the spot assessment of then prevailing conditions and problematic issues at site - as they then manifest, but no doubt change over time as works proceed. From a forensic perspective, these presenting conditions as to access problems at a remote outback construction location

would be difficult to reliably reassemble and replicate in a sterile courtroom environment many years later.

86 In other words, there is a foundation of common sense and pragmatism underlying these General Conditions provisions of the Subcontract setting down the role and functions of BGC's Representative. What looks to be a naked attempt to pretend they do not exist and should be disregarded in a courtroom years later needs to be exposed as a highly problematic approach, in my view.

The Full Court decision in *WMC Resources Ltd v Leighton Contractors Pty Ltd*

87 Reliance was placed by counsel for Ralmana on this decision of the Full Court of this State. In particular, observations by Ipp J concerning different categories of valuations, in the context of a variation clause which had been the subject of a decision by an arbitrator, were invoked as relevant. Reliance was placed upon observations by his Honour at [19] concerning certified valuations to be undertaken, by reference to fixed objective criteria. Such observations were in contrast to the in-principle distinction his Honour's reasons clearly drew, with respect, between clauses embodying fixed valuation criteria as contrasted to other valuation exercises calling for more of a discretionary judgment by the valuer: see Ipp J's observations at [23] - [26]. In that context, his Honour's observations concerning the judicial review of a discretionary valuation were made, commencing at [34] and progressing onwards, culminating at [71].

88 I am grateful for the assistance in that decision of an observation at [60] concerning the effect of a clause which that respondent had contended to be prejudicial. Rejecting the submission, Ipp J observed:

> It is true that the very fact of the appellant's appointment would be likely to be prejudicial to the respondent's interests. But the respondent agreed expressly to this. And by the ordinary principles of the law of contract, by agreeing to the appointment of the appellant as a valuer, the respondent is, subject to whatever else the contract may provide, bound by the appellant's valuation as long as it is given in terms of the contract [60].

89 Those words resonate here for me, as regards the force and effect of written notice requirement provisions required to be given to BGC's Representative, as pragmatic obligations of working significance, that are clearly incorporated within cl 34 and cl 41 of the parties' General Conditions.

Conclusion and determination

90 In the end then, an analysis of Ralmana's FREASOC pleading, undertaken in combination with the relevant terms and provisions made applicable contractually, as between these parties under their General Conditions forming part of their contractual bargain under the Subcontract of 13 December 2013, reveals that Ralmana is running a case as regards extensions of time and delay costs, commencing at essentially FREASOC par 27 through to par 32. The pleaded case is not only obscurely put but, beyond that, is conceptually misconceived. It ignores, in seeking liquidated amounts, key provisions of the bargain (General Conditions cl 34 and cl 41) applicable to the process. By so proceeding, Ralmana has sought, in effect, to try to unilaterally rewrite the parties' contractual agreement. This error is by, effectively, seeking to ignore express notice provisions which clearly govern the path Ralmana is pursuing for obtaining both extensions of time and then for claiming delay costs from BGC. An alternative case for damages for breach, attempted under paragraphs 32A and 32B of the FREASOC is insufficiently developed to form any coherent basis at present for an alternative claim based upon alleged breaches of the Subcontract by BGC.

91 The chamber summons of BGC seeks to strike out paragraphs 17 and 24B. However, the focus of argument did not really address any obvious deficiencies in those FREASOC paragraphs.

92 In the circumstances, the paragraphs of the FREASOC that will be struck out, albeit with leave to replead, will be paragraphs 27, 28, 29, 30, 31, 32, 32A and 32B.

93 The defendant, as successful party to this application, is also prima facie entitled to its taxed costs of the application.

94 The parties should now confer upon the publication of these reasons. They should seek to provide a consensual minute of orders giving effect to these reasons within 14 days of their publication.

95 Otherwise, the parties may thereafter submit their rival minutes of proposed orders and then indicate whether it is necessary for a further hearing, or whether any residual disputation might be determined on the papers.

JURISDICTION	:	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	:	RALMANA PTY LTD -v- BGC CONTRACTING PTY LTD [2016] WASC 131 (S)
CORAM	:	KENNETH MARTIN J
HEARD	:	30 JUNE 2016
DELIVERED	:	30 JUNE 2016
FILE NO/S	:	CIV 1156 of 2015
BETWEEN	:	RALMANA PTY LTD Plaintiff AND BGC CONTRACTING PTY LTD Defendant

Catchwords:

Costs - Application for indemnity costs order - Application for special costs order - Whether conduct of plaintiff warranted making indemnity costs order

Legislation:

Nil

Result:

Plaintiff pay the defendant's costs on an indemnity basis

Category: B

Representation:

Counsel:

Plaintiff	:	Ms S Hotton
Defendant	:	Ms C J Robinson

Solicitors:

Plaintiff	:	HopgoodGanim
Defendant	:	King & Wood Mallesons

Case(s) referred to in judgment(s):

Quancorp Pty Ltd v MacDonald [1999] WASCA 101
Ralmana Pty Ltd v BGC Contracting Pty Ltd [2016] WASC 131
Swansdale Pty Ltd v Whitcrest Pty Ltd [2010] WASCA 129 (S)
Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd [2006] WASC 161; (2006) 33 WAR 1

KENNETH MARTIN J:

(This judgment was delivered extemporaneously on 30 June 2016 and has been edited from the transcript.)

1 Today I am dealing with the question of costs in respect of the strike out application which I determined, and which are the subject of my reasons in ***Ralmana Pty Ltd v BGC Contracting Pty Ltd*** [2016] WASC 131, which was delivered on 28 April 2016, after it was argued on 23 February 2016.

Costs orders sought by the defendant

2 In the aftermath of that application, upon which the defendant was successful in striking out that version of the statement of claim, both of the parties have filed written submissions in respect of the costs of that application, on the basis that the issue of costs be decided on the papers.

3 The defendant under its two sets of written submissions, the first of 9 June 2016, and then the second under its responsive submissions of 22 June 2016, effectively moves for an order that the plaintiff pay the costs of that application on an indemnity cost basis, in accordance with par 1 of its minute of proposed orders of 9 June 2016.

4 In the alternative, it seeks an order in effect lifting the limits in relation to Scale Item 10(a) (for proceedings in chambers other than proceedings to which Scale Item 11 applies) as found in the *Legal Profession (Supreme Court) (Contentious Business) Determination 2014* (WA) (2014 Costs Determination), and an allowance made as for the involvement of Senior Counsel and two practitioners. The terms of the two orders as sought are:

> 1 Upon taxation of the costs referred to in Order 2 of the Orders of the Honourable Justice Kenneth Martin dated 25 May 2016, pursuant to section 280(2)(c) of the *Legal Profession Act 2008* (WA), any limit fixed by any applicable costs determination, including any limits with respect to hourly rates, be removed on the basis that the Defendant shall be entitled to an indemnity in respect of costs incurred, except to the extent that such costs were unreasonably incurred.
>
> 2 **In the alternative to order 1**: Upon taxation of the costs referred to in Order 2 of the Orders of the Honourable Justice Kenneth Martin dated 25 May 2016, pursuant to section 280(2)(c) of the *Legal Profession Act 2008* (WA), a special costs order be made in favour of the Defendant, namely that the limits imposed in the

> *Legal Practitioners (Supreme Court) (Contentious Business) Determination 2014* be removed in relation to item 10(a) (Proceedings in Chambers) and an allowance be made for the involvement of Senior Counsel, a senior practitioner and a junior practitioner.

5 Both of those alternative costs orders approaches are firmly opposed by the unsuccessful plaintiff. I have the plaintiff's submissions of 17 June 2016 indicating why orders in those terms are opposed.

6 The question, essentially, then, is whether the successful party on the application (ie the defendant) should simply receive an ordinary award of the taxed costs of its successful application, or whether there should be the grant of an order, in effect, for costs of the application assessed on an indemnity basis, as sought under par 1 of the defendant's minute of 9 June 2016. The lesser alternative costs outcome sought by the defendant is the order under par 2 of its minute in respect of removing the relevantly applicable limits in relation to Scale Item 10(a) and also an allowance made for the involvement of Senior Counsel, a senior practitioner and a junior practitioner.

7 In relation to the special costs orders which are sought, the defendant's position is supported by two affidavits sworn by Michael Lundberg. The first is of 9 June 2016, in which he exhibits some conferral correspondence passing between the defendant's previous solicitors and the plaintiff's solicitors. Then there is, next, the second affidavit of Mr Lundberg sworn on 22 June 2016, effectively attempting to answer the written submissions filed on behalf of the plaintiff in resisting the application.

Evaluation

8 There has been no argument in respect of the underlying principles of law that are applicable in respect of costs applications of this kind. They have been heavily traversed by judgments, both at first instance and by the Court of Appeal, in recent times. The authorities are comprehensively collected in the parties' respective submissions and it is not necessary for me to traverse those principles yet again.

9 I am persuaded that a basis for a lifting of the limits under the scale of costs as regards Scale Item 10(a) in respect of the 2014 Costs Determination is appropriate and that an allowance should be made for the involvement of Senior Counsel, a senior practitioner and a junior practitioner.

10 The threshold in respect of s 280(2) of the *Legal Profession Act 2008* (WA) first requires me to conclude that the amount likely to be recouped by the successful party (ie, the defendant) would be inadequate in terms of a reflection of the work carried out in respect of the application.

11 Second, I must then be of the opinion that one of the tripartite and several criteria in respect of the unusual difficulty, complexity or importance of the matter applies here.

12 I am thoroughly persuaded of both those s 280(2) considerations, given that I heard the substantive, resisted strike out application across the whole of a day; there was a significant amount of documentary material that was put before me on that application which needed to be assimilated; the arguments put to me on both sides were complex; and it was necessary to deliver reserved reasons and publish what subsequently became my reasons in favour of the defendant on that application, being of some 27 pages and 95 paragraphs.

13 The application, therefore, was of some real difficulty and complexity. It was also plainly of importance structurally, in terms of how this matter might progress to a trial, given some underlying assumptions reflected in the statement of claim of the plaintiff which the defendant successfully took issue over, and which seemed to me to bear heavily upon how an efficient trial would run, depending on whether the plaintiff's assumptions were vindicated or not.

14 Therefore, it seems to me, at the second tier level in terms of assessing difficulty, complexity and importance, that all those criteria are satisfied here. I am also satisfied that the amount of costs allowable in respect of the strike out application under the 2014 Costs Determination would be inadequate in such circumstances.

15 The real question then which has exercised my mind after receipt of the plaintiff's submissions is whether, in the circumstances, it is appropriate, going even beyond issuing a special costs order lifting the relevantly applicable limits under the costs determination to make an order as sought in terms of indemnity costs favouring the defendant? In a practical sense, at the end of the day, the amount recoupable on an indemnity basis might actually not turn out to be numerically much different from the taxed amount allowed under an exercise where relevantly applicable limits in the costs determination are lifted.

16 The case authorities which are collected, particularly in the defendant's written submissions, summarise the relevant principles,

particularly ***Swansdale Pty Ltd v Whitcrest Pty Ltd*** [2010] WASCA 129 (S) [10]. In short, the court's discretion is not constrained.

17 However, an order for indemnity costs is quite an exceptional costs order and the court does not issue such orders in the running, unless it is thoroughly persuaded that there are sufficient and compelling reasons for issuing such a costs order.

18 In the present case, the plaintiff was unsuccessful in terms of sustaining the arguments which it put defending its pleading, and my reasons for decision indicate why that is the case. Generally speaking, orders for indemnity costs in civil applications of this kind would be made where a court wishes to indicate its disapproval of the unsuccessful party's conduct, or otherwise indicate that there has been an element of unacceptable unreasonableness overall, in terms of a party's position adopted in the conduct of the application or litigation.

19 Having reviewed the parties' respective submissions and the affidavit materials provided, I am of the view that this is a case where, in the end, there should be an order for indemnity costs upon the outcome of this application, and so an order under par 1, rather than par 2, of the defendant's minute of 9 June 2016. The reasons, essentially, for why I reach that conclusion are twofold.

20 First, I have had regard to the conferral correspondence which is seen appended to Mr Lundberg's affidavit. It seems to me this is a scenario where the plaintiff was put on significant notice through the conferral process of the conceptual deficiencies in its pleading but, in the face of that, still chose to maintain and defend a position resolutely rejecting what had been put openly on the record to it as problems.

21 As regards what is required by a conferral process, I would note the obligation to confer as expressed in *Rules of the Supreme Court 1971* (WA) (RSC) O 59 r 9, and the observations about that obligation at Practice Direction 4.3.2. I respectfully adopt what was said by Martin CJ in ***Youlden Enterprises Pty Ltd v Health Solutions (WA) Pty Ltd*** [2006] WASC 161; (2006) 33 WAR 1 [2] - [4]. I am troubled that the nature of the conferral that took place here was ineffective. This was a case of the defendant pointing out the deficiencies, but then a lack of engagement on the part of the plaintiff's legal representatives, who effectively said that they would not accept the propositions. I am not satisfied that there followed from the plaintiff a sufficiently rigorous intellectual engagement with the real conceptual difficulties which were being pointed out in

naked terms. The plaintiff effectively offered only a 'straight bat' blocking response - rather than an act of substantive intellectual engagement with problems openly and clearly pointed out in conferral.

22 Had there been a genuine act of intellectual engagement on the part of the plaintiff, then it seems to me this strike out application could have been avoided, as the deficiencies were obvious and were clearly articulated by the defendant. On that basis, there seems to me to have been a clear lack of sufficient or effective conferral on the part of the plaintiff, and for that reason it is appropriate here for the court to indicate its displeasure with these events and do that by an order for indemnity costs in relation to the outcome of this application. I would respectfully adopt what was said by Wheeler J in ***Quancorp Pty Ltd v MacDonald*** [1999] WASCA 101 [7] (adopted by the Court of Appeal in ***Swansdale***), that 'where a party has by its conduct unnecessarily increased the cost of litigation, it is appropriate that the party so acting should bear that increased cost'.

23 That conclusion is reinforced for me here by the written costs submissions received from the plaintiff - which have articulated a de minimis attitude to the adverse strike out decision which has been rendered, indicating that the strike out application was but only a small mini-battle viewed in the scale of a greater war, so that the outcome was not all that significant - being, to invoke the analogy raised by the Black Knight in *Monty Python and the Holy Grail*, 'just a flesh wound' - and could therefore be brushed aside on that basis. It should not be. There was a significant defeat here, and my reasons, if they are read, indicate a stark conceptual deficiency in the plaintiff's pleaded case that needs to be frankly acknowledged and engaged with. There are elements of loser's bravado associated with the submissions that I have read on the part of the unsuccessful plaintiff, and that reaffirms me in my primary view that there ought, in this circumstance, to be an order for indemnity costs of the application favouring the defendant. On that basis, I will issue an order in terms of par 1 of the defendant's minute of 9 June 2016.