IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2011-485-1622
[2012] NZHC 263

BETWEEN	CAPITAL CONSTRUCTION LIMITED Plaintiff
AND	LUXTA LIMITED Defendant

CIV 2011-485-1719
CIV 2011-485-1839

AND BETWEEN	LUXTA LIMITED Plaintiff
AND	CAPITAL CONSTRUCTION LIMITED Defendant

Hearing: 26 January 2012

Counsel: P Chisnall and H Brown for Capital Construction Limited
F Geiringer for Luxta Limited

Judgment: 23 February 2012

JUDGMENT OF MALLON J

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Introduction

[1] Luxta was the developer of a project that involved the construction of 42 townhouses in Wellington. Capital was contracted by Luxta to do the construction work. Disputes arose between them as to the payment of claims made by Capital under the contract between them. The disputes were referred to arbitration. The arbitrator ruled largely in favour of Capital, awarding Capital the sum of $651,271.23 (including costs and interest).

[2] Capital applies to enter the award as a judgment. Luxta opposes that and seeks leave to appeal the award on two questions of law. It is common ground that, if leave to appeal is not granted, the application to enter the award as a judgment is to be granted.

Principles for granting leave

[3] The contract between Luxta and Capital provided that "[t]he award in the arbitration shall be final and binding on the parties". Capital does not consent to an appeal by Luxta. Therefore Luxta may only appeal on a question of law arising out of the award with the leave of the Court.[1]

[4] Leave must not be granted unless, having regard to the circumstances, the determination of the question of law "could substantially affect the rights of one or more of the parties."[2] Apart from that requirement, the Court has a broad discretion as to whether to grant leave. There are a number of factors relevant to the exercise of the discretion (as set out in *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd*[3]), the most important of which is "the strength of the challenge/nature of [the] point of law".

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1 Clause 5(1)(c), Schedule 2, Arbitration Act 1996.
2 Clause 5(2), Schedule 2, Arbitration Act 1996.
3 *Gold and Resource Developments (NZ) Ltd v Doug Hood Ltd* [2000] 3 NZLR 318 at [54].

First question on which leave is sought: 40 day stand down period

The question

[5] Luxta seeks to appeal the following question ("the first question"):

> Was the arbitrator correct to hold that the "40 working day 'stand down' (damage free) period" referred to in the defendant's letter of 23 November 2007 formed part [of] the liquidated damages provisions of the contract between the parties?

Factual background

[6] The construction work was put out to tender by Luxta in October 2007. Capital responded by tender letter dated 14 November 2007.[4] A meeting and discussions took place about the tender and then Capital wrote to Luxta in a letter dated 23 November 2007. In that letter Capital set out seven matters which were said to be by way of confirmation in reply to Notice to Tenderers No 8. The first item set out the cost of altering the tender to a fixed price lump sum. The second item set out the additional cost to provide driveways and paths. The third item set out the cost of installing telephone wiring. The fourth item set out the cost to provide Sky installation. The sixth item proposed a provisional sum for waterproofing. The eighth item set out the cost to provide a roading damage bond.

[7] The fifth item in the 23 November 2007 letter concerned the 40 working day 'stand down' period referred to in the question on which leave is sought. That item was in these terms:

> We are prepared to accept Liquidated Damages based upon a mutually agreeable contract period as we have had insufficient time to investigate and develop a construction programme. In addition we would require a 40 working day 'stand down' (damage free) period prior to any damages being applied from negotiated projected date of completion.

[8] Counsel advise that there were no subsequent negotiations on this topic.

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[4] I have not been referred to the notice(s) to tenderers and Capital's tender letter dated 14 November 2007, but these are referred to in Capital's letter to Luxta dated 23 November 2007.

[9] Capital's tender was accepted by Luxta by letter dated 14 December 2007. That acceptance letter stated:

> The following conditions and documents form part of the contract agreement:
>
> **Head Contract Documentation**
>
> - Head Conditions of Contract: *NZS 3915:2005*
> - Special Conditions of Contract: *NZS 3915:2005 First Schedule*
> - Architectural drawings and Specification by *Roger Walker Limited* – Building Consent issue dated 29.08.07
> - Structural sketches and Specification by *Connell Wagner* issued 03 July 2007
> - Specification for Fire Safety Systems by *Connell Wagner*
>
> **Contract Agreement Documentation**
>
> - Contract Agreement: *NZS 3915:2005 Second Schedule*
> - The Boundary Project Policy annexed as *NZS 3915:2005 First Schedule Part B*
> - Warranty Agreement annexed as *NZS 3915:2005 First Schedule Part B*
> - Form of Producer Statement: *NZS: 3915:2005 Sixth Schedule*
> - *Form of Performance Bond: NZS 3915:2005 Third Schedule*
> - *This letter of acceptance*
> - Tender letter of the 14th November 2007, and Clarification letter of the 23rd November 2007

[10] The Head Conditions of Contract: *NZS 3915:2005* provided that:

> **2.8.3** The General Conditions shall not be varied or modified by the Drawings or the Specifications or the Schedule of Prices unless the change is described in, or clearly identified by reference in the Special Conditions, or by an express provision in any correspondence which has been identified as a Contract Document. The Contract Documents shall in all other respects be taken as mutually explanatory. Ambiguities or omissions shall not invalidate the contract.

[11] As to liquidated damages, *NZS 3915:2005* provided that:

> **10.5.1** The sum stated as liquidated damages in the Special Conditions shall be paid by the Contractor to the Principal for the period between the Due Date for Completion of the Contract Works or any Separable Portion and the time of Practical Completion. The liquidated damages for any Separable

> Portion shall not apply in respect of any period for which liquidated damages are applied in respect of the whole of the Contract Works.

[12] Under this clause, the liquidated damages in the Special Conditions were to be paid between the Due Date for Completion and the time of Practical Completion, or from any Separable Position and the time of Practical Completion. Luxta contends that clause 10.5.1 conflicts with item 5 in the letter of 23 November 2007 and that the letter cannot override the clear terms of this clause.

The arbitrator's decision

[13] In the arbitration Luxta claimed that the reference in the letter of 14 December 2007, to the letter of 23 November 2007, was an error. It claimed that it was not intended that item 5 of the 23 November 2007 letter would be part of the contract. The arbitrator reviewed the competing evidence about this. This evidence included evidence from two of Capital's witnesses that, in the absence of a 40 day "stand down" period for liquidated damages (as referred to in item 5 of the 23 November 2007 letter), Capital "would have walked away from the Contract". The arbitrator accepted this evidence.

[14] Having reached the conclusion that there was no mistake, the arbitrator went on to consider what effect item 5 of the 23 November 2007 letter had on clause 10.5.1 of *NZS 3915:2005*. The arbitrator referred to clause 2.8.3 of *NZS 3915:2005*. The arbitrator noted that the letter of 23 November 2007 was expressly recognised, without amendment, as a Contract Document included in the Second Schedule to *NZS 3915:2005* as signed by the parties. The arbitrator concluded that clause 10.5.1 had been varied by item 5 of the letter. He said:[5]

> I find by reference to the description of the Contract Document that Item 5 of the Capital letter of 23 November 2007 to Luxta, along with every other item in that letter, is part of the Contract between the parties. Item 5 of that letter was not in any way specifically addressed and varied by any documents produced following that date up to and including 14 December 2007, when the Contract Documents were signed.

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5 Paragraph 69 of the Interim Award of 22 December 2010.

[15] The arbitrator then said:[6]

> All that remains is to determine how the Liquidated Damages provisions came to be varied by item 5 of the 23 November 2007 letter and how it should be construed and applied to the Contract, if at all. That is to say, is there an enforceable Liquidated Damages condition?

[16] The arbitrator then went on to discuss how the 40 day "stand down" period applied in relation to Separable Portions. The arbitrator considered the relevant provisions in the contract documentation. The arbitrator again made reference to the evidence of the two Capital witnesses that they would have walked away from the Contract had the liquidated damages issue not been resolved to their satisfaction. The arbitrator concluded:[7]

> After careful consideration I find that the Liquidated Damages provisions in the Contract are not void for uncertainty. It is explicable once read in the context of the other relevant Contract conditions. These provisions can be read to apply in a sensible way to the Contract as signed. To give the Item 5 term meaning and based on the above analysis it must be taken to apply to each sectional completion date – adding 40 working days to each of these dates before liquidated damages can apply. But for that conclusion I would have been bound to hold that the liquidated damages provision was void for uncertainty.

[17] The arbitrator went on to deal with an issue raised by Capital that the liquidated damages were in the form of a penalty rather than a genuine pre-estimate of loss. The arbitrator found against Capital on this point.

Alleged error

[18] Luxta contends that the arbitrator erred when interpreting the effect of item 5 because he relied on the subjective intentions of Capital. Luxta contends that had the arbitrator applied an objective analysis, he would have had regard to the hierarchy of contract documents as set out in the parties' written agreement. Luxta says that there was ample evidence for concluding that the parties intended the terms of *NZS 3915:2005* and its First Schedule to be given preference over item 5 in the 23 November 2007 letter.

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6 Paragraph 70 of the Interim Award of 22 December 2010.
7 Paragraph 92 of the Interim Award of 22 December 2010.

[19] Luxta relies on:

(a) The way the letter of 14 December 2007 listed the contract documents under two different headings: head documents and others.

(b) That *NZS 3915:2005* was described as "Head Conditions of Contract", which Luxta says further elevated its importance.

(c) That *NZS 3915:2005* and its First Schedule contained "the main body of the agreement and was therefore the main focus of the negotiated agreement."

(d) That item 5 was set out as a negotiating position rather than as a clear term modifying the main body of the agreement.

[20] Luxta also says that agreement on a stand down period would make more sense if Capital had been unhappy with the completion date. However in this case Capital and Luxta negotiated and agreed upon a completion date after the 23 November 2007 letter.

Substantially affecting rights of a party?

[21] Luxta submits that the question of law substantially affects its rights. Counsel for Luxta estimates that the award is overstated by about $79,000 (which in turn has an effect on the interest and costs components of the award) because of the alleged error on this issue. Luxta's evidence is that if the award is upheld it is "highly likely to affect the on-going viability of Luxta." That comment appears to apply to the whole of the sum ordered. Nevertheless, I accept that the liquidated damages in dispute is a not insignificant sum. I am therefore prepared to proceed on the basis that this requirement for the granting of leave is met. The issue then is whether the discretionary factors favour the granting of leave.

The strength of the challenge

[22] I consider that Luxta has not raised a strongly or very strongly arguable case that an error of law was made about the effect on clause 10.5.1 of item 5 in the letter of 23 November 2007. Clause 2.8.3 of *NZS 3915:2005* contemplated that the conditions could be varied by "any correspondence which has been identified as a Contract Document". The letter of 14 December 2007 stated, without qualification, that the letter of 23 November 2007 formed part of the contract agreement. The arbitrator found that this was not a mistake.

[23] As Luxta acknowledges, when a contract includes a document by reference, they are to be read together to determine the parties' common intention. Where terms are inconsistent, effect must be given to that part which meets the intention of the parties as gathered from their agreement as a whole. That may mean rejecting a part of the contract which is inconsistent with that intent. However that is only the case where effect cannot fairly be given to both terms and "every effort" should be made to give effect to all terms. Where a term merely limits or qualifies an obligation created by another term, the two are to be read together and effect is to be given to the intention of the parties as disclosed by their agreement as a whole.[8]

[24] The arbitrator's decision gives effect to these principles. Clause 10.5.1 of *NZS 3915:2005*, which set out the general provision, provided that liquidated damages were to be paid from the Due Date for Completion of the Contract Works and Practical Completion (or from the Due Date for Completion of any Separable Portion and Practical Completion); and that the amount of liquidated damages was as stated in the Special Conditions.

[25] But *NZS 3915:2005* also provided that amendments could be made to its provisions by identified correspondence. Consistent with that, the parties identified the letter of 23 November 2007 as part of the contract. In so doing, the parties must have intended to vary the provisions of *NZS 3915:2005* by what was stated in that letter. Giving effect to item 5 of that letter, the parties must have intended to vary

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[8] Hugh Beale (ed) *Chitty on Contracts: Volume 1 General Principles* (13th ed, Thomson Reuters (Legal) Ltd, London, 2008) at [12-078].

clause 10.5.1 as to the time from which the liquidated damages were payable, so that the period commenced 40 days after the Due Date for Completion rather than immediately from the Due Date for Completion.

[26] I agree with Luxta that item 5 of the 23 November 2007 letter is phrased as a negotiating position rather than as an agreed contractual term. However the parties subsequently agreed, in the 14 December 2007 letter, that the 23 November letter was part of the contract. In so doing, the negotiating position put forward by Capital was accepted as a term of the agreement.

[27] I therefore do not accept Luxta's submission that clause 10.5.1 conflicts with item 5 of the letter and that clause 10.5.1 of *NZS 391:2005*, as the key contractual document, must take precedence. By clause 2.8.3 of *NZS 3915:2005* the parties had agreed that its provisions could be varied. Item 5 of the letter did that. There is nothing unworkable about this in the commercial context in which the contract was entered into. Clause 2.8.3 of *NZS 3915:2005* enables parties to a construction contract to have in place industry standard conditions, to which they can make mutually agreeable variations through correspondence, without needing to redraft the standard contract. In this case Capital and Luxta agreed that Capital would be liable to pay liquidated damages, but only if Practical Completion occurred 40 days after the agreed Due Date for Completion.

[28] I acknowledge Luxta's point that, in construing what the parties intended their words to mean, the arbitrator appears to have relied partly on the evidence of the subjective intentions of Capital. However this error was not material to the conclusion. Irrespective of the evidence of Capital's subjective intentions, the parties' common intention is clear from the words they have used in the letter of 14 December 2007, and the documents and correspondence referred to in that letter.

Other discretionary factors

[29] The prospects of success on the first question are such that I would decline leave on this basis. However other discretionary factors do not support the grant of leave either. The issue was squarely before the arbitrator, who is experienced and

legally qualified. The parties chose to submit their dispute to arbitration and agreed that the award would be final and binding. An appeal will involve some delay. While the amount of money involved may be important to Luxta (refer to para [21] above) that alone is not a sufficient basis on which to grant leave.

Second question on which leave is sought: final payment claim

The question

[30] Luxta seeks to appeal the following question ("the second question"):

> Did the arbitrator have the power he purportedly exercised to override the effect of a final payment claim that had been submitted by the defendant to the plaintiff?

Contract provisions

[31] On this question the relevant provisions in the contract are those relating to the submission and assessment of a final payment claim and those relating to disputes.

[32] Clause 12.4 of *NZS 3915:2005* provided for a Final Payment Claim to be made as follows:

> **12.4 Final payment claim**
>
> **12.4.1** Not later than two Months after the expiry of the Period of Defects Liability or within such further time as the Principal may reasonably allow the Contractor shall submit to the Principal a final account of all the Contractor's payment claims in relation to the contract. The final claim shall state the amount or amounts claimed by the Contractor in respect of all outstanding claims. This account shall be endorsed "final payment claim" and signed by the Contractor, and shall:
>
> (a) Identify the construction contract and the relevant period or periods to which the final payment claim relates, which shall cover the period up until completion of all of the Contractor's obligations under the contract;
>
> (b) Identify the Contract Works to which the final payment claim relates (which shall include all Contract Works yet to be completed by the Contractor or paid for by the Principal);

(c) Show the claimed amount in respect of those Contract Works, the amount or amounts claimed by the Contractor in respect of all outstanding claims, and the manner in which all such sums have been calculated;

(d) Indicate the due date for payment which shall be the date of any entitlement of the Contractor to payment under 12.3.2 and 12.5.5;

(e) Where the final payment claim is intended to be a payment claim under the Construction Contracts Act 2002, state that it is made under this Act; and

(f) Where the final payment claim is intended to be a payment claim under the Construction Contracts Act 2002, and the Principal is a "residential occupier" under this Act, include the information set out in Schedule 1, Form 1 of the Construction Contracts Regulations 2003.

12.4.2 Submission of the final payment claim by the Contractor shall be conclusive evidence that the Contractor has no outstanding claim against the Principal except as contained therein, and except for any item which has been referred to mediation or arbitration under Section 13 or to Adjudication. The Principal shall not be liable to the Contractor for any matter in connection with the contract unless contained within the final payment claim but this shall not preclude the later correction of any clerical or accounting error.

[33] Clause 12.5 of *NZS 3915:2005* allowed Luxta the opportunity of assessing the final payment claim. This needed to be done "within ten Working Days after receipt of the Contractor's final payment claim and the issue of the Defects Liability Certificate". Otherwise Capital was entitled to be paid the amount of its final payment claim. If Luxta assessed the final payment claim in the required time period, Luxta was to issue a proposed Final Payment Schedule which in turn would lead to a Final Payment Schedule. Clause 12.6 of *NZS 3915:2005* provided that once the Final Payment Schedule was issued, Luxta ceased to become liable to Capital under the Contract except for monies payable under specified clauses of the contract, and except for Luxta's obligation "[t]o pay any monies which are or become payable under Section 13."

[34] Section 13 of *NZS 3915:2005* dealt with disputes. Clause 13.1.2 in that section provided that "[e]very dispute or difference concerning the contract which is not precluded by the provisions of 12.4 ... shall be dealt with under [Section 13]". Clause 13.2.1 provided that either party may refer a dispute to an expert. The

process for the expert's determination was set out. Clause 13.2.7 provided that the expert's decision on a dispute was binding subject to the mediation and arbitration provisions. Relevantly for present purposes, if a party was dissatisfied with the expert's decision then clause 13.4 provided that they could give notice that the matter was to be referred to arbitration. Clause 13.4.4 of *NZS 3915:2005* provided:

> **13.4.4** The arbitrator shall have full power to open up, review and revise any decision, opinion, instruction, direction, certificate, or valuation of the Principal, Expert or Contractor or any Payment Schedule and to award upon all questions referred to him or her. Neither party to the arbitration shall be limited to the evidence or arguments put before the Expert for his or her determination or put before a mediator or adjudicator or included in any payment claim or Payment Schedule.

Factual background

[35] Construction on the development project commenced on 17 December 2007. The project was completed on 6 April 2009. In the course of the work Luxta instructed 118 variations to the Contract Works. As is set out in the award, disputes arose about the variations.

[36] Capital referred a number of the disputes to an expert. Counsel did not set out for me the details of what disputes were referred to the expert or when. The correspondence before me, however, indicates that on 2 July 2009 the appointed expert issued his determination on some of the items in dispute. A few days earlier (on 25 June 2009), and while the expert determination process was underway, Capital submitted a claim for $683,714.25, which was described as a "Final Payment Claim".

[37] On 9 July 2009, at 3.44pm Luxta sent a letter to Capital by fax stating:

> We confirm receipt of your notice final account dated 25th June 2009. We note and place on record the following;
>
> The assessment of the final account is dependant (sic) on receipt of a formal Final Payment Claim, **and** the achievement of the Defect Liability Certificate. Neither of these requirements has been achieved.
>
> The submission received is not in compliance with the requirements of clause 12.4.1 of NZS3915:2005

> As Capital Construction have not completed their obligations under the contract, Defects Liability Certificate has not been achieved.
>
> Once Capital Construction has achieved and complied with the requirements, Luxta will assess the final payment claim.

[38] At 4.16pm that same day Capital replied to Luxta by fax saying:

> We accept your attached letter and formally withdraw the submitted draft final account.
>
> We acknowledge all Defects Liability Certificates are not signed off and are working to get these complete as we speak.

[39] Within two minutes of receiving that reply (ie at 4.18 pm on 9 July 2009) Luxta replied to Capital by fax, saying: "Please advise on what basis the final account is draft, and under which contract clause Capital Construction is permitted to submit draft final accounts".

[40] Further progress claims were submitted by Capital on 31 July 2009 which, as I understand it, reflected agreements/determinations made under the expert process. On that same day (31 July 2009), Luxta wrote to Capital advising that it was dissatisfied with the expert's determination of 2 July 2009 and that it was giving notice of arbitration. On 13 August 2009 the parties agreed to appoint Phillip Green as arbitrator. In the meantime the expert process had continued on other items in dispute and, as is recorded by the arbitrator in his award, it was anticipated that this process would further resolve some of the issues between the parties.

[41] On 28 August 2009 Capital submitted to Luxta what was described as a "Final Payment Claim" for $559,127.79. On 13 November 2009 this was revised again, with Capital submitting to Luxta what was described as a "Final Payment Claim – For Arbitration Proceeding" in the sum of $608,292.54. Capital says that the reason for the revised final payment claims was that amendments were made to the figures claimed for various items as the expert process proceeded (and issues that had been in dispute were agreed by the parties or determined by the expert).

[42] The hearing of evidence for the arbitration took place on dates in late November 2009, late January 2010 and early February 2010. The arbitrator's award records that on the second to last day of the hearing it had become apparent that the

pleadings "had not necessarily encompassed all the issues which the parties wanted determined in the arbitration."[9] The arbitrator noted that additional issues had emerged from the expert's second determination and from the evidence. The arbitrator recorded that the "parties had agreed that they did not want the arbitration to end without all matters being resolved between them."[10]

Arbitrator's decision

[43] On the issue of whether the Final Payment Claim submitted on 25 June 2009 could be revised, the arbitrator's decision was as follows:

> 988. In Luxta's response to Capital of 8 January 2010 at paragraphs 27-33 Mr Kerr submits that the issue was put by Capital to Mr Dean for determination and was addressed in his Second Determination. Luxta considers the matter has ended, but Capital does not. While Luxta, in adopting its position, states that there is no dispute because it does not have a dispute, this rather ignores the Capital position. There is a dispute and as such I must determine it.
>
> 989. Mr Kerr in submission also objected to the notion that Capital could present a draft final account or withdraw such a document because NZS 3915 makes no provision for such draft accounts.
>
> 990. Luxta believes that the Final Payment claim is number 19 of 25 June 2009. Yet, on 13 November 2009 Capital issued a further Final Payment claim number 21. (Footnote 345: Capital Exhibit 390) Luxta notes that this claim number 21 was received by it for the first time during the hearing. It makes the point that the document has not been reviewed by Luxta before it was presented in the Arbitration.
>
> 991. Finally, Luxta points to the fact that the major difference between the Final Payment claims 20 and 21 relate to Variations 19, 30, 82 and interest, all of which are part of the dispute before me.
>
> 992. A practical approach is called for. My determinations, of which there are many, will impact on the final payment claim. The final payment claim will need to be reworked and will have to have regard for interest. I see no avoiding that task as a machinery process for concluding the dispute. But I see as in no more than in those terms – a machinery step to be taken after this Interim Award has issued.

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9 Paragraph 14 of the Interim Award of 22 December 2010.

10 Paragraph 15 of the Interim Award of 22 December 2010.

Alleged error

[44] Luxta says that the final payment claim submitted on 25 June 2009 was "conclusive evidence" that Capital had no outstanding claim against it, except as set out in that claim or in respect of any item in the final payment claim that had already been referred to arbitration by the time the final payment claim was submitted (clause 12.4.2). It says that at the time of the final payment claim of 25 June 2009, no dispute had been referred to arbitration. It says that the changes made in the later final payment claims submitted by Capital were matters of substance rather than "clerical and accounting errors" (as referred to in clause 12.4.2). It says that the arbitrator had no power to override the effect of clause 12.4.2, namely that the final payment claim of 25 June 2009 was "conclusive evidence" that Capital had no other claim, under clause 13.4.4 or elsewhere.

Substantially affecting the rights of a party?

[45] The amount at issue under this question on which leave is sought is (about) $134,000. As with the other question, I am prepared to proceed on the basis that this amount is sufficiently large that it could substantially affect the rights of Luxta; and that therefore the discretionary factors for granting leave should be considered.

Discretionary factors

[46] Whether the arbitrator had the power to revise items claimed on the 25 June 2009 is in part a question of law: namely, whether the effect of clause 12.4, 13.1.2 and 13.4.4 is that the arbitrator may only revise an item in a final payment claim if that item had already been referred to arbitration by the time the final payment claim was submitted. While there may be some strength in Luxta's position on that question, I do not need to consider this further. That is because the question of law only arises if the 25 June 2009 claim was a final payment claim under clause 12.4. On that factual matter I consider Luxta is not on strong grounds.

[47] The letter of 9 July 2009 from Luxta makes it clear that it was not accepted by Luxta as a final payment claim. That letter stated that Luxta's assessment (under

clause 12.5) was dependant on two things: receipt of a formal Final Payment Claim; and the achievement of the Defect Liability Certificate. It then says that "neither" of these things have been met. It goes on to say that the submission did not comply with 12.4.1. Clause 12.4.1 relates only to the submission of a final payment claim.

[48] So Luxta was saying that one of the reasons it was not required to assess the final payment claim purportedly submitted by Capital, was that it was not a final payment claim. This was because Luxta considered that it did not meet the requirements of clause 12.4.1. Consistent with that view, it did not assess the claim. It appears that on the one hand Luxta was seeking to avoid having to assess and pay the submitted claim (because it did not meet the requirements for a final payment claim), while on the other hand it was seeking to hold Capital to the amount it had claimed. The contract did not permit Luxta to do this.

[49] Luxta's position that the 25 June 2009 claim was a final one is even less tenable when, at the time it was submitted, a number of items in the 25 June 2009 claim had been referred to the expert. That is Luxta and Capital had embarked on the agreed contractual process for resolving disputes. In those circumstances Luxta must have known that Capital intended that its claim of 25 June 2009 was subject to that process.

[50] Additionally, as the arbitrator records, the parties agreed that he was to determine all matters in dispute between them. The matters in dispute included items claimed in the 25 June 2009 claim which had been referred to the expert. If the arbitrator was to determine all matters in dispute between the parties, that would inevitably result in adjustments to the 25 June 2009 claim. That was the conclusion the arbitrator reached at para 922 of his award (refer [43] above). Therefore, by subsequent agreement, and whatever the effect of clause 12.4 on the arbitrator's powers, the parties gave the arbitrator the power to do as he did.

[51] For these reasons I would decline to grant leave to Luxta to appeal on the second question. For completeness I note that other discretionary factors (how the question arose before the arbitrator, the qualifications of the arbitrator delay, and that the parties had agreed that the award would be final and binding) do not favour the

grant of leave either; and other factors (such as the importance of the matter and the amount of money at stake) are insufficient to outweigh all the factors that point against leave.

Result

[52] The application for leave to appeal the award is dismissed. That was the only basis on which Capital's application, that the award dated 26 July 2011 made by Phillip D Green be entered as a judgment, was opposed. Accordingly Capital's application is granted. The question of costs is reserved. If the parties are unable to agree on costs, they may submit brief memoranda within 30 days of the date of this judgment on the areas of disagreement.

Mallon J