

Adjudication Decision 1103290

Building Industry Fairness (Security of Payments) Act 2017 Queensland

Adjudicator: Joram (John) Murray AM (J1181216)

Application Details

Claimant

Name: ASM Builders Pty Ltd
ABN: 99 148 990 881
Address: 2 Tonga Close, Yeppoon Qld 4703

Respondent

Name: Hidden Valley Harvest (Facility) Pty Ltd
ABN: 50 625 687 390
Address: Unit 617, 200 Coward Street, Mascot NSW 2020

Project

Type: Tropical Pines Production Facility
Location: 3-5 Pineapple Drive, Hidden Valley Qld 4703

Payment Claim

Date: 24 May 2021
Amount: \$1,378,221.57 (incl GST)
Nature of Claim: Complex

Payment Schedule

Date: 14 June 2021
Amount: -\$2,404,570.10 (incl GST)

Application Detail

Application Date: 26 July 2021
Acceptance Date: 30 July 2021
Response Date: 7 September 2021
Extension of Time: Yes

Adjudicator's Decision

Jurisdiction: Yes
Frivolous or Vexatious: No
Adjudicated Amount: \$757,744.34 (incl GST)
Due Date for Payment: 7 June 2021
Rate of Interest: 18% per annum
Claimant Fee Proportion (%): 15%
Respondent Fee Proportion (%): 85%
Decision Date: 25 October 2021

Decision

This is a decision made under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (“Act”).

In respect of the Claimant’s Payment Claim, I decide that:

- the amount of the progress payment to be made by the Respondent to the Claimant is the Adjudicated Amount shown above;
 - the date on which the payment became due is the due date for payment shown above;
 - the rate of interest on the unpaid amount of the progress payment is the rate shown above; and
 - the fees and expenses of the Adjudicator as apportioned are as shown above.
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REASONS

Background

1. In November 2019, the Respondent issued an open Request For Tender (RFT) for a construction manager of a fruit processing facility located at 3-5 Pineapple Drive, Hidden Valley, Queensland (“Project”). Relevantly, the RFT advised tenderers that the *“procurement method selected is Construction Management Contract and this (RFT) relates to selection of a Construction Manager”*. The tender documents included a copy of the General Conditions of Contract – Construction Management AS4916-2002 published by Standards Australia, together with special conditions and a document identified as *“Form 4 – Contractor’s Proposed Subcontractors”* which required tenderers to set out the key subcontractors proposed to be utilised on the Project.
2. On 5 December 2019, the Claimant submitted its tender for the Project¹. Included in its tender was the Form 4 document setting out the list of subcontractors that the Claimant proposed to utilise in relation to the various trade works.
3. On 9 December 2019, the Respondent sent a Letter of Intent to the Claimant confirming the Respondent’s intention to enter into a contract for the Project. The letter of Intent stated that:

“The contract will be as per the terms and conditions set out in the (RFT) under an AS4916 Construction Management Contract for the value of \$585,222.00 (incl GST) as per your submitted RFT, dated 05 December 2019.”

4. On 9 January 2020, the parties executed an Agreement relating to the *“Construction and Construction Management of the Tropical Pines Production Facility at 3-5 Pineapple Drive, Hidden Valley, Qld.”* Relevantly, the Agreement annexed the following documents:
 - AS4916 – 2002 Construction Management – General Conditions;
 - Annexure A to D of AS 4916 – 2002 Construction Management – General Conditions; and
 - Special conditions of contract.

Annexure Part C stated that the Construction Management Fee was a lump sum amount of \$585,222.00 (GST inclusive). Annexure Part B listed the various tasks relating to the services to be provided by the Claimant, either as agent for the Respondent, or not as agent. Item 10 of Annexure Part A stated the *“Target Price”* for the Trade Packages at \$3.7 Million (ex GST). Included as part of the documents in Annexure D was the Form 4 schedule that the Claimant had included in its tender listing the subcontractors proposed to be utilised on the Project. All these documents, together with the drawings and specifications listed in the Agreement, comprised the Contract.

¹ Copy of the Claimant’s tender is included as Annexure SM-5 to the Statutory Declaration of Samuel Milfull (SDSM).

5. Notwithstanding the execution of the Contract, the design of the Project had not at that time been finalised and this did not enable the Claimant to seek tenders for the listed trade work components. Nonetheless, on 10 January 2020, the Claimant was instructed to proceed with the engagement of JRT Civil Pty Ltd (“JRT Civil”) so as to enable the civil trade works to commence².
6. At the end of January 2020, the Claimant submitted its first progress payment claim to Slattery Australia Pty Ltd (“Slattery”), who was the quantity surveyor firm that the Respondent engaged to review the Claimant’s progress payment claims. On 30 January 2020, Slattery issued Progress Payment Certificate No. 1. The Claimant proceeded to submit further progress claims between the period January 2020 and January 2021 and Slattery in turn assessed such claims and issued progress payment certificates. The amounts certified by Slattery were usually for the amounts as claimed and the Respondent paid the Claimant the various amounts, as certified. In all, up to January 2021, 10 progress claims had been submitted by the Claimant, assessed by Slattery, and the certified amounts paid by the Respondent.
7. On 9 February 2021, the Respondent sent an email to the Claimant requesting that it confirm that all the contractors were engaged by the Claimant using the AS2124 contract form, as specified under the Contract. On the same day, (i.e. 9 February 2021), the Claimant advised that a number of key trade contractors had been engaged using “*alternative agreements*”³.
8. On 11 February 2021, the Respondent served on the Claimant a Notice to Show Cause under clause 27.2 and 27.3 of the Contract, stating that the Claimant had been in substantial breach of Contract for a range of reasons, including failure to engage Direct Contracts using a form of contract which was either AS2124-1992 (or such other form as agreed) and that the Claimant had failed to provide the various reports and documents as required under the Contract⁴.
9. On 18 February 2021, the Claimant gave its response to the Notice to Show Cause. The Claimant’s response stated that it had shown reasonable cause as to why the Respondent should not exercise the rights set out in clause 27.4 of the Contract, viz: take out of the Claimant’s hands the whole or part of the services remaining to be completed or terminate the Contract⁵.
10. On 6 April 2021, the Respondent served a Notice to Terminate under clause 27.4 of the Contract⁶ and on 8 April 2021, the Claimant wrote to the Respondent stating that its Notice to Terminate had introduced new allegations with no opportunity afforded to the Claimant to respond and that the Respondent’s conduct, including its failure to make a payment and failure to maintain a project account with sufficient funds and that this constituted a repudiation of the Contract, which the Claimant had accepted and had accordingly terminated the Contract with immediate effect.

² Refer to the Superintendent’s Instruction No. 1, in Tab SM-20 of SDSM.

³ Refer to copy of the email of the Claimant’s representative Laurie Butterworth, dated 9 February 2021, copy of which is included in the Statutory Declaration of Mr Jim Stewart (SDJS) behind Tab JFS-6.

⁴ Copy of the Respondent’s Notice of Show Cause is included behind Tab JFS-14 of the SDJS.

⁵ Copy of the Claimant’s response to the Notice to Show Cause is included as SM-158 of the SDSM.

⁶ Copy of Notice to Terminate is included in Tab JFS-15 of the SDJS as well as Tab SM-173 of the SDSM.

11. On 24 May 2021, the Claimant served a payment claim on the Respondent, being for an amount of \$1,378,221.57 (incl GST) (“Payment Claim”). Page 2 of the Payment Claim stated that the claimed amount comprised of the following components:
- (a) Preliminaries, profit and attendance - \$203,707.73 (ex GST);
 - (b) Subcontractor Trade Packages (approved) as part of \$3,700,000.00 estimate - \$959,936.62 (ex GST);
 - (c) Subcontractor Trade Packages variations (approved) - \$88,284.35 (ex GST);
 - (d) Extension of time costs (approved) - \$1,000.00 (ex GST);
 - (e) Subtotal - \$1,252,928.70 (ex GST); and
 - (f) GST - \$125,292.87.

The Payment Claim also attached a spreadsheet, (which itemised the above amounts), as well as a Supporting Statement made under s 75(7) of the Act and a bundle of documents said to be in support of the Payment Claim.

12. On 14 June 2021, the Respondent served its Payment Schedule in response to the Payment Claim. The Payment Schedule had scheduled an amount of (\$2,404,570.10) (incl GST) as being payable by the Claimant to the Respondent (“scheduled amount”). The scheduled amount was stated to have been arrived at as follows:

Value of the construction work and related goods and services provided pursuant to the Contract.	\$81,475.57
Plus, Approved EOTs	\$149,000.00
Less amount paid to date by the Principal to the Construction Manager (excl GST)	\$1,847,536.48
Subtotal	-\$1,617,060.91
Plus GST	-\$161,706.09
Subtotal (incl GST)	-\$1,778,767.00
Less damages	\$625,803.10
Total	-\$2,404,570.10
Total payable by the Principal to the Construction Manager	-\$2,404,570.10
Total amount due by the Construction Manager to the Principal	-\$2,404,570.10

The Payment Schedule was a detailed document and comprised of the following:

- (a) A 21-page covering letter that set out the Respondent’s position under the following headings:
 - (i) Miscomprehension of the Construction Manager’s engagement;

- (ii) Termination of Contract;
 - (iii) Invalid Claim;
 - (iv) Reasons the Scheduled Amount is less than the Claimant Amount of the Payment Claim:
 - Claimant only entitled to payment of an amount of \$81,457.57, or (depending on the method of assessment) an amount no greater than \$327,892.82;
 - No entitlement to payment for “Trade Packages” and “Trade Packages Variations”;
 - (v) Principal’s entitlement to set-off;
- (b) Annexure A, being a copy of the spreadsheet that the Claimant had included in its Payment Schedule;
 - (c) Annexure B, being a document entitled “*Principal’s assessment of the Services carried out by the Construction Manager*”;
 - (d) Annexure C: “*Reasons: Principal’s assessment of the Trade Packages*”;
 - (e) Annexure D: “*Reasons: Principal’s assessment of the “Trade Packages Variations”*”;
 - (f) Annexure E – JRF Quote 3863;
 - (g) Copy of a report prepared by Mr Julian Hemms of Aston Consult (“Aston Report”); and
 - (h) Copies of a number of photographs.

13. On 26 July 2021, the Claimant referred its Payment Claim to adjudication by lodging its adjudication application (“AA”) with the QBCC Registry. On 7 September 2021, the Respondent delivered its adjudication response (“AR”)⁷.

JURISDICTION

14. Section 84(2)(1) of the Act requires that for a proceeding conducted to decide an adjudication application, an adjudicator must decide whether he or she has jurisdiction to adjudicate the application.

⁷ On 3 August 2021, the Respondent made a written application pursuant to s83(3) and (4) requesting an additional 15 business days for the delivery of its adjudication response, and such additional time was granted.

15. To decide whether I have jurisdiction to decide the AA, it is necessary that:

- (i) the Contract is a construction contract to which the Act applies;
- (ii) the Claimant has made a Payment Claim from a reference date under the Contract in accordance with ss 70 and 75(4) of the Act;
- (iii) the Payment Claim was made within the timeframes provided for under s 75 of the Act;
- (iv) the Payment Claim was served on the person liable to make the claim; and
- (v) the AA has been made in accordance with s 79 of the Act.

Did the Claimant enter into a construction contract with the Respondent?

16. Section 64 of the Act defines a “*construction contract*” to mean:

“... a contract, agreement or other arrangement under which one party undertakes to carry out construction work for, or to supply related goods and services to, another party.”

17. Section 65 of the Act defines “*construction work*” broadly, and relevantly includes:

- “(a) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of buildings or structures, whether permanent or not, forming, or to form, part of land;*
- (b) the construction, alteration, repair, restoration, maintenance, extension, demolition or dismantling of any works forming, or to form, part of land, including walls, roadworks, powerlines, telecommunication apparatus, aircraft runways, docks and harbours, railways, inland waterways, pipelines, reservoirs, water mains, wells, sewers, industrial plant and installations for land drainage or coast protection;*
- (c) the installation in any building, structure or works of fittings forming, or to form, part of land, including heating, lighting, air-conditioning, ventilation, power supply, drainage, sanitation, water supply, fire protection, security and communications systems;*
- (d) ...*
- (e) any operation that forms an integral part of, or is preparatory to or is for completing, work of the kind referred to in paragraph (a), (b) or (c), including—*
- (f) ...*

(g) ...

(h) ...

18. Section 66 of the Act defines “*related goods and services*”, in relation to construction work to mean any of the following:

“(a) ...

(b) *services of the following kind –*

(i) *the provision of labour to carry out construction work;*

...”

19. Clause 1.3.2 of the Formal Instrument of Agreement (Agreement) states that the Respondent must pay the Claimant “*for the supply of the Goods and/or performance of the Services, in accordance with this Agreement*”. The first paragraph of the Agreement, under the heading “*Name of Goods and/or Services*”, states:

“*Construction and Construction Management of the Tropical Pines Production Facility at 3-5 Pineapple Drive, Hidden Valley Qld 4703.*”

This clearly indicates that the nature of the Contract that the parties entered into falls within the meaning of “*construction work*” as defined under s 65(1)(a) or (b) or (c), as well as within the meaning of “*related goods and services*” under s 66(1)(b)(i) of the Act. Further, the definition of the expression “*Services*” within the Contract, and in particular the various tasks set out in Part B, also clearly falls within the meaning of “*construction work*” and/or “*related goods and services*”.

20. Accordingly, I am satisfied that the Claimant entered into a construction contract with the Respondent, within the meaning of the Act.

Was there a valid reference date?

21. Section 67 of the Act provides:

“(1) A **reference date**, for a construction contract, means—

(a) *a date stated in, or worked out under, the contract as the date on which a claim for a progress payment may be made for construction work carried out, or related goods and services supplied, under the contract;*
or

(b) *if the contract does not provide for the matter—*

(i) *the last day of the month in which the construction work was first carried out, or the related goods and services were first supplied, under the contract; and*

(ii) *the last day of each later month.*

(2) *However, if a construction contract is terminated and the contract does not provide for, or purports to prevent, a reference date surviving beyond termination, the final reference date for the contract is the date the contract is terminated.”*

22. The Claimant refers to clause 25.1 of the Contract, which provides the Claimant with an express right to issue progress claims *“in accordance with the provisions of Annexure Part C”*. The Claimant, however, goes on submit that because Annexure C *“has very little in the way of meaningful requirements in respect to issuing progress claim”*⁸ and because the Contract does not state a date on which a claim for a progress claim may be made under the Contract⁹, s 67(1)(b) of the Act applies and that, accordingly, a reference date accrued on 30 April 2021.
23. The Respondent made no submission on the issue relating to this matter, whether in its Payment Schedule or in its AR.
24. It is clear that Annexure C of the Contract provides little guidance as to when a progress claim may be made. Clause 1.1 of Annexure Part C relates to the *“Lump Sum fee”*, but it makes no reference as to when a progress claim for such fee is to be made. Clause 1.2 refers to *“Percentage fee”* and clause 1.3 refers to *“Time based fee”*, but both such fees have been endorsed as *“N/A”*. Accordingly, I agree with the Claimant’s submission that s 67(1)(b) of the Act applies and that as s 70 of the Act enables a progress claim to be made *“on and from each reference date”*, it follows that the Claimant was entitled to serve a payment claim on and from 30 April 2021. Thus, as the Payment Claim was served on the Respondent on 24 May 2021 and as there is no evidence before me that the Claimant had served any prior progress payment claim(s) in respect of the reference date of 30 April 2021, I consider that the Payment Claim is supported by a valid reference date and does not contravene s 75(4) of the Act. I am also satisfied that the Payment Claim was issued within the timeframe set out in s 75(3)(c) of the Act.
25. I should also state that if the basis of the conclusion I have arrived at in the above paragraph were to be incorrect because the Contract had been terminated (either by the Respondent on 6 April 2021, or by the Claimant on 8 April 2021) then, by reason of s 67(2) of the Act, the Payment Claim would still have been supported by a valid reference date.

Did the Payment Claim identify “construction work” as required under s 68(1) of the Act?

26. Section 68(1)(a) of the Act relevantly provides:

⁸ Paragraph 43.4 of the AA.

⁹ Paragraph 43.5 of the AA.

“(1) A payment claim, for a progress payment, is a written document that—

(a) identifies the construction work or related goods and services to which the progress payment relates; and

...”

27. In its Payment Schedule, the Respondent submits that the Payment Claim is not a valid payment claim under the Act because it failed to identify the construction work to which the progress payment relates. The Payment Schedule referred to the decision of *KDV Sport Pty Ltd v Muggeridge Construction Pty Ltd & Ors*¹⁰, where in considering whether a document purporting to be a payment claim met the legislative equivalent of s 68(1)(a) of the Act¹¹, Brown J made the following observation:

“The payment claim submitted by Muggeridge consisted of a one page document.^[25] It contained 6 columns. The first was headed “trade breakdown”, the second “Total Amount”, the third “Total Paid to Date”, the fourth “Total Claim % to Date”, the fifth “Total Claimed Trade to Date” and the sixth “Progress Claim”.

...

... While it may be accepted, as Muggeridge contends, that KDV is aware of the content of the Trade Breakdown Schedule, where there are some 51 categories of work in a sizeable contract with a number of components in the work to be undertaken, merely referring to the category of work does not identify the construction work itself to which the claim relates...¹² (Emphasis that of the Respondent.)

Accordingly, Brown J went on the find:

“The matters identified by KDV do not simply relate to the interpretation of the payment claim and its scope and nature, as contended by Muggeridge, but rather its comprehensibility. There is no description of the work which is the subject of the claim. References to the total percentages of work claimed to date and the amount the subject of the claim does not sufficiently identify the work done. It is possible that KDV may have been able to determine what part of the work is being claimed out of the percentage by engaging in a process of reconstruction based on previous claims and amounts paid. However, as White J stated in *Neumann Contractors*, a payment claim which requires such an exercise would be contrary to the Payments Act, in circumstances where the payment schedule is required to be provided within 10 days of receipt of the payment claim under s 18. In that case, her Honour found a payment claim which referred to “Add previously claimed & unpaid” was not a valid payment claim, because it required the principal to engage in a careful analysis of the schedule exhibited to the summary setting out the work which was undertaken

¹⁰ [2019] QSC 178.

¹¹ The court considered the equivalent provision of the provisions version of the Act, viz: s 17(2) of the *Building and Construction Industry Payments Act 2004* (Qld).

¹² At [35] – [36].

and marry that work with the amounts payable on the progress certificates to arrive at the outstanding items.[52]

...

I do not consider the payment claim meets the relatively undemanding test to satisfy s 17(2)(a) of the Payments Act and reasonably purports to identify the work done which is the subject of the claim.”¹³ (Emphasis that of the Respondent.)

28. The Payment Schedule stated that, as was the case in *KDV*, in the present case, the Claimant’s Payment Claim did not comply with s 68(1)(a) of the Act because:
- (a) the claim merely refers to the category of work or services to which each line items purportedly relates; and
 - (b) the claim fails to adequately identify the construction work and/or services to which the claim relates.
29. Specifically, the Payment Schedule stated that the Respondent is unable to assess the Claimant’s claim because of vague and uninformative descriptions such as:
- (a) *“Preliminaries – Fixed (Mobilisation, demobilisation (sic), insurances, security, permits and fees, final clean, DLP”;*¹⁴
 - (b) *“Footings packages (by ASM) – Agreed package of work complete by ASM as part of strategy to maintain momentum during design delay in June/July”*¹⁵;
 - (c) *‘JRT V09 Dewatering of site’*¹⁶;
 - (d) *“VPR2 – Hydraulics (changes to pits)”*¹⁷;
 - (e) *“Email instructions from JS to increase pad (CBC Ramage work) 20.01.21 – CBC price \$3,370”*¹⁸;
 - (f) *“Connection of aggy drain to swale (email from GS). The amount claimed includes the 10% margin for ASM Builders”*¹⁹;
 - (g) *“EOT2 (1 day)”*²⁰;

¹³ At [63] – [65].

¹⁴ As included as item 1a under the heading “Preliminaries, Profit and Attendance” in the spreadsheet included in the Payment Claim.

¹⁵ As included as item 9 under the heading “Subcontractor Trade Packages (approved) as part of \$3,700,000 estimate” in the spreadsheet included in the Payment Claim.

¹⁶ As included under the heading “Subcontractors Trade Packages Variations (approved)” in the spreadsheet included in the Payment Claim.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid.

²⁰ As included under the heading “EOTs Approved with Delay Costs” in the spreadsheet included in the Payment Claim.

- (h) *“PC01 – Tropical Pine Harvest – January & February Works”*²¹;
- (i) *“Variations”*²²;
- (j) *“Quoted Progress Claim 1 – Contract Component”*²³;
- (k) *“Sundries Claim #3 on Original Engineering Contract”*²⁴; and
- (l) *“Deposit 65% progress prior to dispatch Quote Ref: Q070103 Supply & Installation of Dock Equipment”*²⁵.

30. The Payment Schedule then went on the state:

“In circumstances where section 69(c) of the BIF Act requires the Principal to state its reasons for providing a scheduled amount of less than the Claim, the Principal cannot understand and assess the Claim (or provide reasons for its assessment) where it does not know:

- (a) what construction work and related goods and services the Construction Manager alleges it has performed;*
- (b) how the Construction Manager has calculated the progress payment that it claims; or*
- (c) on what basis the Construction Manager alleges it is entitled to the progress payment claimed.*

It is not possible for the Principal to deduce from the Claim, and documents provided with the Claim and referred to within the Claim, the matters raised at paragraph 5.8 above.

Further, if the Construction Manager had properly performed the Services it was engaged to provide under the Contract, there would be no doubt as to what Contractors were entitled to as the Construction Manager was required to properly review, report on and respond to their progress claims, but has failed to do so.

In order to have even the vaguest understanding of the items contained in the Claim, the Principal would not only be required to engage in a careful analysis

²¹ Tax invoice #10009485, dated 28 February 2020, issued by JRT Civil and included in the bundle of documents marked *“Attachment A”* to the Payment Claim.

²² Tax invoice #1543, dated 24 January 2021, issued by CBC-Ramage Concreting and included in the bundle of documents marked *“Attachment A”* to the Payment Claim.

²³ Tax Invoice #41875, dated 30 October 2020, issued by Pierce Engineering, as included in the bundle of documents as *“Attachment A”* to the Payment Claim.

²⁴ Tax Invoice #42279, dated 23 February 2021, issued by Pierce Engineering as included in the bundle of documents as *“Attachment A”* to the Payment Claim.

²⁵ Tax Invoice #30796D2, dated 27 October 2020, issued by Safetech, as included in the bundle of documents marked as *“Attachment A”* to the Payment Claim.

of the bundle material marked 'Annexure A' to the Claim, but also all documents exchanged between the Construction Manager and various unrelated third parties, to even form the most basic understanding of the Claim. The Construction Manager has not provided that documentation to enable the Principal to understand the basis of the Construction Manager's Claim and the construction work the subject of the Claim."²⁶

31. In its AA, the Claimant submits that the requirements set out under s 68(1)(a) of the Act have been considered in various court decisions. Specifically, the Claimant refers to the observation of McDougall J in *Isis Projects v Clarence Street*²⁷ where his Honour said that the requirement to sufficiently identify the construction work (or related goods and services) to which the progress payment relates will be satisfied where:

- "(1) The payment claim gives an item reference which, in the absence of evidence to the contrary, is to be taken as referring to the contractual or other identification of the work;*
- (2) That reference is supplemented by a single line item description of the work;*
- (3) Particulars are given of the amount previously completed and claimed and the amount now said to be complete;*
- (4) There is a summary that pulls all the details together and states the amount claimed."*²⁸

32. The Claimant submits that as set out in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in Liquidation)*²⁹, the test to be applied is "*relatively undemanding*"³⁰ and that the Queensland Court of Appeal in *T&M Buckley Pty Ltd v 57 Moss Road Pty Ltd*³¹ emphasised that the requirement for identification is such that the basis of the claim must be reasonably comprehensible to the respondent³². Further, evaluating the sufficiency of the identification is an objective process which is "*determined not only by reference to the terms of the payment claim itself but also by reference to the factual circumstance and background knowledge of the parties, including previous payment claims and correspondence passing between them before and at the time the payment claim was exchanged*"³³. In particular, the Claimant refers to the following observation by McDougall J which it states is relevant in the present case:

"Where payment claims in that format have been used, apparently without objection, on 11 previous occasions, it is very difficult to understand how the

²⁶ Paragraph 5.8 to 5.11 of the Payment Schedule.

²⁷ [2004] NSWSC 714.

²⁸ At [37].

²⁹ [2005] 64 NSWLR 462.

³⁰ At [48].

³¹ (2010) BCL 280.

³² *T&M Buckley* at [38].

³³ *Vannella Pty Limited v TFM Epping Land Pty Ltd* [2019] NSWSC 1379 at [78].

use of the same format on the 12th and 13th occasions could be said not to comply with the requirements of s 13(2)(a). ”³⁴

33. The Claimant submits that the above test has been satisfied in the present case because:

- (a) the Payment Claim itemises each component of construction work claimed and provides a comprehensive description of the works that relate to each line item;
- (b) in four items claimed, the Claimant directly describes the work by express reference to email correspondence exchanged between the Respondent, its representatives and Claimant;
- (c) the Payment Claim includes the work completed expressed as a percentage, but also describes the work carried out in respect to that percentage of work completed;
- (d) the Payment Claim identifies the specific amount claimed for the work completed to which the Payment Claim relates;
- (e) the descriptions of the work completed are sufficient for the Respondent, taking into account the background and documents exchanged between the parties, to intelligibly understand the work that is the subject of the claim; and
- (f) ten similar payment claims had previously been issued and ten corresponding payment certificates certifying the work claimed and completed by the Claimant had been issued and therefore the Respondent was able to understand the work claimed and completed in respect to each of those payment claims.

34. The Claimant also submits that its Payment Claim is not a claim for all work carried out with deductions for amounts paid to date, but rather a claim in respect to work carried out but not previously claimed, assessed and paid. The Claimant states that where under the column “*Amount This Claim*” in the spreadsheet that was attached to the Payment Claim there is a reference to “\$0.00”, then “*that means that no amount is claimed in respect to that line item in the Payment Claim*”³⁵. The Claimant goes on to submit:

“There is no obligation under the Act or otherwise to include a description of work where there is no amount actually claimed in respect to that work in the Payment Claim. All of the line items where no amount is claimed have previously been assessed by Slattery, approved as 100% complete by Slattery and paid in full by (the Respondent).

...

³⁴ *Isis projects* at [38].

³⁵ Paragraph 44.10 of the AA.

*In circumstances where the claim is not a claim for all work done, it is misleading for (the Respondent) to now assert, by reference to items previously assessed and paid, that the Payment Claim does not sufficiently identify the construction work or related goods and services to which the progress payment claim relates”.*³⁶

35. In relation to the various line items that the Respondent had listed in its Payment Schedule and which it said had not enabled it to understand or assess, viz: refer to paragraph 29 above, the Claimant submits:
- (a) In respect to the line items set out at paragraph 29(b), (c), (d) and (e) above, the amounts claimed in the Payment Claim were stated at \$0.00 because the work relating to these items had previously been claimed for and paid;
 - (b) In respect to the line item set out at paragraph 29(a) above, the description relates to the work carried out and similar descriptions were included in payment claims 1 to 10 that had been assessed and paid by the Respondent without dispute. Further, *“Preliminaries is a term that is widely used and understood in the construction industry to refer to costs of the kind to which the item relates (which, in any event, are included in the description of the item within the Payment Claim). (The Respondent’s) allegation that it does not understand the claim is disingenuous and should be rejected”*³⁷;
 - (c) In respect to the line item set out at paragraph 29(f) above, the claim is for the whole amount for this item, on the basis that all the work relating to this item has been completed. *“The work to which the item relates is clear from the description. The description also refers to an email from Scott approving the work. That email is document SM-133 (of the SDSM). The email was copied to Stewart”*³⁸;
 - (d) In respect of the line items set out at paragraph 29(g) above, this related to the one-day delay cost that Slattery had previously assessed and certified and a copy of the certificate had been provided to the Respondent by Slattery. *“It is plain from the description of this item what (the Claimant) is claiming and disingenuous for (the Respondent) to assert otherwise”*³⁹; and
 - (e) In respect to the line items set out at paragraph 29(h) to (l) above, the reference to the various material included in Attachment A was *“not provided to inform the description of work included in the Payment Claim ... (but rather) in order to satisfy clause 26 of the Contract ... (The) Payment Claim sufficiently describes the work claimed and no more*

³⁶ Paragraph 44.11 and 44.14 of the AA.

³⁷ Paragraph 44.15 of the AA.

³⁸ Ibid.

³⁹ Ibid.

information is required to be gleaned from the supporting documents to satisfy that requirement”⁴⁰.

36. Further, and insofar as the Respondent relies on the decision of *KDV*, the Claimant refers to the case of *Vannella Pty Limited v TFM Epping Land Pty Ltd*⁴¹ where Henry J sought to highlight the unique feature associated with the payment claim that led the court in *KDV* to arrive at its conclusion:

*“KDV Sport involved a payment claim that was made during the course of the project which required the principal to identify the work that related to the percentage claimed to be completed. Relevantly, the payment claim in that case included errors in respect of at least fifteen items, which meant that it was unclear what the percentages actually meant and what items reconciled with other claims. The payment claim also failed to include any substantive description of some of the work done the subject of the claim. Those errors impacted the Court’s view on whether the payment claim reasonably identified the construction work to which it relates (at [44]).”*⁴² (Emphasis that of the Claimant.)

37. Indeed, to demonstrate that the descriptions of the details set out in the Payment Claim are distinguishable from those in *KDV*, the Claimant has provided an extract of the first 5 claimed items of the payment claim reproduced in the court decision in *KDV* (at [35]), viz:

	WUC – Site Project Student Accommodation Big 18 Chisholm Road Carrara Qld		Prior Payment	Total Claim to Date		This Claim
	Trade Breakdown	Total Amount	Total Paid to Date	Total claim % to date	Total Claimed Trade to date	Progress Claim 13
	...					
8	CONCRETE SUPPLY	\$229,454	\$217,981	100%	\$229,454	\$4,589
	...					
19	ALUMINIUM WINDOWS & DOORS	\$811,840	\$32,474	67%	\$543,933	\$97,421
	...					
23	BATHROOM POD – COMPLETE SUPPLY AND INSTALL	\$659,231	\$560,346	98%	\$646,046	\$97,421
	...					
39	ELECTRICAL	\$783,827	\$470,296	78%	\$611,385	\$101,898
40	MECHANICAL	\$920,220	\$690,165	82%	\$754,580	\$26,809

38. The Claimant then submits that the descriptions included in its Payment Claim go well beyond what the court dealt with in *KDV*:

“... KDV can be distinguished from the present facts because:

⁴⁰ Paragraph 44.21 of the AA.

⁴¹ [2019] NSWSC 1379.

⁴² *Vannella* at [88].

- (a) *the Payment Claim indicates a line-by-line description of each item of work claimed by (the Claimant), whereas the payment claim in KDV purported to identify construction work by reference to broad categories of work from a Trade Breakdown Schedule (e.g. Aluminium Windows & Doors);*
- (b) *the Payment Claim includes a comprehensive description of the work in respect to each item claimed in the Payment Claim where as the payment claim in KDV failed to include any substantive description in respect to the work claimed – in this respect it is telling that four of the seven examples of items alleged by (the Respondent) to lack adequate description were not even claimed by (the Claimant) as part of the Payment Claim; and*
- (c) *the payment claim in KDV included errors in respect of at least fifteen items in the progress claim – the same cannot be said of the Payment Claim.*⁴³

39. In its AR, the Respondent repeats much of what it had set out in the covering letter of its Payment Schedule. The Respondent emphasises that it was not possible for it to have deduced from the Payment Claim, the documentation provided with the Payment Claim and those referred to within the Payment Claim as to what construction work and related goods and services the Claimant alleges it performed, the basis upon which the claimed items have been calculated and nor on what basis the Claimant alleges that it is entitled to the progress payment claimed. To further reinforce its position, the Respondent provides the following illustrations:

- “(a) *The spreadsheet to the Payment Claim claimed \$4,842.00 for ‘Operational Works – new contract with JRT entered into on June 9 2020. Contracted work as per the revised B of Q supplied to the Principal as part of tender documentation (Calibre Civil B of Q Job: 18-003216, dated 03.06.2020). The value claimed represents an arithmetic error identified in the reconciliation (sic) of all JRT invoices and previous values claimed by ASM” at line item 7 of ‘Subcontractor Trade Packages (approved) as part of \$3,700,000 estimate’ but the summary of amounts payable to JRT Civil under ‘JRT Contract 2’ included with the Payment Claim do not reconcile with the amount claimed by (the Claimant). The invoices included by (the Claimant) for the trade package do not identify the actual works performed either. It is impossible for (the Respondent) to reconcile what amounts should be paid for the ‘Operation Works’.*
- (b) *The spreadsheet to the Payment Claim claimed \$335,284 for ‘Structural Steel Fabrication (contract \$649,327 less supplied tonnage rates = \$610,284.00) – as negotiated with the Principal’s rep...’ at line item 10 of the ‘Subcontractor Trade Packages (approved) as part of \$3,700,000 estimate’ but the Payment Claim also included a tax invoice 42279 from Pierce Engineering Pty Ltd for \$200,000 (ex GST) for ‘sundries’. It was*

⁴³ Paragraph 44.21 of the AA.

not possible for (the Respondent) to identify what work was being claimed by (the Claimant). Was \$200,000 in unidentified sundries being claimed as part of the Payment Claim?”

- (c) *The spreadsheet to the Payment Claim claimed \$3,707.00 for ‘Email instruction from JS to increase pad (CBC Ramage work) 20.01.21 – CB price \$3,370 at the ‘24.01.21’ line item under ‘Subcontractor Trade Packages Variations (approved)’.* From this it is unclear what work is being performed or why the amount claimed by (the Claimant) does not correlate to the ‘CBC price’ stated in the Payment Claim.”⁴⁴ (Emphasis that of the Respondent.)

40. The Respondent thus goes on to submit that, in the light of its submissions, an adjudicator, cannot conclude that the Claimant’s purported Payment Claim meets the requirements of s 68(1)(a) of the Act:

*“It is clear on the face of the purported Payment Claim that it does not provide anything more than a description of the category of work in the “subcontractor trade packages” rather (than) identifying the actual construction work alleged to have been performed.”*⁴⁵

My Decision

41. I do not accept the Respondent’s submission that the Payment Claim is invalid because it had failed to “*identify the construction work or related goods and services to which the progress payment relates*”, as required under s 68(1)(a) of the Act.
42. The requirement of a claimant to comply with s 68(1)(a) has been extensively considered by the courts. Thus, in *T&M Buckley*, Phillipides J (with whom Fraser and White JJA agreed), in finding that the judge at first instance had set too high a bar as to the requirement set out in the equivalent provision in the previous Act, said:

*“The issue for determination was not whether the payment claim explained in every respect the means by which a particular claim had been calculated, but whether the relevant construction work or related goods and services was sufficiently identified... That is, whether the payment claim reasonably identified the construction work to which it related such that the basis of the claim was reasonably comprehensible to the applicant.”*⁴⁶

Her Honour, in making the above observation, referred to the NSW Court of Appeal’s decision in *Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)*⁴⁷ and noted that Santow JA (at [47] – [48]) had expressed the view that:

“... in respect of the minimum necessary to satisfy the identification requirement that the payment claim “purport in a reasonable way to identify the work” there must be “sufficient specificity in the payment claim for its

⁴⁴ Paragraph 6.19 of the AR.

⁴⁵ Paragraph 6.22 of the AR.

⁴⁶ *T&M Buckley* at [11].

⁴⁷ [2005] NSWCA 391.

recipient actually to be able to identify a “payment claim” for the purpose of determining whether the pay, or to respond by way of a payment schedule indicating the extent of payment if any”. But having said that, his Honour stated his agreement with what Hodgson JA said in Climatch Pty Ltd that what was required was sufficient identification “to enable the respondent to understand the basis of the claim” and disavowed the notion that there was a legal necessity to include any material directed merely to persuading a respondent to accept a payment claim.”⁴⁸

43. The case law also states that the test to determine whether the payment claim sufficiently identifies the construction work the subject of the payment claim is an objective one and the assessment is made not only by reference to the terms of the claim, but also by taking into account the background knowledge of the parties derived from their past dealings and exchanges of documentation.⁴⁹
44. It is therefore clear that to be a valid payment claim, it is necessary that such a document must reasonably identify the construction work to which it relates such that the basis of the claim is reasonably comprehensible to the recipient of the payment claim. In my view, the Payment Claim met the requirements set out in s 68(1)(a) because that document had:
 - (a) itemised each component of the construction work claimed and provided a sufficient description of the work relating to that line item;
 - (b) identified the work completed in the line items, expressed as a percentage;
 - (c) identified the specific amount being claimed for those line items; and
 - (d) was presented in a similar form to the ten previous payment claims, which the Respondent’s quantity surveyor, Slattery, was able to sufficiently understand, assess and issue payment certificates upon which the Respondent made payment to the Claimant.
45. Insofar as the Respondent contends that the present Payment Claim suffers from the same lack of detail as led Brown J in *KDV* to conclude that the payment claim before him did not satisfy the requirements of the Act, then, as the Claimant correctly submits, the facts in the present case are clearly distinguishable. In *KDV* the payment claim consisted of a one-page document comprising of a table of six columns (see paragraph 36 above) and where because of the broad category of the work described in the Trade Breakdown column, Brown J held that it was not possible for the respondent to have understood what specific work was claimed to have been carried out. In the present case, the Payment Claim sets out a line-by-line description of the specific items of work. Similarly, whereas in *KDV* the payment claim document failed to include any description in relation to the work being claimed, the present Payment Claim, and in particular the second column of the spreadsheet, provided a sufficient description of the work being claimed. Further, in *KDV* there were a

⁴⁸ *T&M Buckley* at [25].

⁴⁹ See *T&M Buckley* at [15]; *Newmann Contractors Pty Ltd v Peet Beachton Syndicate Ltd* [2011] 1 Qd R 17 at [25], and *McDougall J in Leighton v Arogen* [2012] NSWSC 1323 at [69] – [70].

number of errors in the items set out in the payment claim that were not able to be reconciled and this was, in the view of Brown J, a factor that demonstrated that the document was “*not reasonably comprehensible to a reasonable principal*”⁵⁰, however, in the present case there is no evidence the Payment Claim suffers from similar such errors.

Was the Payment Claim made within the timeframes set out in s 75 of the Act?

46. As the Payment Claims seeks payment for work claimed to have been carried out as at 6 April 2021⁵¹, I consider that the Payment Claim was issued within the timeframe set out in s 75(3) of the Act.

Service of Payment Claim

47. Given that the Payment Claim had been addressed to the party set out in the Agreement and given that delivery of same was acknowledged by the Respondent⁵², I am satisfied that the Payment Claim was served on the person liable to make the claim, as required under s 75(1) of the Act.

Was the AA made in accordance with s 79 of the Act?

48. Given that the Respondent had issued a payment schedule in response to the Claimant’s Payment Claim, the Claimant elected to exercise its right under s 78 (2)(b) of the Act by making an adjudication application and lodging it with the QBCC Registrar. I am satisfied that the AA, dated 26 July 2021, was made within 30 business days after the Claimant had been served with the Respondent’s Payment Schedule and that therefore there had been compliance with s 79(2)(iii) of the Act. I am also satisfied that the AA was in the approval form and that a copy of same was served on the Respondent, as required under ss 79(2)(b)(i) and 79(3) of the Act.

Summary on Jurisdiction

49. For all the reasons set out above, I consider that I have jurisdiction to decide the AA that has been referred to me.

NATURE OF CONSTRUCTION CONTRACT

Overview

50. At paragraph 5.12 of the covering letter that accompanied its Payment Schedule, the Respondent states that the Payment Claim is not a valid payment claim under the Act because it includes many claims which are not amounts payable under the Contract. Specifically, the Payment Schedule states that the following headings within the spreadsheet that formed part of the Payment Claim cannot be regarded as a progress payment claimed or payable under the Contract:

⁵⁰ KDV at [38].

⁵¹ Refer to paragraphs 448 and 449 of the SDSM.

⁵² Refer to paragraph 1.1 of the covering letter to the Payment Schedule.

- (a) “Value B Subcontractor Trade Packages as part of \$3,700,000.00 estimate”; and
- (b) “Value C Subcontractor Trade Packages Variations (approved) to date”.

51. Essentially, it is the Respondent’s position that an analysis of the nature of the Contract entered into by the parties will disclose that the Claimant is pursuing extra-contractual claims through adjudication, which the Respondent submits it is not able to do under the Act. The parties’ respective submissions go to the essence of the dispute and as such require consideration of several complex legal issues. I therefore commence this section of my Decision by setting out the parties’ submissions relating to the issues of the nature of the Contract.

Position as outlined in Payment Schedule

52. As outlined above, the Respondent submits that the amounts claimed under the heading Trade Packages and Trade Packages Variations (see paragraph 50 above) are not able to be made under the Contract. The Respondent states that under the Contract, the Claimant was engaged to perform the Services identified in Annexure Part B, Annexure Part D and throughout the Contract generally. In this regard, the Respondent’s Payment Schedule highlighted the following:

- (a) Annexure Part B of the Contract sets out the various services that the Claimant was required to provide. Many of the services were to be provided by the Claimant as agent for the Respondent and these included the following:

Task	As Agent
Obtain tenders from contractors and suppliers	☒
Negotiate with contractors and suppliers	☒
Award contracts in consultation with the Principal	☒

- (b) Annexure Part D of the Contract, further sets out the process that the Claimant, as Construction Manager, was required to follow when awarding Direct Contracts and this included:
 - (i) the Construction Manager to provide the Principal with recommendations regarding the awarding of Direct Contracts (SC1.1.3);
 - (ii) Direct Contracts could only be awarded by the Construction Manager with the Principal’s prior written consent (SC 4.6);
 - (iii) Direct Contracts were to be in the form required by SC1.2.2, (being a standard form AS2124-1992 published by Standards Australia); and

- (iv) The Direct Contracts must be between the Principal and the Contractor or the Construction Manager (as the disclosed agent of the Principal) and the Contractor (SC1.7).
- (c) The Claimant, as Construction Manager, was required to make written recommendations to the Respondent for all claims for payment made by Direct Contracts (SC1.8.5);
- (d) Pursuant to clauses 7.1 and 7.2 and Annexure Part B (including the extracts below) of the Contract, where Contractors were engaged, the Claimant, as Construction Manager, was to administer payments to the Contractors as the Respondent's agent:

COST CONTROL AND PAYMENT

Manage the cost plan in accordance with Principal's requirements	☒
Monitor actual and committed costs against the cost plan	☒
Manage payments	☒

- (e) If the Claimant, as Construction Manager, engaged Contractors in its own name, or in a form other than that required by SC1.2.2, then the Claimant did so in substantial breach of the Contract and those engagements were not pursuant to the Contract and do not give the Claimant any entitlement to claim payment pursuant to the Contract.

53. The Payment Schedule then went on the state:

- (a) In or around March 2021, the Claimant provided the Respondent with the following Queensland Master Builders Association (QMBA) Subcontract agreements between the Claimant and the following trade contractors:
 - (i) JRT Civil, dated 15 June 2020, in relation to civil works;
 - (ii) CBC Group Trust t/as Ramage Concreting Australia, dated 30 November 2020, in relation to concrete works;
 - (iii) Hohmanns Plumbing Services, dated 11 November 2020, in relation to plumbing works;
 - (iv) Kool Lec, dated 20 November 2020, in relation to air-conditioning and ventilation works;
 - (v) Pierce Engineering, dated 3 October 2020, in relation to the supply of structural steel and purlins;
 - (vi) Pierce Rigging, dated 3 October 2020, in relation to the erection of structural steel and purlins; and

- (vii) Smoothy Electrical, dated 12 October 2020, in relation to electrical works.
 - (b) The Respondent did not authorise the Claimant to enter into any of the agreements listed in (a) above;
 - (c) Under the Contract, the Claimant was engaged as the Respondent's agent to:
 - (i) tender and negotiate the trade contracts;
 - (ii) provide recommendations of the trade contracts;
 - (iii) administer the trade contracts including the issuing of progress certificates as the Respondent's agent; and
 - (iv) enter trade contracts as the Respondent's disclosed agent, where so directed by the Respondent.
 - (c) In performing the agency services, the Claimant owed fiduciary obligations to the Respondent;
 - (d) The Respondent was not aware of the Claimant's failure to engage "Direct Contracts" as required under the Contract until the Claimant provided copies of the above agreements in or about March 2021; and
 - (e) The Claimant is in substantial breach of Contract, having failed and refused to engage contractors in accordance with the Contract.
54. Accordingly, the amounts claimed by the Claimant in respect of the Trade Packages and Trade Packages Variations:
- (a) relate to "subcontracts" that the Claimant entered into in its own name, that were in substantial breach of Contract. Not only were these subcontracts in the incorrect form between the Claimant and the Contractors, but the contracts were not entered into by the Claimant as a disclosed agent of the Respondent;
 - (b) are not amounts the Claimant has any entitlement to claim under the Contract; and
 - (c) cannot be a progress payment made in accordance with s 68 of the Act.
55. To reinforce the position set out in the above paragraph, the Payment Schedule referred to s 70 of the Act which states that the Claimant only has an entitlement to claim payment for work or services provided under the Contract and that under ss 71 and 72(1)(a) of the Act, the value of the construction work, which for present purposes, is the value of "Services", is to be valued in accordance with the Contract. However:

“Because the (Claimant) was not engaged to perform and has no entitlement to claim payment for the works the claim refers to as the Trade Packages and the Trade Packages Variations, the claim cannot be a claim for a progress payment under the Contract and must be a claim for some extra-contractual remedy which is beyond the scope of the BIF Act (and which is not a claim for a progress payment).

The (Claimant’s) sole entitlement to claim payment by way of a payment claim is for payment for work or services provided under the Contract. In this instance, under the Contract, the (Claimant’s) claim is limited to a claim for payment for the services provided and the Contract (albeit, for the reasons stated at paragraph 6), the (Respondent also denies that entitlement).

It follows that, as (the Claimant’s) claims in relation to the “Trade Packages” and the “Trade Packages Variations” are not claims under the Contract, the (Claimant) has no entitlement to claim payment for the works purportedly performed by the Contractors.”⁵³

Claimant’s position as outlined in AA

Overview of Claimant’s position

56. The Claimant’s submits that, by reference to the evidence set out in the Statutory Declaration of Mr Samuel Milfull (SDSM), the Respondent directed the Claimant to engage each subcontractor on the Project. Thus, Mr Milfull states:

“... For each subcontractor, (the Respondent):

- (a) was directly involved in negotiating the scope of works and the price at which a subcontractor was to be engaged;*
- (b) gave an instruction to (the Claimant) to engage a particular subcontractor at the agreed price for the agreed scope of works.”⁵⁴*

57. Similarly, and again by reference to the evidence set out in the SDSM, the Claimant submits that in respect of all Variations that are the subject of the Payment Claim, the Respondent issued the Claimant with an instruction to vary the relevant subcontractor’s works for an agreed price.
58. Further, in most instances, the subcontractors that the Claimant engaged were the subcontractors that the Claimant had identified in its Form 4 document at the time of tender, but where the Claimant entered into subcontractors not identified in that document, the Respondent had expressly authorised the Claimant to engage those subcontractors.
59. Relevantly, the Claimant submits that a course of conduct was established at the time the Claimant submitted its first Payment Claim whereby the Claimant would initially

⁵³ Paragraph 8.10 to 8.12 of the Payment Schedule.

⁵⁴ Paragraph 7.8 of the AA.

give a draft of its claim to Slattery for consideration and assessment and the Respondent would then pay the full amount so assessed directly to the Claimant. Until recently, the Respondent had never raised any concerns with that course of conduct, or in respect of the works completed by the Claimant and its subcontractors.

60. Accordingly, insofar as the Respondent now contends that the Claimant is in breach of Contract and not entitled to payment, the Respondent's position should be rejected:

*"(The Respondent) should not be permitted to depart from the course of conduct that it participated in which engendered an expectation of payment on the part of (the Claimant) that (the Respondent) encouraged throughout the Project, on which (the Claimant) relied at all relevant times."*⁵⁵

The Claimant's interpretation of the Contract

61. The Claimant contends that the Contract makes provision for the engagement of:

- (a) Contractors by the Claimant, as disclosed agent for the Respondent, as a result of which contractual relations are created between the Respondent and the Contractors directly (refer to clauses 7.1 to 7.4 of the Contract); and
- (b) Subcontractors by the Claimant, in which case contractual relations exist between the Claimant and the Subcontractors on the one hand, and the Claimant and Respondent on the other. In this regard the Claimant refers to clauses 6 and 26 of the Contract.

62. The Claimant also refers to clause 7.3 of the Contract which states that:

"7.3 Project Account

Where the Services require the Construction Manager to make payments to contractors on behalf of the Principal, the Principal shall maintain a project account with sufficient funds from which the Construction Manager shall pay project debts when due and payable."

63. Accordingly (so the Claimant contends), if *"the Project had been administered in the manner set out at paragraph 61(b) above, (the Claimant) would not have paid any of its subcontractors directly and (the Respondent) would not have paid the Claimant any amounts in respect of work performed by those subcontractors. Instead, (the Respondent) would have been obliged pursuant to clause 7.3 of the General Conditions, to establish and maintain a project account with sufficient funds from which (the Claimant) would pay subcontractors (or would otherwise have been responsible for paying subcontractors directly). No payment to subcontractors would have been made by (the Claimant) from its own funds."*⁵⁶ However, no project account, as required under clause 7.3 of the Contract, was established or maintained

⁵⁵ Paragraph 7.22 of the AA.

⁵⁶ Paragraph 8.7 of the AA.

by the Respondent at any time, and no payments were made by the Respondent to any subcontractors directly. Thus, the Claimant states:

“(The Respondent) conveniently omits to acknowledge clause 7.3 of the General Conditions when purporting to summarise, in the Payment Schedule, provisions of the Contract relevant to the engagement of, and administration of contracts with contractors (as distinct from subcontractors). Presumably, that is because it cannot explain its own non-compliance with clause 7.3, which is directly inconsistent with the position it has taken in its Payment Schedule.

If (the Respondent) genuinely considered that the trade packages were being performed by contractors rather than subcontractors, it defies logic that the Respondent would at no time have:

- (a) objected to (the Claimant) monthly claims for payment in respect of its subcontractors’ works;*
- (b) objected to paying (the Claimant) directly for work performed by subcontractors;*
- (c) questioned why payments were not instead flowing from it to subcontractors directly;*
- (d) established, maintained and deposited funds into a project account for the payment of contractors.*

However, (the Respondent) at no time prior to serving its show cause notice in February 2021, raised any such objections. Instead, (the Respondent) sat back and allowed ASM Builders to pay its subcontractors for the work that they performed, inherited the benefit of that work, and is now seeking to deny liability to pay (the Claimant) for the work that it has inherited.”⁵⁷
(Emphasis that of the Claimant)

Parties course of conduct established the elements of estoppel

64. The Claimant contends that throughout the Project, the parties adopted a course of conduct whereby the Claimant engaged subcontractors directly and then made progress payment claims in respect of the costs relating to the subcontractor’s work, together with a margin to cover its administration costs. To support this position, the Claimant makes the following submissions:

- (a) Early in the Project, the Respondent engaged various persons to act as its representatives. The most relevant delegation made by the Respondent related to the appointment of Slattery, initially to undertake the role of the

⁵⁷ 8.10 to 8.12 of the AA.

*“Contract Superintendent”*⁵⁸, which included the assessment of progress payment claims being submitted by the Claimant and then making recommendations to the Respondent in relation to the payment. At paragraph 10.2 of the AA, the Claimant has produced a table that sets out the various representatives that the Respondent had appointed at various times of the Project. Notwithstanding the appointment of such representatives, the Claimant submits that the Respondent’s directors, and in particular Mr Stewart, remained involved in key aspects relating to the Project, in the sense that copies of relevant correspondences were forwarded to them and also that such directors participated in the Project Group Committee (PCG) meetings;

- (b) Insofar as the Respondent had stated in its Payment Schedule that it never gave approval to the Claimant to engage subcontractors, the Claimant disagrees. The Claimant submits that under clause 6.2 of the Contract, it was obliged to engage the subcontractors listed in the Form 4 document. The Claimant submits that shortly after the entering into the Contract, it began negotiating the trade packages with the subcontractors that were set out in the Form 4 document and that it proceeded to do this in accordance with the Respondent’s instructions. At paragraph 11.3 to 11.7 of its AA, the Claimant sets out the process adopted in the engagement of JRT Civil, emphasising that this process involved receiving an instruction from the Respondent’s representative, Slattery.⁵⁹ The Claimant also emphasises that subsequent to the engagement of JRT Civil, the Claimant made a progress claim that included a claim for the works that JRT Civil had carried out in the month of January 2020, which Slattery had assessed and certified as per the amount claimed. The Respondent then paid the certified amount, not to JRT Civil and not to any separate project account, but directly to the Claimant. At paragraph 11.8 of the AA, the Claimant provides a table that set out how the same process was adopted in relation to the Claimant’s engagement of the following other subcontractors:
 - (i) CBC Group Trust t/as Ramage Concreting Australia;
 - (ii) Hohmanns Plumbing Services;
 - (iii) Pierce Engineering;
 - (iv) Pierce Rigging;
 - (v) Smoothly Electrical; and
 - (vi) SQR Constructions.
- (c) Up to the date when the parties relationship broke down leading to each party giving to the other its notices of termination (i.e. April 2021), the Claimant had made 11 progress payment claims. The *“overwhelming*

⁵⁸ Refer to the email of Michael Cook dated 7 January 2020 in Tabs SM-10 of the SDSM.

⁵⁹ Refer to Tab SM-20 of the SDSM, which included Slattery’s Instruction No. 1.

majority’’⁶⁰ of these claims were assessed by Slattery as similar to the amounts claimed with Slattery recommending that the amounts so assessed be paid, which the Respondent did. The Claimant emphasises that all these progress payment claims included claims for work undertaken by subcontractors that it had engaged, as instructed by the Respondent. At Annexure H of the AA, the Claimant has provided a table that summarises its claims and Slattery’s assessments. Specifically, that table sets out:

- (i) the Claimant’s progress claims during the course of the Project;
- (ii) the amounts claimed by the subcontractors that the Claimant had engaged;
- (iii) the works completed, expressed as a percentage, in respect of the subcontractors, works being claimed;
- (iv) the payment certificates issued by Slattery in respect of each progress claim;
- (v) the amounts assessed by Slattery that were paid to the Claimant by the Respondent; and
- (vi) the works assessed as completed by Slattery, for each progress claim made.

Accordingly, the Claimant submits that to the extent that the Respondent states that the Claimant has completed less work than cumulatively claimed over the course of the Project, then the Claimant relies on the contemporaneous assessments made by Slattery.

*“To the knowledge of (the Claimant), the Respondent has not disputed the assessments made by Slattery and there is no reason to now doubt the veracity of the assessments.”*⁶¹;

- (d) The Claimant summarises the course of conduct that the parties had adopted throughout the Project, as follows:
 - (i) The Claimant engaged the Respondent to identify and negotiate packages of work with subcontractors, including provision of quotes and tender options for subcontractors to the Respondent for its approval;
 - (ii) In most instances, the subcontractors that the Claimant negotiated with (and subsequently engaged at the

⁶⁰ Paragraph 12.6 of the AA.

⁶¹ Paragraph 12.10 of the AA.

Respondent's instructions) were subcontractors identified in the Form 4 document⁶²;

- (iii) In the five instances where the Claimant negotiated and engaged subcontractors that were not identified in the Form 4 document, this was due to delays on the Project and where the subcontractors identified in the Form 4 were no longer available to work on the Project. The engagement of those subcontractors were however made with the direct knowledge and instruction of the Respondent⁶³;
- (iv) The Respondent directed the Claimant to enter into contracts with the specific subcontractors that it selected, based on the quotes and other information compiled by the Claimant;
- (v) The Respondent instructed the Claimant to carry out Variations to the subcontractors works and to incur costs in relation to those Variations⁶⁴;
- (vi) The Respondent never gave instruction to the Claimant to enter into any contract with a subcontractors as a "disclosed agent"⁶⁵;
- (vii) The Claimant paid its subcontractors directly from its own funds;
- (viii) The Respondent never established, or advised the Claimant that it had established, a separate account from which the Claimant was to pay its subcontractors;
- (ix) The Respondent never gave a direction to the Claimant to have any subcontractor paid from a separate account established by the Respondent;
- (x) The Claimant issued eleven progress claims on the Project where it claimed for the subcontractors' work as part of its claims;

⁶² Refer to paragraphs 101 to 109 and 148 to 149 of the SDSM in relation to the engagement of JRT Civil; paragraphs 235 to 243 of the SDSM in relation to the engagement of Smoothy Electrical; paragraphs 244 to 249 of the SDSM in relation to the engagement of Hohmanns Plumbing; paragraphs 275 to 285 of the SDSM in relation to the engagement of Ramage Concreting; paragraphs 226 to 234 of the SDSM in relation to the engagement of Pierce Engineering and paragraphs 313 to 325 in relation to the engagement of SQR Constructions.

⁶³ See, for example, the procedure relating to the engagement of Safetech at paragraph 183 to 191 of the SDSM.

⁶⁴ See, for example, paragraph 333 of the SDSM relating to the email Stewart sent to Perkins instructing it to proceed with variations to the Hohmanns' original contract works. See also SM-124 and paragraph 248 of the SDSM.

⁶⁵ Refer, for example, to paragraph 264 of the SDSM, and in particular the penultimate sentence within that paragraph.

- (xi) The Claimant, as agreed with the Respondent, claimed 10% administration on all costs claimed in respect to its subcontractors;
 - (xii) The Claimant had, where requested by the Respondent, provided invoices evidencing the subcontractors' works that were made out directly to the Claimant;
 - (xiii) Slattery assessed and the Respondent paid directly to the Claimant, the amounts that the Claimant had claimed in the first ten progress claims; and
 - (xiv) Despite the Claimant having been engaged since January 2020, the Respondent had never raised any concerns as to how the Claimant had engaged subcontractors or claimed for their work, until January 2021.
- (e) By the conduct set out in (d) above, the parties adopted a conventional basis for the engagement of subcontractors and the claiming of subcontractor payments. That conduct established the necessary elements of an estoppel by convention, viz:
 - (i) the parties adopted an assumption as to the terms of their legal relationship;
 - (ii) both parties conducted their relationship on the basis of that mutual assumption;
 - (iii) each party knew or intended that the other act on that basis; and
 - (iv) departure from the assumption would occasion detriment.

The parties are therefore bound by the adopted conventional basis and it would be unjust to allow either party to depart from the mutual assumption;

- (f) The conventional understanding that the parties adopted throughout the Project was that:
 - (i) The Claimant's scope of work included the construction and the construction management of the Project;
 - (ii) The Claimant had an obligation to engage subcontractors on the Project in accordance with the instructions given by the Respondent and to pay those subcontractors for the work they performed;

- (iii) The Claimant was entitled to claim from the Respondent amounts relating to work carried out by subcontractors, including in respect to variations directed by the Respondent;
 - (iv) The Claimant was entitled to claim a 10% administration fee in respect to the claimed amounts relating to work carried out by subcontractors for variations; and
 - (v) The Respondent was, subject to assessment by Slattery, required to pay the Claimant the amounts claimed in relation to work carried out by subcontractors, including the variations directed by the Respondent.
- (g) The Claimant would not have continued to engage subcontractors directly and pay the existing and newly engaged subcontractors for the work had it known that there was a risk that the Respondent would refuse to pay the Claimant for that work, or had the Respondent disclosed that it in fact considered it was responsible for paying the subcontractors directly. *“Had (the Respondent) raised objection at an early stage of the Project, any commercial party in (the Claimant’s) position would naturally have responded by requiring (the Respondent) to pay all subcontractors directly.”*⁶⁶;
- (h) Further, the Claimant submits that the common assumption adopted by the parties has contractual support, as can be seen from:
- (i) The Claimant’s Form 4 document that had set out the subcontractors in the Claimant’s offer and which the Respondent had agreed to when it countersigned that document. Under clause 6.2 of the Contract, the Claimant was obliged to engage each of the subcontractors identified in the Form 4, as its subcontractors:

*“(The Respondent) must have known that (the Claimant) was not engaging its subcontractors as “contractors” under the Contract. Aside from the radically different basis on which subcontractor works were being claimed, assessed and paid, there were other communications between (the Claimant), Slattery and (the Respondent) that made clear the basis on which (the Claimant) was engaging, paying and claiming payment in respect in respect of subcontractors.”*⁶⁷
 - (ii) Under item 24 of Annexure Part B, the parties expressly agreed that clause 26 of the Contract would apply. Clause 26

⁶⁶ Paragraph 13.9 of the AA.

⁶⁷ Paragraph 15.3 of the AA.

gives the Claimant the right to claim for works carried out by subcontractors:

*“(The Respondent) would have the Adjudicator find that it is entitled to receive the benefit of the subcontractors, goods and services without paying for them. That outcome is at odds with the Contract, the parties conduct throughout its performance and the legitimate expectation of (the Claimant), induced by (the Respondent) that (the Claimant) was to engage and pay its subcontractors in the manner in which it did and receive payment from (the Respondent) for their work.”*⁶⁸

- (iii) Specifically, the first sentence on page 1 of the Agreement provides the following description of the Contract:

“Construction and Construction Management of the Tropical Pines Production Facility at 3-5 Pineapple Drive, Hidden Valley QLD 4703.”

The Claimant submits that the Respondent’s obligation to pay under the Agreement is, by reason of clause 1.3.2 of the Agreement, tied with that description of the Contract

*“The effect is that, objectively, it must have been contemplated when entering into the Contract that (the Claimant) may carry out construction and construction management of the Project.”*⁶⁹ (Emphasis added.)

- (iv) A similar obligation is set out in clause 2 of the General Conditions, where the Claimant is required to carry out and complete the “Services” in accordance with the Contract and where the expression “Services” is defined broadly. Further, under clause 6.2, it is contemplated that the Claimant can subcontract the work in respect of the “*Services described in Item 15*”; and
- (v) In addition to its entitlement to claim for the work carried out by its subcontractors, clause 25.1 of the Contract entitles the Claimant to issue progress claims “*in accordance with the provisions of Annexure Part C*” which relates to “*Construction Management Fees*”. Clause 1.1 of Annexure Part C of the Contract states that the “*Management Fee*” is a lump sum amount of \$585,222.00 (GST inclusive). The Claimant notes that whereas the final paragraph of clause 25.1 states that payment made pursuant to clause 1.1 and 1.2 of Annexure Part C “*shall be payment on account only*”,

⁶⁸ Paragraph 16.5 of the AA.

⁶⁹ Paragraph 18.3 of the AA.

payments made in respect to any other amounts “*therefore are not made on account and are not subject to reassessment under the Contract.*”⁷⁰ The Claimant therefore contests the Respondent’s entitlement to reopen previous assessments carried out by Slattery including in respect to subcontractor payments.

The Respondent’s position outlined in AR

65. In its AR, the Respondent expands on the position it had set out in its Payment Schedule, as well as responding to the material that the Claimant provided in its AA.
66. The Respondent repeats its position that it had engaged the Claimant to carry out and complete the “Services” as set out within the Contract. The Contract defined “Services” to include those services listed at Annexure Part B (Construction Management task list) and the Special Conditions (“SC”) (Annexure Part D) of the Contract. In this regard, the Contract required the Claimant to engage “contractors” as the Respondent’s disclosed agent and using the AS2124-1992 form of contract. In return, the Claimant was to receive a Management Fee being the lump sum of \$585,222.00 (GST inclusive). The Contract did not entitle the Claimant to engage trade contractors as its subcontractors and nor, contrary to the Claimant’s assertion, did the Respondent agree to the Claimant engaging trade contractors as subcontractors and therefore the estoppel, as alleged by the Claimant, has no substance. Accordingly, the Claimant has no entitlement to claim and receive payment for the Trade Package works.

The Respondent’s version of the relevant facts

67. The Respondent submits that a consideration of the relevant facts disclose not only how the Claimant acted with “*callous disregard*”⁷¹ of its obligations as the Respondent’s agent, but also how it “*hid the true state of affairs*”⁷² from the Respondent. The Respondent emphasises that the Claimant’s engagement of trade contractors as its subcontractors was a breach of the agency relationship that underpinned the nature of the Contract. According to the Respondent, much of the material included in the AA seek to obfuscate the true facts “*in order to distract from the clear fact that (the Claimant) acted in fundamental breach of the Contract*”⁷³.
68. The Respondent submits that the following summarises the relevant facts relating to the engagement of the trade contractors:
- (a) Under the Contract, the Claimant was required to manage the tender process for all trade packages⁷⁴. This required the Claimant to obtain three separate quotations for each trade package and this was in fact what exactly happened in practice and the Claimant’s material shows that it

⁷⁰ Paragraph 20.2 of the AA.

⁷¹ Paragraph 11.3 of the AR.

⁷² Paragraph 11.4 of the AR.

⁷³ Paragraph 19.1 of the AR.

⁷⁴ Refer to SC1.1.1 to 1.1.3.

was fully aware of that obligations⁷⁵. The Claimant would then prepare the tender documentation and then evaluate and provide the Respondent with a recommendation for the award of each trade package⁷⁶. The Claimant would then prepare the tender documentation, evaluate the tenders received and provide the Respondent with a recommendation for the award of each trade package⁷⁷. Insofar as in its AA, the Claimant repeatedly has inserted the word “subcontractor”, then the Respondent submits that the contemporaneous documents show that that expression was never used at the time.

“It is contrived of (the Claimant) to allege that the negotiations carried out in respect of the trade packages were always intended to relate to “subcontractors” to be engaged by (the Claimant) in its own right. As explained in the (SDJS), (the Claimant’s) actions in respect of engaging trade subcontractors aligned with the requirements of the Contract, with the term “subcontractor” not being used.”⁷⁸;

- (b) Under SC1.6 of the Contract, the Claimant was only able to award contracts to a trade contractor if it obtained the Respondent’s written approval and this is acknowledged by the Claimant⁷⁹. Insofar as the Claimant seeks to make out that each of the Respondent’s approval in respect of the Trade Packages was in fact an instruction to engage “subcontractors” in its own right, then that is “plainly false”⁸⁰. Not only did the Respondent never approve the engagement of subcontractors, but the Claimant had never requested approval to engage a subcontractor to perform a Trade Package:

“It is telling that (the Claimant) has been unable to point to a single instance in which (the Respondent) has used the language “subcontractor” in an approval to proceed with the award of a trade package. That is because (the Respondent) never approved the engagement of subcontractors.”⁸¹

At paragraph 19.19 of the AR, the Respondent provides a table that sets out the award of each trade package and which the Respondent submits demonstrates that it had never approved the engagement of “subcontractors” to perform Trade Packages, as alleged by the Claimant;

- (c) Under SC1.2.2 of the Contract, the Claimant was obliged to use AS2124-1992 Conditions of Contract for Direct Contracts with trade contractors and (by reason of clause SC1.2.7 of Annexure B), those contracts were to

⁷⁵ The Respondent refers to paragraph 21.6 of the SDJS, as well as Tab SM-102 of the SDSM.

⁷⁶ The Respondent refers to paragraph 21.6 of the ADJS, as well as Tab SM-102 of the SDSM.

⁷⁷ The Respondent, by way of illustration, refers to the recommendation relating to the appointment of Smoothy Electrical.

⁷⁸ Paragraph 19.6 of the AR and see also paragraph 18 of the SDJS at pages 52 to 53.

⁷⁹ The Respondent refers to paragraph 322 of the SDSM.

⁸⁰ Paragraph 19.18 of the AR.

⁸¹ Paragraph 19.14 of the AR.

be entered into by the Claimant as disclosed agent of the Respondent. Thus:

“Given the express requirements of the Contract, in conjunction with (the Respondent’s) express approval to award trade packages, there was no reason (at the time of the instructions) for (the Respondent) to suspect that (the Claimant) was not engaging contractors as agent for (the Respondent).”

(The Claimant) fails to raise any cogent basis for asserting that (the Respondent) should have or would have been aware that it was not engaging contractors in accordance with the Contract. (The Respondent) was entitled to expect that its agent was acting on the instructions given to it.”⁸²

- (d) Insofar as Mr Milfull states at paragraph 422 of the SDSM, that;

“At the end of December 2020, (the Claimant) had raised with (the Respondent) that it was not using an AS2124-1992 contract, however after that (the Respondent) continued to instruct (the Claimant) to carry out works on the Project.”

then the Respondent regards such an assertion to be “*deceptive*”⁸³. In this regard, the Respondent refers me to the statement of Mr Stewart at paragraph 21.7(b) of the SDJS, as well as the response that Ms Edwards (Slattery) gave to the Claimant expressly instructing the Claimant to engage contractors in accordance with the terms of the Contract to which the Claimant’s representative, Mr Laurie Butterworth, responded by acknowledging and agreeing that the Claimant would “*proceed in accordance with the Contract*”⁸⁴. Accordingly, the Respondent submits:

In light of the above, given (the Claimant’s) explicit assurances, there was no basis upon which (the Respondent) could have “understood” that (the Claimant) was engaging subcontractors in its own right and in fundamental breach of the Contract.

As explained in the (SDJS), it was not until 23 February 2021 when (the Claimant) provided (the Respondent) with a select number of trade package agreements that (the Respondent) became aware of (the Claimant’s) fundamental breach of Contract.”⁸⁵

- (e) The Respondent also submits that the exchange of emails between Ms Edwards and Mr Butterworth on 18 December 2020, as outlined above, disclose the following critical flaws in the Claimant’s position:

⁸² Paragraph 19.24 – 19.25 of the AR.

⁸³ See paragraph 19.27 of the AR.

⁸⁴ Copy of the email chain between Ms Edwards and Mr Butterworth is included in Tab JFS10 of the SDJS.

⁸⁵ Paragraph 19.33 and 19.34 of the AR.

- (i) By the 18 December 2020 emails, the Claimant inferred that it was yet to formally engage six of the recently awarded Trade Packages. The Respondent therefore expected that, in the light of the Claimant's express assurances, that the Claimant would proceed in accordance with the Contract and that therefore, at least those six Trade Packages, would be awarded in accordance with the Contract;
 - (ii) Having regard to Annexure A of the SDSM (which set out the "*Subcontractor Engagement*") and the subcontracts that the Respondent received on 23 February 2021, it is evident that as at 18 December 2020, the Claimant had already engaged each of those contractors as "subcontractors", contrary to what had been prescribed under the Contract;
 - (iii) It is also clear that the Claimant paid no regard to the Respondent's express instruction of 18 December 2020 to engage contractors in accordance with the terms of the Contract;
 - (iv) More telling however, was that not only did the Claimant fail to take any steps to rectify its substantial breach of the Contract following 18 December 2020, but that it proceeded to engage at least one other "subcontractor", viz: SQR Constructions, in direct contravention of the Contract and the Respondent's instruction.⁸⁶;
- (f) Insofar as the Claimant contends that, by reason of clause 26 and Item 24 of Annexure Part A of the Contract, it had an entitlement to claim payment for the works carried out by subcontractors, then such an interpretation of the Contract is not supported by the facts. This is because the Trade Packages works did not form part of Services and as such, the Claimant had no contractual entitlements to subcontract the Trade Packages and to then claim payment for those works. The Claimant's entitlement to claim payment on behalf of contractors and to make payment to those contractors, hinged on the agency relationship it held under the Contract:

"As explained (in Section 17 of the SDJS), between January 2020 when (the Respondent) received (the Claimant's) first payment claim and February 2021 when (the Claimant) provides copies of the subcontracts, (the Respondent) understood that in performing its role as agent, (the Claimant) was:

- (a) *reviewing and assessing the contractors' claims for payment as required by SC1.8.3 of the Contract;*

⁸⁶ SQR Constructions were engaged as subcontractor on 6 January 2021 as can be seen by paragraph 325 of the SDSM and Tab SM-121 and also as detailed in Attachment A to the SDSM.

- (b) *by issuing a claim to (the Respondent) that separately and distinctly identified the amounts of payment to the contractors for performing the trade package work (including variations to that work), certifying the amounts payable to the contractors; and*
 - (c) *receiving payment from (the Respondent) for the trade package works, on trust and as (the Respondent's) agent, and then remitting those funds to the contractors in its capacity as (the Respondent's) agent.*⁸⁷
- (g) The Respondent submits that the course of events outlined in (f) above is entirely consistent with the scope of Services set out in Annexure Part B of the Contract and that there was nothing in the payment process that indicated any departure from the terms of the Contract. The Claimant's invoices upon which payment was made never used the term "subcontractor" and insofar as the Claimant contends that the Respondent knew that trades were being engaged by the Claimant as subcontractors because no project bank account had been established, then at no stage did the Claimant request that such an account be established. In any event, the Respondent's understanding in respect to the progress claims and progress certificates issued were, as stated by Mr Stewart at paragraph 17.8 to 17.12 of his Statutory Declaration, viz:

"17.8 Until receiving copies of the subcontracts from (the Claimant) in February 2021, I understood:

- (a) *(the Claimant's) claims separately and distinctly claimed the amounts it was claiming payment for, as part of its Management Fee;*
- (b) *(the Claimant's) claims separately and distinctly identified the amounts payable to the contractors for performing the trade package work (including variations to that work) pursuant to the contracts between (the Claimant) and those contractors. I understood those amounts were what (the Claimant) had certified under the relevant trade contract (with that certification part of (the Claimant's) services under the Contract);*
- (c) *that (the Claimant) had, as part of the Services and acting as (the Respondent's) agent, carefully reviewed and managed each of the trade contractor claims, protecting (the Respondent's) interests in doing so.*

⁸⁷ Paragraph 19.41 of the AR.

17.9 *As (the Claimant) was issuing (the Respondent) with monthly invoices for payment for both the Services and the trade packages, I understood that (the Claimant) has assessed the work completed by the Contractors and agreed that the amount claimed was fair and reasonable.*

17.10 *My understanding was that the payments being made to (the Claimant) in respect of the trade packages were being received and dealt with in (the Claimant's) capacity as (the Respondent's) agent. I understood (the Claimant) received and managed those funds on trust.*

17.11 *In this, I considered it was simpler for (the Respondent) and for (the Claimant) for there to be one payment by (the Respondent) to (the Claimant) and for (the Claimant) to then distribute those funds to the trade contractors, as had been identified in the build-up document provided by (the Claimant).*

17.12 *Based on conversations that I had with Mr Milfull over the course of the Project, I understood that (the Claimant) had adopted a standard process for receiving and processing trade contractors' claims, whereby:*

(a) *(the Claimant) would request a copy of the trade contractors' invoice to be provided to (the Claimant) prior to the 24th day of each month (being the date that (the Claimant) was required to submit progress claims under the Contract);*

(b) *(the Claimant) would include the trade contractors claim in the payment claim issued to (the Respondent) and would claim payment on behalf of the trade contractors (although I assumed that (the Claimant) would undertake some review and assessment process for the trade contractors' claims prior to claiming the amounts on the trade contractors' behalf);*

(c) *once (the Claimant) received payment from (the Respondent), it would make payment to the relevant trade contractors. I recall being advised by (the Claimant) that it had negotiated payment terms of 30 days with each of the trade contractors, which provided enough time for (the Claimant) to receive the amount claimed from (the Respondent) prior to making payments to the contractors."*

(h) The Respondent also submits that if the Claimant had in fact engaged the trade contractors as subcontractors then, by reason of s 75(7) of the Act,

the Claimant would have been required in ensuring that any of its payment claim submitted to the Respondent was accompanied with a supporting statement. The Claimant however did not include a supporting statement with any of its claim prior to the present Payment Claim:

“Likely because before this time (the Claimant) did not wish to reveal that it had engaged subcontractors in substantial breach of the Contract.”⁸⁸

- (i) The Respondent did not become aware of the Claimant’s failure to engage contractors in accordance with the Contract until the Claimant provided the Respondent with a select number of subcontractor agreements on 23 February 2021 and it took the following events to induce the Claimant to provide copies of these documents:

- (i) On 9 February 2021, the Respondent requested the Claimant to confirm all trade contractors had been engaged using AS2124-1992 contract;
- (ii) The Claimant responded advising that alternative forms of agreement had been used to date and at no time did the Claimant reveal that it had entered into those as agent for the Respondent:

“(The Respondent) considers that the above circumstances illustrates (the Claimant’s) sure knowledge of its contravention of the Contract. It was not until the eleventh hour, when (the Claimant) was pressed for the trade contract agreements that it finally handed over copies of the subcontract agreements and revealed its substantial breach fo the Contract.

It was not until this Adjudication that (the Claimant) admitted it had engaged subcontractors. That is not the conduct of an agent cognisant of the terms of the Contract they were engaged under.”⁸⁹

Estoppel not established

69. The Respondent contends that when interpreting the Contract, it is necessary to identify the intention of the parties from the words used in the Contract⁹⁰. Relevant to that task is clause 31 of the General Conditions, which provides:

31 Waiver of conditions

⁸⁸ Paragraph 19.51 of the AR.

⁸⁹ Paragraph 19.54 and 19.55 of the AR.

⁹⁰ In this regard the Respondent refers m to the High Court of Australia’s decision in *Australian Broadcasting Commission v Australian Performing Right Association Ltd* [1973] 129 CLR 99 and in particular the passage of Gibbs J at 109.

Except as provided at law or in equity or elsewhere in the *Contract*, none of the terms of the *Contract* shall be varied, waived, discharged or released, except with the prior written consent of the parties.

The Respondent emphasises that neither party has provided written consent to vary, waive, discharge or release the terms of the *Contract*.

70. As to the question of whether, at law, the Claimant has demonstrated that, estoppel by convention has been established, the Respondent refers me to the following observation made by Dixon J:

“The object of estoppel in pais is to prevent an unjust departure by one person from an assumption adopted by another as the basis of some act or omission which, unless the assumption be adhered to, would operate to that other’s detriment. Whether a departure by a party from the assumption should be considered unjust and inadmissible depends on the part taken by him in occasioning its adoption by the other party. He may be required to abide by the assumption because it formed the conventional basis upon which the parties entered into contractual or other mutual relations, such as bailment; or because he has exercised against the other party rights in which would exist only if the assumption were correct...

... or because knowing the mistake the other laboured under, he refrained from correcting him when it was his duty to do so; or because his imprudence, where care was required of him, was a proximate cause of the other party’s adopting and acting upon the faith of the assumption; or because he directly made representations upon which the other party founded the assumption. But, in each case, he is not bound to adhere to the assumption unless, as a result of adopting it as the basis of action or inaction, the other party will have placed himself in a position of material disadvantage if departure from the assumption be permitted...”⁹¹

(Emphasis that of the Respondent.)

71. The Respondent also refers me to the decision of the Queensland Court of Appeal in *Queensland Independent Wholesalers Limited v Coutts Townsville Pty Ltd*⁹², where in applying the principles of conventional estoppel set down by Dixon J, the Court held:

“That a party replying upon the doctrine of estoppel by convention must demonstrate the acceptance of a particular state of things as the foundation of the dealings of the parties. Acts done privately by the one party without coming to the knowledge of the other were not capable of affecting their mutual relations or raising an assumption capable of forming a conventional or accepted basis governing their relations.” (Emphasis that of the Respondent.)

Further, as to the meaning to be given to the expression “conventional”, McPherson J expressed the following:

⁹¹ *Thompson v Palmer* (1993) 49 CLR 507.

⁹² [1989] 2 Qd R 40.

*“The word “conventional” in this context carries connotations of agreement, not necessarily express but to the inferred, or at least a demonstrable acceptance of a particular state of things, as the foundation for the dealings of the parties.”*⁹³

72. Thus, from the above judicial pronouncements, the Respondent submits that, for the following reasons, there is no basis for the Claimant to allege conventional estoppel:

- (a) Not only did the Respondent do anything to occasion the Claimant to depart from the Contract, there was also no mutual assumption that gave rise to some “conventional” basis whereby the Claimant was entitled to depart from the requirements of the Contract and engage contractors in its own right. Insofar as the Claimant contends that there was an assumption that it was to “engage subcontractors on the Project”, that assumption (if true) was neither induced by the Respondent and nor was it within the Respondent’s knowledge. In this regard, the Respondent refers me to Section 21 of the SDJS and to the following passage of Dixon J in *Gunt v Great Boulder Gold Mines Ltd*⁹⁴:

*“The justice of an estoppel is not established by the fact in itself that a state of affairs has been assumed as the basis of action or inaction and that a departure from the assumption would turn the action or inaction into a detrimental change of position. It depends also on the manner in which the assumption has been occasioned or induced. Before anyone can be estopped, he must have played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it.”*⁹⁵ (Emphasis that of the Respondent.)

Accordingly, the Respondent submits that the Claimant cannot allege that the Respondent is estopped from enforcing the Contract, given that:

- (i) the Respondent was not aware of the Claimant’s purported assumption and departure from the Contract. Indeed, the Respondent was not aware that the Claimant had engaged subcontractors until 23 February 2021;
- (ii) the Claimant was engaged as the Respondent’s agent and, as such, was obliged to obtain the Respondent’s fully informed consent to depart from strict conformance. Indeed, the Respondent never disclosed that it had engaged subcontractors and never sought nor obtained the Respondent’s fully informed consent;

⁹³ At [44].

⁹⁴ (1937) CLR 641.

⁹⁵ At [673].

- (iii) the Respondent did not play any part in the Claimant's adoption of the purported assumption; and
 - (iv) upon becoming aware of the Claimant's deviation from the Contract, the Respondent put the Claimant on notice to show cause for that deviation;
- (b) The Respondent emphasises the importance of the agency relationship that underpins the nature of the Contract entered into by the parties. The Respondent had understood that the Claimant would at all times act as its agent, including the Claimant's dealing with trade contractors. Insofar as the Claimant relies on the fact that the issuing of its invoices (where it claimed both the Construction Management fee and the amounts payable for the trade package works) were inconsistent with the agency relationship, then the Respondent disagrees. Not only do the facts relating to the engagement of trade contractors (as outlined at paragraph 68 above) not support the Claimant's position (and particularly as the Claimant had never (until 23 February 2021) identified that the trade contractors were "subcontractors"), but the law also does not support the Claimant's argument.

In this regard, the Respondent emphasises that under the relationship of agency:

- (i) an agent can engage a third party on behalf of its principal (as disclosed agent);
- (ii) an agent can receive invoices from the third party, made out to the agent; and
- (iii) the agent can then claim payment from the principal for the third party amount, together with the amounts payable to the agent directly.

To support its position, the Respondent refers me to the GST ruling entitled "*GSTR 2000/37 Goods and services tax: agency relationship and the application of the law*" issued by the Australian Tax Office (ATO)⁹⁶. The Respondent specifically highlights the following paragraphs within the ATO Ruling:

- (i) At paragraph 45, in relation to the common practice of an agent collating invoices from third parties and then forwarding that claim to the principal and including within that claim, the amounts payable to the agent:

"Divisions 57 and 153 apply when a principal makes a relevant transaction (i.e., taxable supply, taxable importation, creditable acquisition or creditable

⁹⁶ Copy of the ATO Ruling is included as Tab 7, Folder 3 of the AR.

importation) through an agent. The word ‘make’ and its derivatives, such as ‘made’, are used in the GST Act, inter alia, to connect the thing being transacted in the course of the entity’s enterprise with the paying or receiving of consideration. When an agent is authorised to undertake a transaction on behalf of the principal, thereby binding the principal to the legal effects of the transaction, then the transaction is made by the principal through the agent.” (Emphasis that of the Respondent.)

- (ii) At paragraphs 61, 64, 65, 74 and 89, in relation to the practice of an agent receiving tax invoices made out to it, notwithstanding that the supply of the good and/or service was provided to the principal but where the agent can then claim those amounts in its tax invoice to the principal.

Accordingly, the Respondent submits:

“The existence of the GST Ruling identifies that it is a common occurrence for an agent to receive and process claims from third parties, notwithstanding that the agent has no contract with those third parties and does not receive a supply from those third parties. There are obvious logistical and administrative benefits of invoices and payments being processed in this manner without altering the fact that the contract is between the principal and the third party.”⁹⁷

- (c) Insofar as the Claimant relies on the decision of *Ryledar Pty Ltd v Euphoric Pty Ltd*⁹⁸ relating to the principle of conventional estoppel, it is telling that it had not referred to the approach to this principle adopted by the courts subsequent to that case. In particular, the Respondent submits that the following passage of McPherson J in *Queensland Independent* had been applied and approved in subsequent decisions⁹⁹:

“...the principle invoked first requires that evidence be identified which establishes the conventional basis for the assumption relied upon. The word “conventional” in this context carries connotation of agreement, not necessarily express but to be inferred, or at least a demonstrable acceptance of a particular state of things, as the foundation for the dealings of the parties. There must, as the passage from Lord Denning’s judgement [in Amalgamated Investment & Property Co v Texas Commerce International Bank Ltd [1982] QB 84 at 120-121] acknowledges, be at least a “course of dealing between the parties”; that is to say, acts or conduct which impinge upon what his Lordship described as “their mutual

⁹⁷ Paragraph 23.34 of the AR.

⁹⁸ [2007] NSW CA 65.

⁹⁹ See *Attorney-General (ACT) v Eastman* [2008] ACTCA 6; 163 ACTR 46 at [45]; and *TMA Australia Pty Ltd v Indect Electronics* [2015] NSWCA 343 at [123].

affairs” ... To produce that consequence, the acts or conduct relies upon must point plainly, if not unequivocally, to the assumption put forward as the conventional basis of relations. A course of dealing that is explicable by reference to some other equally plausible assumption, inevitably falls short of establishing that the parties accept as the basis of their relations the particular assumptions contended for.”¹⁰⁰

Thus, by reference to the evidence set out in Section 21 of the SDJS, Mr Stewart explains that:

- (i) there was never a mutual assumption between the parties that the Claimant was to engage contractors in its own right as subcontractors;
 - (ii) the Contract clearly sets out the parties’ common intention regarding the process and requirement for engaging contractors; and
 - (iii) if it was the Respondent’s intention to have the Claimant engage contractors in its own right, then the Contract and the basis upon which it was formed, would be rendered redundant.
- (d) Insofar as it could be said that a state of estoppel ever existed (which the Respondent denies), then that mutual assumption ended on 18 December 2020 when both parties expressly acknowledged that the Direct Contracts were to be let in strict compliance with the Contract (refer to paragraph 68(e) above). The effect of the rejection of a common intention was expressed by Tobias JA in *Ryledar* as follows:

“Once any such common intention is rejected, it follows that the contract between the parties (in this case the 1999 Variation) relevantly speaks for itself, namely, that Ryledar well knew as at 31 March 1999 that its contractual right to the 6c/litre rebate was confirmed to the New Rebate Area. In these circumstances, as at that date, Ryledar could not have assumed that it would thereafter be entitled to receive the 6c/litre rebate “across the board” not only for the balance of the Term but also in respect of the three renewal periods.”¹⁰¹ (Emphasis that of the Respondent.)

73. The Respondent submits that the Claimant has not discharged its onus of demonstrating that the various elements for estoppel by convention have been satisfied. To support its position, the Respondent has provided the following table that sets out its response to the four elements of estoppel by convention that the Claimant asserted at paragraph 13.4 of the AA had been met (reproduced at paragraph 64(e) above):

¹⁰⁰ At [46].

¹⁰¹ At [222].

Element for estoppel by convention (para 13.4 of (the Claimant's) submissions)	Respondent's response as to why the element has not been satisfied
<i>(a) the parties have adopted an assumption as to the terms of their legal relationship;</i>	Only (the Claimant) has adopted the assumption it alleges in respect of the relationship. (The Respondent) has at all times acted entirely consistently with the relationship detailed in the Contract. Nothing has occurred to change that relationship.
<i>(b) both parties have conducted their relationship on the basis of that mutual assumption;</i>	There was no mutual assumption. As set out in the above paragraph (the Respondent) has conducted its relationship on the basis of what the Contract provides. The invoices (the Claimant) issued and (the Respondent) paid <u>were entirely consistent with the Contract</u>. The ATO confirms the way in which (the Respondent) acted is entirely lawful and entirely common for the treatment of payments to third parties via an agent. (the Claimant) conducted itself in breach of the Contract. (The Claimant) ignores its obligations as agent. (The Respondent) has always acted consistently with (the Claimant) being its trusted agent, empowered to create legal relations on behalf of (the Claimant). (The Claimant) breached its obligations and did not follow the instructions provided to it as agent. Further, (the Claimant) did not act in accordance with the (recently concocted) 'mutual assumption' it alleges. As set out at paragraph 19.32, Mr Butterworth (on behalf of (the Claimant)) stated on 18 December 2020 in respect of the trade packages: Hi Christine, Thank you for your prompt reply. We shall proceed as directed in accordance with the contract. Regards Laurie The estoppel (the Claimant) alleges is a work of fiction.
<i>(c) each party knew or intended that the other act on that basis;</i>	As (the Respondent's) agent, (the Claimant) was under an obligation to obtain (the Respondent's) fully informed consent to depart from the Contract and the instructions provided to (the Claimant) (as agent). (The Claimant) did not do that.

	(The Claimant) acted unilaterally. That is not sufficient to establish estoppel. (The Respondent) acted entirely consistently with the Contract. That fact is confirmed by: • (The Respondent) strictly comply with the Contract indirectly (the Claimant) to engage trade contractors, as part of approving the trade package quotes. • (The Respondent) directing (the Claimant) on 18 December 2020 to strictly comply with the Contract when (the Claimant) sought permission to use a different form of Contract. (The Claimant) responded advising it would comply with the Contract. • (The Respondent's) show cause notice and subsequent termination of the Contract when the true state of affairs was exposed by (the Respondent). (The Claimant) was deceitful. It acted contrary to the instructions provided to it. There was no way (the Respondent) did, or could have known, the basis on which (the Claimant) was acting.
<i>(d) departure from the assumption will cause detriment</i>	(The Respondent) has experienced significant detriment as a consequence of (the Claimant's) fundamental breaches of the Contract. If (the Claimant) has a claim for any benefit received by (the Respondent) that claim would be in quantum meruit, not under the contract/estoppel. The value of that benefit would be \$nil given the value of the incomplete work.

74. The Respondent submits that, under the Contract, the Claimant was required to engage contractors to perform the trade package works, as the Respondent's agent. However, because the Claimant had, in breach of its obligation, engaged "subcontractors" to complete the Trade Package works, it follows that insofar as the Payment Claim seeks payment for the amounts relating to the Trade Package work, then the Claimant cannot be entitled under the Act to such amounts as these amounts cannot be said to arise under the construction contract and cannot be valued in accordance with ss 71 and 72(1)(a) of the Act. The Respondent submits that the Claimant's claim is in fact a claim in quantum meruit, and such a claim is not a claim made pursuant to a construction contract and therefore, not able to be made under the Act. In this regard, the Respondent refers me to the following cases:

(a) *BM Alliance Coal Operations Pty Ltd v BGC Contracting Pty Ltd*¹⁰²;

¹⁰² [2015] 1 Qd R 2289 at 232.

- (b) *Milgun Pty Ltd v Austeo Ltd and the State of Queensland*¹⁰³;
- (c) *Ansett Transport Industries (Operations) Pty Ltd v Alenia Aeritalia & Salenia SpA*¹⁰⁴;
- (d) *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd*¹⁰⁵.

75. Further, insofar as the Claimant (at Section 19 of its AA) seeks to ground an alternative argument as to its claims for payment for the Trade Packages and Trade Packages Variations as a “*disbursement*” under the Contract, the Respondent submits that such a proposition is not supported by the terms of the Contract. This is because the Claimant’s entitlement to the payment for services is limited to the lump sum Management Fee specified at clause 1.1 of Annexure Part C of the Contract and where clause 2 Annexure C states:

2 Disbursements not included in management fee

The following disbursements are not included in the *management fee* and shall be reimbursed if:

- a) written approval is given by the *Principal* before they are incurred; and
- b) receipts are provided to the reasonable satisfaction of the *Principal* when claimed.

.....

Costs the subject of reimbursement by the *Principal* shall include an additional administrative charge of%.

Disbursement claims shall be made on the 24th day of each month and payment shall be made within 7 days.

The Respondent highlights that the parties “*did not include any of the information contemplated by clause 2 of Annexure Part C which (the Respondent) submits would have been expected had the parties intended for the clause to be utilised. This is simply because the parties agreed that (the Claimant’s) sole entitlement to payment under the Contract would be before the lump sum amount of \$585,222.00 (incl GST).*”¹⁰⁶

My Decision

76. I consider that the Claimant has established its contractual entitlement to the Trade Packages and Trade Packages Variations components of its claim, and I have arrived at this conclusion because:

¹⁰³ [1988] 2 Qd R 670 at 672.

¹⁰⁴ [1991] 105 FLR 169 at [175].

¹⁰⁵ [2016] 340 ALR 193 at [66].

¹⁰⁶ Paragraph 22.7 and 22.8 of the AR.

- (a) The Instrument of Agreement executed by the parties was of a Construction and Construction Management nature and this was expressly stated at the very beginning on page 1 of the Agreement as follows:

“Name of Goods and/or Services:

Construction and Construction Management of the Tropical Pines Production Facility at 3-5 Pineapple Drive, Hidden Valley QLD 4703.”

At paragraph 21.11 (page 66) of the SDJS, Mr Stewart states that the Claimant was engaged under a construction management contract to manage the construction of the Project and not to perform the construction works or Trade Package works and *“the fact that (the Claimant) can only point to what is clearly a mistake in the Instrument of Agreement is telling”*. I however do not accept Mr Stewart’s assertion that the reference to the words *“Construction and Construction Management”* in the Instrument of Agreement was *“clearly a mistake”* and I say this because a careful reading of the Contract documentation shows otherwise, viz:

- (i) The Claimant’s offer formed part of the Contract and this, relevantly, included the Claimant’s list of *“Proposed Subcontractors”* Form 4 document that the Claimant submitted at the time of tender. Further, clause 6.2 of the Contract required the Claimant to engage those “subcontractors”, subject to obtaining the Respondent’s written approval. Where however part of the Services were to be carried out by the Claimant as agent for the Respondent, then clause 7.2 of the Contract provides that the Claimant is to engage “contractors” in the capacity as agent for the Respondent and disclose that fact to the “contractors”. It can thus be seen that, consistent with the description set out in the Instrument of Agreement, the Contract contemplated the Claimant carrying out the Project Trade Packages by engaging subcontractors as well as engage “contractors” as agent for the Principal/Respondent;
- (ii) Where a person is engaged as a “contractors” then, by reason of clause 7.3, that contractor would be paid by the Claimant from a project account, which the Respondent is required to maintain *“with sufficient funds from which (the Claimant) shall pay debts when due and payable”*. In other words, the payment to be made to the person who the Claimant had engaged as agent for the Respondent, are not to be paid by the Claimant from its own funds, but rather from the monies the Respondent had placed in the project account for that purpose;
- (iii) Consistent with the nature of the contract as described in the Instrument of Agreement (viz: Construction and Construction

Management), clause 26 of the Contract provides the Claimant with the right to make progress claims on the Respondent to include the works carried out by its “subcontractors”; and

- (iv) Further, the “Services” that the Claimant is required to carry out and complete can include those subcontracting works described in Item 15 of Annexure Part A which states “*the trade package subcontracting in accordance with the Special Conditions*”. This demonstrates that the Contract (again, consistent with the Instrument of Agreement) allowed the parties to either arrange for the Project works to be carried out by “contractors” or by “subcontractors” engaged by the Claimant (subject to having first obtained the Respondent’s written approval);

- (b) The Claimant had in fact obtained the Respondent’s written approval (whether from Mr Stewart or from its other authorised representatives) to engage the various subcontractors as can be seen from the below table:

Subcontractor	Description of works	Respondent’s approval
CBC Group Trust t/a Ramage Concreting Australia	Supply of all concrete works and labour for project as per tender documents provided.	Jim Stewart provided approval on 9 November 2020 (see SM-103 of the SDSM).
Hohmanns Plumbing Service	Plumbing work at 3 Pineapple Drive Yeppoon as per quote dated 08/10/2020.	Graham Scott provided approval on 15 October 2020 (see SM-89 of the SDSM).
JRT Civil Pty Ltd	Civil Work as per plans and Bill of Quantities provided and as per Quote 3348.	Matthew Petchell (Slatter) instructed ASM to engage JR on 10 January 2020 (see SM-2 of the SDSM). Graham Scott provided approval on 9 June 2020 (see SM-45 of the SDSM).
Pierce Engineering Pty Ltd	Supply of structural steel and purlins as per drawings transmittal 1809-15 (dated 07/09/2020). Refer to Initial Pierce Quote W1632/A.	Graham Scott provided approval on 25 September 2020 (see SM-80 of the SDSM).
Pierce Rigging Pty Ltd	Erection of structural steel and purlins as per Quote W 1632/A for project, fabricated by Pierce Engineering.	
NR and CL Smoothy Electrical	Electrical installation at Hidden Valley Harvest Facility (Qld) Pty Ltd Project.	Jim Stewart approved on 9 October 2020. Confirmation of approval from Graham Scott and Matthew Petchell (Slattery) on 12 October 2020 (see SM-85 of the SDSM).

SQR Constructions Pty Ltd	Roofing works.	Christine Edwards (Slattery) provided approval on behalf of Slattery on 15 December 2020. Jim Stewart provided approval on 16 December 2020 (see 23SM-119 of the SDSM).
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(c) Insofar as the Respondent contends that the approval it had given to the Claimant was to enter into contracts with trade contractors as agent for the Respondent and that it had never given approval for the Claimant to engage trade contractors as subcontractors, then I consider that the evidence does not support such a conclusion and I say this because:

(i) No project account had ever been established by the Respondent and this would support the drawing of the inference that the Respondent saw no need to establish such an account because it had never requested the Claimant to engage contractors as its agent. If it were otherwise then the Respondent would have been required to establish and maintain such an account for that was the obligation it assumed under the Contract. At paragraph 17.14 of the SDJS, Mr Stewart states that it had not established a project account because at no time prior to receiving the Claimant's response to the Respondent's show cause notice (on 18 February 2021) did the Claimant *"ever raise the prospect of establishing such an account or for the payments to be made from that account. I would have arranged for such an account to be established and for it to be in funds had it been requested or necessary"*. I regard Mr Stewart's explanation unpersuasive. The requirement set out in clause 7.3 of the Contract is expressed in mandatory language and makes it abundantly clear that:

"Where the Services require the Construction Manager to make payments to contractors on behalf of the Principal, the Principal shall maintain a project account with sufficient funds from which the Construction Manager shall pay project debts when due and payable." (Emphasis added)

The onus was not on the Claimant to request the Respondent to establish and maintain a project account in circumstances where the Claimant had engaged contractors on behalf of the Respondent, but rather that it was the Respondent's contractual obligation to establish (and maintain) such account in circumstances where contractors had been engaged in that capacity. The fact that no such project account had ever been established supports the Claimant's position that the parties proceeded on the basis that the Claimant was to engage the trade contractors as subcontractors and then

include the subcontractors' costs as part of the Claimant's progress claims to the Respondent;

- (ii) Insofar as the Respondent contends that it was not necessary for it to have established a project account because, as can be seen by the GST Ruling 200/37, it is not uncommon for an agent to receive and process claims for third parties notwithstanding that the agent has no contract with those third parties, then that does not, in the present case, advance the Respondent's argument. In the present case, the Contract provided that where the third parties/contractors were to be engaged by the Claimant on behalf of the Respondent, then the process by which those third parties/contractors were to be paid was through the project account that the Respondent was to establish and maintain. It may well be that an agency relationship may be shown to exist in the circumstances set out in the GST Ruling, but that was not what the parties had agreed would be the process here if such a relationship was to be established and given the express agreement by the parties as set out in clause 7.3 of the Contract. Thus, the inference I draw from the fact that no project account had been established was that the Respondent saw no need to do so because it had never instructed the Claimant to engage "contractors". Rather, the Respondent had given written approval to the Claimant for the Trade Packages to be carried out by the Claimant's subcontractors.
- (iii) The manner in which the Claimant presented its progress claims (including the present Payment Claim) was for claims relating to the following components:
- Construction Management fee;
 - Trade Packages work; and
 - Trade Packages Variations.

The Construction Management fee component was presented as a claim relating to the Construction Management fee of \$532,020.00 (ex GST) on a percentage complete basis. The Trade Packages which were estimated in the Contract at \$3,700,000.00 (ex GST) was presented on the invoiced amounts of its subcontractors on a percentage complete basis. The Trade Packages Variations was presented on the basis of the approved Variation to the Trade Packages which was presented on the basis of the invoices of the subcontractors which had carried out the variation work, together with the 10% margin that the Respondent had agreed would be paid for such Variations. These components of the Claimant's progress claims would then be assessed by Slattery, who would then issue a payment certificate which was stated as

the value of the “*building work*” completed to date, less the value previously certified, but where, significantly, the “*Contract Price*” was stated to be \$4,232,020.00 which is the aggregate of the estimate of the Trade Packages and the Construction Management fee, plus any adjustments (e.g. variations to the Trade Packages). The Respondent would then pay the Claimant the amount set out in the Payment Certificate, not from the project account (for no such account had been established), but from its own funds. Thus, the process relating to the making of progress claims, the certification of such claims and the payment to the Claimant, supports the parties’ understanding that the Claimant would be entitled to be paid for the three components as outlined above. Indeed, each of the Payment Certificates stated that the basis of the assessments was “*in accordance with the terms of the Contract*”. Importantly, to substantiate the amount being claimed, the Claimant provided copies of its subcontractors’ invoices together with copies of the Variation orders it had duly signed off with the relevant subcontractor that had carried out the approved Variation¹⁰⁷. To my mind this process very much reflects the nature of the Contract that the parties had entered into and which is described in the Instrument of Agreement as “*Construction and Construction Management*”.

- (iv) Much of the Respondent’s position that it had requested the Claimant to arrange for the Trade Packages to be carried out by “contractors” is said to be supported by what the Respondent submits is the fact that the terminology “subcontractors” only began to be used by the Claimant as from February 2021. This, according to the Respondent, demonstrates that the parties had understood that the true nature of the relationship that the Claimant was required to have entered into was as agent for the Respondent, but that the Claimant had hidden from the Respondent’s knowledge the fact that, contrary to the terms of the Contract, the Claimant had in fact entered into subcontract with the various trade contractors. I however consider that the evidence does not support the submission that the Respondent makes on this point, and I say this for the following reasons:

- A. The Respondent relies on the exchange of emails between Ms Edwards (Slattery) and Mr Butterworth (Claimant), dated 18 December 2020, which the Respondent submits is evidence that the Claimant acknowledged that it was required to enter into contracts with trade contractors as agent

¹⁰⁷ See, for example, JRT Civil’s variation dated 14 July 2020 included with the Claimant’s progress claim 4 in Tab SM-64 of the SDSM.

for the Respondent. However, on my reading of the emails, what the emails show was that Ms Edwards had insisted that the Claimant was to enter into contracts with trade contractors in accordance with the form prescribed in the Contract, viz: AS2124-1992 and not the further requirement that such contract be entered into as agent for the Respondent. In fact the email chain had been initiated by the Claimant seeking to amend the requirement set out in special condition 1.2.2 (viz: to engage contractors based on AS2124-1992) for the reason that the companion document to the present Contract AS4916-2002 as recommended (and also as in fact stated on the Preface) was AS4917-2002 and that the use of AS2124-1992 would require extensive amendments. In any event, the evidence supports the Claimant's position, as the email that Mr Milfull had sent earlier on 18 December 2020, was stated as the Claimant seeking "*written approval to engage the subcontractors*"¹⁰⁸. Further, on the next day i.e. 19 December 2020, Mr Milfull sent an email relating to the Speciality Package (Insulated Panels and Epoxy Flooring) advising that tenders had been received from "*our subcontractors*" of which two of the tenders were from persons that were not included in the Form 4 document, but nonetheless recommended by the Respondent's consultant. In this email, the Claimant stated:

"ASM Builders asks (that) SBP be contracted directly to the Principal..."

Clearly, if the Claimant had been required to enter into a contract with all trade contractors as the Respondent's agent there would not have been a need for the Claimant to have requested that the Respondent enter into a direct contract with SBP. Tellingly however, Ms Edwards also responded to the Claimant that one of the tenderers, Arctic, who did not hold the requisite QBCC licence, could nonetheless be able to be appointed "*as a subcontractor*" to the Claimant. Further, Mr Milfull's email of 21 December 2020, continued the dialogue with Ms Edwards, by referring to one of the other tenderers, ISD, as a subcontractor;

¹⁰⁸ Copy of the email is included in Tab SM-120 of the SDSM.

- B. Relevantly, and contrary to the Respondent's submissions, the Claimant had referred to the trade contractors as its subcontractors in several of the earlier correspondences it had sent to the Respondent. Thus, for example, in Mr Milfull's email to Mr Stewart and Ms Edwards, dated 19 November 2020, in relation to the delays due to incomplete design documentation, Mr Milfull expresses concern that this would have "*for our subcontractors*"¹⁰⁹. Further, the minutes of some of the PCG meetings attended by not only various of the Respondent's representatives (such as Slattery) but also Mr Stewart, refer to the trade contractors as "*subcontractors*". For example, at page 4 of the minutes of the PCG meeting held on 18 August 2020 state, under the heading "*Programming and Subcontractors*":

*"LP (i.e. Luke Perkins) needs some clarity and certainty to inform subcontractors and suppliers on project timelines. (The Claimant) reiterates that they cannot keep them on hold and need design procurement program with which to keep them up to date and to enable them to accommodate the Project."*¹¹⁰

As a copy of those minutes had been sent to Mr Stewart, there is no evidence that Mr Stewart having subsequently objected to the expression of "subcontractors". In any event, the record of those minutes do not align with Mr Stewart's statement at Section 18 of his Statutory Declaration that the terminology of "*subcontractors*" only first emerged after 11 February 2021 and that the reference to that terminology was "*recent, disingenuous and contrived*".¹¹¹

- C. I should also observe that I have not been able to identify in any of the Respondent's written approvals given to the Claimant to engage the various trade contractors that the Claimant was to engage them as agent for the Respondent. Indeed, it very much appears to me that the trigger to what ultimately led to the Respondent issuing the notice of termination/show cause notice was not the

¹⁰⁹ Refer to Tab SM-106 of the SDSM.

¹¹⁰ Refer to Tab SM-68 of the SDSM.

¹¹¹ See paragraph 18.2 of the SDJS.

allegation that the Claimant was in breach of contract for not having engaged the trade contractors as agent for the Respondent, but rather that the Claimant had failed to engage such trade contractors under the AS2124-1992 contract as specified in SC1.2.2 of the Contract. Thus, when the Respondent issued its show cause notice on 11 February 2021, it stated that the Claimant was to show cause in relation to the following alleged substantial breach:

4. Substantial Breach 2: Failure to properly engage contractors ('Direct Contracts')

- 4.1 By SC 1.2.2 of the Contract, the Construction manager was to engage 'Direct Contracts' using 'standard AS2124-1992 General Conditions of Contract and procedures as agreed with the Project Manager'.
- 4.2 In substantial breach of SC 1.2.2 of the Contract, the Construction Manager has engaged Direct Contracts using a form of contract with is neither AS2124-1992 or a form agreed by the Project Manager.

Nowhere within the above allegation nor elsewhere within the show cause notice does the Respondent allege that the Claimant was in substantial breach of contract because of the Claimant's failure to engage the trade contractors as the agent for the Respondent. This would therefore suggest that, at that time, the Respondent did not consider the capacity in which the Claimant entered into contracts with the subcontractors to be an issue because the parties had proceeded with the common understanding that such trade contractors would be engaged by the Claimant directly as its subcontractors. If it were otherwise then (as outlined above) the Respondent would have established a project account and the parties would have adopted a different process for the making of progress claims and the assessment and payment of such claims. In his Statutory Declaration, Mr Stewart states that it was only when the Respondent had received the Claimant's response to its show cause notice that it first became aware that the Claimant had entered into direct contracts with trade contractors in its own right, rather than as the Respondent's disclosed agent:

"It was only once I received...a link to the contracts entered into by (the Claimant) had not only engaged contractors using an "alternative

agreement” but had also engaged the contractors in its own right.

...

At that time, it was clear that (the Claimant) was incapable of complying with (the Respondent’s) instructions and that the Claimant could not be trusted to proceed as (the Respondent’s) agent. I considered that (the Claimant) was hiding the truth from me and was not acting in (the Respondent’s) interest”.¹¹²

The Respondent then proceeded to issue a Termination notice, stating that it had formed the view that the Claimant had failed to show reasonable notice¹¹³. The point however that needs to be emphasised (as the Claimant also stated in its own Notice of Termination), is that the Respondent’s show cause of 11 February 2021 had not alleged that the Claimant was in substantial breach of contract because it had engaged subcontractors in its own right. No doubt, had the Respondent’s show cause notice included that allegation then the Claimant, having been made so aware, would have responded to such an allegation, but the failure to include that allegation in the show cause notice deprived the Claimant of the opportunity to address that issue before the Respondent issued its Termination Notice. Be that as it may, I am nonetheless not persuaded by the Respondent’s submission, based on the evidence set out in the SDJS, that the Claimant’s engagement of the trade contractors constituted a breach of contract and also that the Claimant had hidden from the Respondent the fact that it had entered into direct subcontractors. For all the reasons set out above, I consider that the parties proceeded on the common understanding that the Claimant would engage the trade contractors as its subcontractors. It was only when the Respondent issued its Termination Notice on 6 April 2021 that this allegation had first been raised. In the process of arriving at this conclusion, I have carefully considered the evidence as provided to me, but I would be remiss if I did not make the further observation that the Respondent did not include

¹¹² Paragraph 31.12 and 31.15 of the SDJS.

¹¹³ Refer to the Respondent’s Notice of Termination, dated 6 April 2021, copy of which is included in Tab SM-156 of the SDSM.

any evidence of its representatives, other than Mr Stewart, that had given approval to the Claimant to engage various trade contractors, viz: Mr Graham Scott, Mr Matthew Petchell and Ms Edwards. It would have been helpful to have received evidence from those persons as to their understanding of the capacity that the Claimant was to enter into with the trade contractors when they had given such approval. However, no such evidence had been provided; and

- D. In its AR, the Respondent submits that the Claimant's failure to include supporting statements with its payment claims prior to February 2021 (contrary to s 75(7) of the Act) evidences the Claimant's covert conduct:

*"It is telling that (the Claimant) did not include a supporting statement with any of its claims prior to this Payment Claim. Likely because before this time (the Claimant) did not wish to reveal that it had engaged subcontractors, in substantial breach of the Contract."*¹¹⁴

Leaving aside that this allegation had only first been raised in the AR, but, for present purposes, assuming such allegation to be correct, then this would have the effect of exposing the Claimant to a penalty for such (past) breaches. It is not a decisive factor in satisfying me of the Claimant's breach of contract, nor the nature of the Claimant's conduct, as contended by the Respondent.

77. Accordingly, for all the reasons set out above, I accept the Claimant's submission that the Respondent had approved and directed the Claimant to engage the various trade contractors to carry out work on the Project, as subcontractors. Insofar as the Claimant had entered into contracts on terms other than an AS2124-1992 contract then, for the reasons set out in the Claimant's Response to the Notice of Show Cause, dated 18 February 2021¹¹⁵. I do not consider this to have been a material breach sufficient for it to have been regarded to be of a substantial nature. As the Claimant stated in that document, the Claimant having entered into the alternative QMBA contract with its subcontractors had not caused any prejudice to the Respondent. Further, and again for the reasons that were set out in the Claimant's Response to the Notice of Show Cause, the requirements in SC1.2.2 of the Contract for the Claimant to enter into contracts with the trade contractors on the AS2124-1992 form was

¹¹⁴ Paragraph 19.51 of the AR.

¹¹⁵ Copy included in Tab SM-158 of the SDSM.

clearly unsuitable and difficult (if not impossible) to comply.¹¹⁶ It is also relevant to note that the AS2124-1992 form was not the companion document that Standards Australia had recommended for use with the present Contract¹¹⁷.

78. I consider, for the reasons set out above, that the parties had adopted the course of conduct as described by the Claimant at paragraph 13.1 of the AA (refer also to paragraph 64(d) above) and that therefore the amounts that the Claimant claims in respect of its subcontractors' work in the present Payment Claim have been validly claimed under the Contract. Thus, insofar as the Respondent contends that the Claimant's claim is made outside the Contract and that such a claim cannot be made under the Act, then, in my view, such a position cannot be sustained.
79. In any event, I consider that the parties, by their conduct, adopted a conventional basis for the engagement of subcontractor payments under the Contract. In my view, the conventional understanding or common assumption that the parties had adopted as to their legal relationship was that:
- (a) The Claimant's scope of work included the construction and construction management of the Project;
 - (b) The Claimant was obliged to engage the trade contractors as its subcontractors on the Project in accordance with the written instructions that had been given by the Respondent (through its various representatives) and that as such, the Claimant would pay those subcontractors for the work they performed;
 - (c) The Claimant was entitled to claim, from the Respondent, amounts relating to the work carried out by the subcontractors and that that included the variation works as directed by the Respondent;
 - (d) Where variation work had been approved, the Claimant was entitled to claim a margin of 10%; and
 - (e) Subject to assessment by Slattery, the Respondent was required to pay to the Claimant, the amounts claimed in relation to the work that the subcontractors had carried out, including the variations as directed by the Respondent.
80. I therefore accept the Claimant's submission that, relying on the above conventional understanding/common assumption, the Claimant had engaged and paid its subcontractors in the expectation that it would receive payment for that work from the Respondent. Clearly, if the Respondent had expressed any view that was inconsistent with that understanding, the Claimant would have engaged the trade contractors in a different manner but the Respondent did not express any view contrary to the parties' common assumption until the early months of 2021. I therefore agree with the Claimant's submission that all the elements relating to an estoppel by convention have been established, viz:

¹¹⁶ Refer to paragraphs 146 to 150 of the Response to the Notice of Show Cause.

¹¹⁷ Refer to the Preface page of the Contract.

“In the circumstances:

- (a) (The Claimant) and (the Respondent) proceeded on the basis that subcontracts and payments for subcontractors work would be administered in the manner described above;*
- (b) both parties conducted their relationship on the basis of that mutual assumption (to (the Claimant’s) significant financial disadvantage);*
- (c) each party knew or intended that the other act on that basis; and*
- (d) departure from that assumption will occasion detriment to (the Claimant);*

such that (the Respondent) is estopped from taking a (contrary position) by denying that (the Claimant) is entitled to recover amounts due and payable to subcontractors for work that they performed on the Project for (the Respondent). ”¹¹⁸

I deal below with what value is to be given to the amounts claimed by the Claimant in relation to the various components of the Claimant’s claim that includes the claim for the subcontractors’ work and the variations to such work¹¹⁹.

VALUATION OF THE PAYMENT CLAIM

Introduction

Overview

- 81. Having decided that the Claimant is entitled to make a progress claim under the Act and that the claimed components of its Payment Claim are claims made under the Contract, I now proceed with the valuation task.
- 82. The Payment Claim comprises of four separate components, viz:
 - Preliminaries, Profit and Attendance
 - Subcontractor Trade Packages
 - Subcontractor Trade Packages Variations; and
 - EOT/delay costs
- 83. Of the above four components, the Respondent contests the Claimant’s entitlement to the amounts claimed for the first three components, but (as stated in the Payment Schedule) the Respondent agrees to the payment for the EOT/delay cost amount claimed, viz: \$1,000.00. I therefore proceed to deal with each of the three contested

¹¹⁸ Paragraph 13.10 of the AA.

¹¹⁹ See paragraph 129ff below.

components of the Claimant's claim and in doing so, I will also deal with the Respondent's entitlement to set off from any amounts payable to the Claimant. (Please note that references to amounts in this section of my Decision are exclusive of GST, unless otherwise stated.)

Assessment of Management Fee

The Parties Submissions

84. The amount claimed in relation to this component was set out under Value A of the Payment Claim, as follows:

Sub Items	Contract Amount	Previous % Complete	Previous Amount Complete	Current % Complete	Current Amount Complete	Amount This Claim	Cost to Complete
1a Preliminaries Fixed (Mobilisation, demobilisation, Insurances, Security, Permits and Fees, Final Clean	\$22,750.00	40.00%	\$9,100.00	90.0%	\$20,475.00	\$11,375.00	\$2,275.00
1b Preliminaries – Time Related, as per Form 2 Tender – Value of claim relates to resources and overheads, sit sheds, amenities, carnage, scaffolding and access equipment, temporary services (water, sewer, power, etc)	\$192,170.00	55.00%	\$105,693.50	100.0%	\$192,170.00	\$87,986.25	\$ -
2 Margin (as per Form 2 from Tender documentation, calculated at 4% of value of the \$3,700,000.00 trade packages estimate provided at Tender Stage by the Principal)	\$148,000.00	23.30%	\$34,529.64	63.7%	\$94,434.87	\$59,905.23	\$53,565.13
3 Attendance on subcontractors – management, coordination, supervision of subcontractors to ensure work is completed in accordance with design and Principal supplied information/requirement	\$169,100.00	73.00%	\$122,967.75	99.0%	\$167,409.00	\$44,441.25	\$1,691.00
VALUE A TOTAL – Preliminaries Profit and Attendance	\$532,020.00		\$272,290.89		\$474,488.77	\$203,707.73	\$57,531.13

85. The Claimant submits that the amount claimed under this component, viz: \$203,707.30 for the items 1a, 1b, 2 and 3, is a claim for the Management Fee.

86. In its Payment Schedule, the Respondent noted the amount claimed together with the amounts previously claimed in relation to this component, viz: \$272,290.89, represents 89.19% of the total value of the Management Fee. The Payment Schedule

however referred to the various contractual provisions that deal with the Respondent's obligation to pay for this component. Thus, clause 2.1 of the Contract states:

"The Principal shall pay the Construction Manager the management fee and fee adjustments in accordance with the Contract."

Further, under clause 1.1 of Annexure Part C, the Claimant is to be paid a lump sum fee of \$532,020.00, but clause 25.1 of the Contract states that payments under clause 1.1 of Annexure Part C shall be *"payment on account only"*. Thus, the Respondent stated in the Payment Schedule that the Claimant is entitled to be paid a lump sum amount for the performance of all of the Services under the Contract. However, under Annexure B of the Payment Schedule (being an eleven-page spreadsheet entitled *"Principal's assessment of the Services carried out by the Construction Manager"*), the Respondent stated that it had identified:

- (a) the Services (which form part of the Claimant's scope of services) as set out at Annexure B of the Contract) that the Claimant had failed to carry out; and
- (b) the Services (which form part of the Claimant's scope of services as set out at Annexure Part B of the Contract), that the Claimant had failed to perform to the standard required by the Contract, such that the Services are defective and therefore do not comply with the Contract.

Accordingly (so the Payment Schedule stated) as the Claimant had failed to perform the Services under the Contract (either adequately or at all), the Claimant has no entitlement to payment of the Management Fee which it had not carried out, or which had not been carried out to the standard required under the Contract.

- 87. Further, the Payment Schedule stated that the Respondent had assessed the Services completed by the Claimant under the Contract at 15.31%, or \$81,475.57 and to support its assessment, the Respondent relies on not only the information summarised in the above paragraph (including the details set out in Annexure B of the Payment Schedule), but also the independent expert report prepared by Mr Julian Hemms of Aston Consult ("Aston Report"), a copy of which was also attached to the Payment Schedule.
- 88. Further, the Payment Schedule stated that, in any event, based on the Claimant's own documents, the Services cannot be more than 65% complete because:
 - (a) the Management Fee is a lump sum for completing the Services; and
 - (b) by reference to the Claimant's cashflow forecast (prepared in February 2021) it was stated that an additional \$195,000.00 in Management Fee would be incurred between March and June 2021 in order to complete the Project.
- 89. The Payment Schedule also stated that insofar as the Aston Report had estimated that the Claimant has provided Services to the value between \$81,475.57 and \$204,127.18

depending on the method of assessment adopted, the Respondent has adopted the assessment of \$81,475.57.

90. In its AA, the Claimant submits that it was only in its Payment Schedule that the Respondent first contended that the Claimant is required to have carried out all of the tasks outlined in Annexure B to be entitled to the payment of the full amount of the lump sum included in the Contract at clause 1.1 of Annexure Part C. Insofar as the Respondent relies on the opinion set out in the Aston Report to support this position, then the Claimant submits that that view is:

- (a) Not only inconsistent with the assessment carried out by Slattery and paid by the Respondent without reservation over a 12-month period, but also that the Contract does not require the Claimant to carry out all of the tasks to be entitled to the lump sum amount. This is because:

(i) Services is defined to mean “*all the agency and other services in Annexure Part B which the Construction Manager is or may be required to carry out...*” (emphasis that of the Claimant. This is because:

(ii) the multiple items set out in the Annexure Part B are contingent on the occurrence of events, without which they will never be required to be performed “*For instance, one task listed “As Agent” is to “Recommend and arrange suitable replacement for any contractor whose contract may be determined”. That is an obligation that cannot arise unless a contractor’s contract is determined*”¹²⁰;

- (b) The Claimant had engaged its own independent expert report to respond to the Aston Report and the report it obtained from Mr Tsipis of E3 Advisory (“Tsipis Report”) expressly disagrees with Aston’s assessment of the Management Fee on a proportional basis. On this issue Mr Tsipis states:

“Based on my experience in the administration and analysis of contracts based upon a management fee, I have never encountered a circumstance that the progress payment of a management fee is assessed proportionally with the progress of the awarded trade works. This is due to the effort expended by the manager prior to the award of the trade packages so that the manager has expended significant effort even before there is any progress on the actual trade works. Thus, the management fee tends to be inversely proportional to the progress of awarded trade works, i.e. high fee expenditure at the early stages with little trade work being carried out, and with waning fee expenditure as the trade works ramp up.

To follow Aston’s view, in the stage prior to any award of trade work no management fee is payable, despite the effort expended by a manager in the preparation and execution of tender packages.

¹²⁰ Paragraph 23.6(b) of the AA.

This is clearly not the intent of any progress payment of a management fee, as contemplated by clause 25 of the contract.

Accordingly, I disagree with the fundamental premise of Aston's assessment."¹²¹

91. The Claimant refers to and relies on that part of the Tsipis Report where the author concludes that the amount claimed in respect to the Management Fee in the Payment Claim, is reasonable¹²².
92. In its AR, the Respondent submits that, notwithstanding previous requests¹²³ the Claimant has failed to provide any evidence to support its position that 89.19% of the Services have been completed and this is despite the Payment Schedule having included a copy of the Aston Report that had identified the various Services that had not been completed.

*"Instead (the Claimant) provides only vague and unsupported assertions in respect of the Services (the Claimant) elected to perform, rather than addressing the services it was required to perform."*¹²⁴

93. Insofar as the Claimant relies on the Tsipis Report, then the Respondent submits that that Report does not provide a sound basis to substantiate that the Claimant is entitled to 89.19% of the Management Fee. Rather (so the Respondent contends), Mr Tsipis:
- (a) relies on the original date for completion (19 June 2020) as a basis for asserting that as at the date of the Payment Claim (24 May 2021), the Claimant would have expended:
 - (i) 90% of the Preliminaries – Fixed. However, as set out at 6.1 of the Supplementary Aston Report, Mr Tsipis' assessment lacks support and is based solely on the original date for practical completion and fails to take into account the EOTs and delay costs given to the Claimant;
 - (ii) 100% of the Preliminaries – Time Related. However, as set out at 6.2 of the Supplementary Aston Report, Mr Tsipis failed to have due regard to the Contract; and
 - (iii) 99% of the "Attendance on Subcontractors" item. However, such an assessment is untenable given that the total trade works had only progressed by 44.7%¹²⁵ and also because the Claimant had failed to "attend" to many of its obligations relating to subcontractors (e.g. safety, site management, etc.);

¹²¹ Paragraph 49-51 of the Tsipis Report.

¹²² Refer to paragraph 59 of the Tsipis Report.

¹²³ Refer to paragraph 32.40 of the SDJS.

¹²⁴ Paragraph 31.6 of the AR.

¹²⁵ Part 6.4 of the Supplementary Aston Report.

- (b) relies on the “value” of the trade package works as claimed in the Payment Claim for justifying the claimed margin¹²⁶.
94. To support its position that the Claimant has failed to perform the level of Services claimed the Respondent provides the following list of incomplete services:
- (a) Cashflow management over the course of the Project - This is evidenced by the cashflow forecast included in the Claimant’s PCG meeting minutes dated 31 April 2021, wherein (the Claimant) forecasted that trade package works would cost approximately \$1 million more than what was budgeted at the commencement of the Project;
 - (b) Procuring appropriate design documents consistent with the project timeline - The Claimant relied on consultants (engaged by the Respondent) to manage design procurement. When the procurement of design documents did not align with the Claimant’s program, it sought to shift responsibility for design coordination on to the Respondent;
 - (c) Awarding trade contracts in consultation with the Principal and in accordance with the Respondent’s instructions, as required by the Contract. The Claimant not only failed to award trade contracts in the form required by the Contract, but failed to engage trade contractors as the Respondent’s disclosed agent;
 - (d) Effecting and maintaining relevant insurances - As explained at paragraphs 42.9 to 42.21 of the Stewart Declaration, the Claimant caused the trade contractors to obtain unnecessary (duplicated) contract works insurance policies in respect of the Project (despite the Contract clearly stipulating that the Respondent would insure the works);
 - (e) Reviewing and assessing claims for payment made by contractors against the value of the works completed, resulting in the Respondent having paid contractors for incomplete and effective works;
 - (f) Developing and or implementing environmental management, industrial relations, and work health and safety procedures;
 - (g) Developing and implement quality assurance strategies with the effect that the Respondent is unaware of the quality and compliances of the works completed under the Claimant’s supervision;
 - (h) Monitoring the performance of contractors and the quality of their work to secure the prompt remedy of the defects, resulting in the Respondent incurring substantial rectification costs to bring the works to an acceptable state;

¹²⁶ In this regard, the Respondent refers to paragraph 149 of the Supplementary Aston Report, where the author opines that the margin payable should be assessed proportionally to the progress of other parts of the Management Fee, including the award of trade packages.

- (i) Maintaining project records or implementing construction monitoring reporting systems - Despite required by the Respondent, the Claimant failed or refused to provide documentation that evidenced adequate project records were maintained during the construction phase of the Project;
- (j) Liaising with the Respondent on progress and quality - As a result, the Respondent was often blind-sided by extension of time claims for substantial periods of time, after having no notice that delays were occurring on site; and
- (k) As a result of the Claimant's breach of the Contract, the Claimant's engagement was terminated prior to completing the Services relating to completion and handover, as well as final completion.

Accordingly, the Respondent submits that the Claimant has *"failed to provide any cogent reasons for why (the Respondent) should be required to pay an amount equal to 89.19% of the Management Fee. Especially in circumstances where, despite request, (the Claimant) has failed and or refused to substantiate the Services actually completed and the value of the Management Fee claimed."* If however I were to decide that the Claimant is entitled to a payment for this component of its Payment Claim, then the Respondent refers to and relies upon the assessment set out in the Aston Report.

My Decision

95. It is appropriate that I commence the analysis of this component of the Payment Claim by observing that the quantity surveyor firm that the Respondent had engaged to assess the Claimant's progress payment claims, Slattery, had, as at the end of January 2021, certified that the Claimant was entitled to a Management Fee of \$272,291.00, or 51% of the Total Management Fee amount of \$532,020.00 and that the Respondent had paid the Claimant the amounts so certified. Thus, in rejecting the amount claimed in relation to the Management Fee, the Respondent has, by reference to the Aston Report, formulated an entirely different approach to that which Slattery, had adopted during the course of the Project and which it appears to have accepted without any criticism. Now, by reference to the Aston Report, the Respondent contends that the Claimant has significantly over-claimed and been significantly overpaid for the Management Fee, such that it seeks to assess the total value of this component, not at \$474,488.87 (or 89.19%) as claimed, but at \$81,475.57 (or 15.31%). I have difficulty in accepting the position that the Respondent now seeks to adopt.
96. Rather than provide an explanation as to why the approach that Slattery had adopted during the course of the Project in relation to the progressive assessment of this component was incorrect and as to why it had proceeded to make progress payment as per the amounts set out in the Payment Certificates issued by Slattery without previously raising any objections, the Respondent now refers to and relies on the assessment methodology set out in the Aston Report. Whereas the author of the Aston Report contends that his assessment and approach complies with the relevant provisions of the Contract, I disagree. As pointed to in the Tsipis Report, the basis upon which the Aston Report has assessed this component is not only inconsistent

with the approach that had been adopted over the course of the Project, but is also contrary to industry practice.

97. I mean no disrespect to the author of the Aston Report, but the notion of assessing a progress payment of a management fee based proportionally with the progress of awarded trade works, is unusual and contrary to how a construction manager would be expected to carry out its services. As Mr Tsipis points out in his Report, the approach adopted in the Aston Report fails to take into account of the efforts a construction manager has expended prior to the award of trade packages. In his Statutory Declaration, Mr Milfull details the work that the Claimant had been involved with in the negotiation and eventual engagement of the trade contractors. This would therefore support Mr Tsipis' view that the Management Fee is in fact inversely proportional to the progress of awarded trade works and that appears to explain the approach that Slattery had adopted in the assessment of this component. For example, when valuing the Claimant's progress claim #1 where the Claimant had claimed an amount of \$45,554.00 (or 9% of the total value of the Management Fee) even though only \$29,980.00 of the total (estimated) Trade Package amount of \$3,700,000.00 (or 0.18%) had been let, Slattery had approved such claim, no doubt reflecting the Claimant's extensive efforts relating to the negotiation and engagement of JRT Civil. This approach continued to be adopted throughout the course of the Project, as can be seen when Slattery issued its Payment Certificate #10 and valued the Management Fee at \$272,291.00 (or 51% of the total Management Fee of \$532,020.00) even though only \$1,400,935.00 of the total of \$3,700,000.00 of the trade package (or 37.86%) were complete. I am not persuaded as to why the approach that the parties and Slattery had adopted during the course of the Project should now be revised by the adoption of an entirely different approach as set out in the Aston Report. It seems to me that in carrying out its assessment during the course of the Project, Slattery would have been well acquainted with the construction management service that the Claimant had provided and that it was on this basis that Slattery issued its Payment Certificates.
98. Further, insofar as the author of the Aston Report has sought to assess the Management Fee by reference to the extent to which the Claimant had carried out all of the services set out in Annexure Part B then that approach is not in accordance with the requirement set out in the Contract. As the Claimant correctly submits, the definition of *Services* in clause 1 of the General Conditions states that that expression refers to "*all the agency and other services in Annexure B which the Construction Manager is or may be required to carry out and complete under the Contract....*". The operative words within the definition are "*is or may be required to carry out*" which clearly countenance, contrary to the Respondent's submission, that not all of the services listed in Annexure B would be required to be actually carried out. The example given by the Claimant at paragraph 22.6(b) of its AA (see paragraph 90(a)(ii) above) is a good illustration of how a listed item of service may in fact never be required to be carried out by the construction manager.
99. Further, insofar as the author of the Aston Report contends that the carrying out of a desktop review of the available material had validated his assessment, then such a "cross checking" exercise does not detract from the view I have expressed at paragraph 97 above. As Mr Tsipis states at paragraph 55 of his Report, given Slattery's knowledge of the Claimant's progress during the course of the Project,

greater weight should be given to its assessments rather than the approach adopted in the Aston Report. After all Slattery's assessment of the Claimant's progress claims relating to the Management Fee would have been based on Slattery's familiarity with the services that the Claimant had progressively performed.

100. Accordingly, based on the detailed information set out by Mr Milfull in his Statutory Declaration relating to the construction management services provided, the assessment carried out by Slattery during the course of the Project, the Claimant's evidence as to the state of completion of the works as at the time when the Claimant ceased work on site and on the opinion set out in the Tsipis Report as to how a Management Fee is ordinarily claimed and paid, I consider that the amount claimed for the Management Fee in the Payment Claim is reasonable. I therefore decide that the value to be given to the Management Fee component of the Payment Claim is \$203,707.73.

Assessment of Trade Packages

Introduction

101. In its Payment Claim, identified in the spreadsheet under "Value B", the Claimant claims an amount of \$959,936.62. This amount represents the value of the Subcontractor Trade Packages and the make-up of this component was set out in the Payment Claim as follows:

Item No.	Subcontractor Trade Packages (approved) as part of \$3,700,000 estimate	Contract Amount	Previous % Complete	Previous Amount Complete	Current % Complete	Current Amount Complete	Amount This Claim	Cost to Complete
6	Operational Works – JRT Approved contract from January (total paid).	\$101,930.99	100.00%	\$101,930.99	100.00%	\$101,930.99	\$0.00	\$ -
7	Operational Works – new contract with JRT entered into on June 9 2020. Contracted work as per the revised B of Q supplied by the Principal as part of tender documentation (Calibre Civil B of Q Job No: 18-003216, dated 03.06.2020). The value claimed represents an arithmetic error identified in the reconciliation of all JRT invoices and previous values claimed by ASM.	\$491,895.10	45.30%	\$219,363.10	45.6%	\$224,205.10	\$4,842.00	\$267,690.00
7a	JRT- Crossovers – The three concrete driveway crossovers installed, that were not included in the revised B of Q supplied by the Principal.	\$18,288.00	100.00%	\$18,288.00	100.00%	\$18,288.00	\$0.00	\$ -
8	Retaining wall works at eastern end (Loading Dock) – Agreed package of work completed by ASM as part of strategy to maintain momentum during design delay in June/July.	\$47,014.00	100.00%	\$47,014.00	100.00%	\$47,014.00	\$0.00	\$ -
8a	Retaining wall additional costs (additional steel and geotechnical testing not inc in item 8 price, Principal Rep approved).	\$4,560.87	100.00%	\$4,560.87	100.00%	\$4,560.87	\$0.00	\$ -
9	Footing package (by ASM) – Agreed package of work completed by ASM as part of strategy to maintain momentum during design delay in June/July.	\$92,152.70	100.00%	\$92,152.70	100.00%	\$92,152.70	\$0.00	\$ -

9a	Footings additional costs (as approved by the Principal's Rep and Slattery)	\$1,083.68	100.00%	\$1,083.68	100.00%	\$1,083.68	\$0.00	\$ -
9b	Relocation of excess fill to adjacent property owner's (Mick Cranny) – as approved by the Principal's Rep and Slattery.	\$2,425.00	100.00%	\$2,425.00	100.00%	\$2,425.00	\$0.00	\$ -
10	Structural Steel Fabrication (contract \$649,327 less supplied tonnage rates = \$610,284) – as negotiated with the Principal's Rep. The value of the work relates to the supply and installation of the remaining structural steel, purlins and wall girts to enable the building to be completed, to allow all wall and roof sheeting to be installed.	\$810,284.00	42.30%	\$275,000.00	100.00%	\$610,284.00	\$335,284.00	\$ -
11	Hydraulics – tender documents supplied by the Principal, and Hohmanns submission approved by the Principal as per supporting information. The value of the claim relates to installation of stormwater pits, four fire hose reels, earthworks, concrete works around the greasetrap lid, installation of the PRZ valve, underground drainage, fire line installation, internal hydrants installation, water reticulation, vents within building, stainless steel grates on blue line on plans, stainless steel trench grates.	\$584,194.00	55.50%	\$324,534.28	74.0%	\$433,551.63	\$109,017.35	\$150,642.37
12	Concrete Works (CBC Ramage) – all concreting works as per Principal supplied documentation, contracted in accordance with Principal's instructions. Claim value relates to subcontractor concrete and demobilisation costs, external pavings – pedestrian path and front apron concreting, driveway grid D to boundary concreting, grid M to P concreting, external building apron at Grid 1 columns concreting.	\$440,362.40	65.00%	\$284,267.68	100.00%	\$440,382.40	\$156,114.72	\$ -
13	Dock leveller costs (Safetech require payment for production, \$26,315 has been paid by ASM, cast in sections are in place). Approved by the Principal.	\$27,700.00	95.0%	\$26,315.00	95.0%	\$26,315.00	\$0.00	\$1,385.00
14	Electrical (NR & CL Smoothy Electrical) – Contracted on the basis of Principal supplied plans and specifications, and approved by the Principal as per supporting documentation. The value of this claim relates to the installation of the pit adjacent to the transformer and associated conduits, and installation of incoming NBN conduits and pits – as evidenced in photographs.	\$189,443.00	2.00%	\$4,000.00	3.0%	\$8,000.00	\$4,000.00	\$181,443.00
15	Blockwork – CQ Brick and Blocklaying – admin blockwork as per documentation provided by the Principal for tender, contracted as per approval from Principal/Slattery as evidenced. The value of claim relates to the supply and installation of all blockwork in the administration building, all internal blockwork walls and feature pillars as shown in photographs.	\$56,522.00	0.00%	\$0.00	100.0%	\$56,522.00	\$56,522.00	\$ -
16	Waterproofing – The value of the claim relates to the installation of waterproofing membranes to all blockwork openings, as approved by Principal Representative. This includes all window openings, external door	\$1,356.60	0.00%	\$0.00	100%	\$1,356.60	\$1,356.60	\$ -

	openings, shopfront glazing openings to ensure compliance.							
17	Roofing and Wall Cladding (SQR) – works as per tender documents and submission approved by the Principal, SQR contracted following approval from Principal and Slattery. The value of the claim relates to the supply and installation of all roofing iron, safety mesh and insulation in the roof, installation of 72% of roof flashings, supply and installation of all wall insulation, supply and installation of 63% of wall cladding, 55% of wall flashings, 40% of roofwater (gutters), access equipment costs (scissor lifts and boom lift hire), 46% of soffits in loading/unloading bays, consumables, accommodation, safety handrail installation.	\$361,712.00	0.00%	\$0.00	15.0%	\$262,124.99	\$262,124.99	\$99,587.01
18	Glazing (G James) – Windows and glazing as per Principal supplied documentation, as noted in the G James tender submission, which was approved by the Principal and contracted accordingly. The value of the claim relates to the supply and installation of shopfront glazing, entry doors, glass sliding doors and glazing at lunchroom, all windows, all louvres as shown on plans.	\$23,480.00	0.00%	\$0.00	96.0%	\$22,515.21	\$22,515.21	\$964.79
19	JRT – remove excess fill from site as directed by PR 20.01.2021 – continued relation on the same basis as Line Item 9b	\$4,394.50	0%	\$ -	100%	\$4,394.50	\$4,394.50	\$ -
20	ASM Builders – Grouting of columns (part of Structural Steel package as approved by GS 24.02.2021, but not included in either the s/steel or concreter's scope). The work involved the supply and installation of cementitious ground under all structural steel columns, prior to the completion of concreting works.	\$3,765.25	0%	\$ -	100%	\$3,765.25	\$3,765.25	\$ -
Value B	Subcontractor Trade Packages as part of \$3,700,000 estimate	\$3,062,584.09		\$1,400,395.30		\$2,360,871.92	\$959,936.62	\$701,712.17

102. It will be noted from the above table that the amount previously claimed in relation to the Trade Packages was \$1,400,935.30 and that the amount claimed in the Payment Claim in respect to this component is \$959,935.62 which according to the Claimant, results in the value of the Trade Packages brought to completion, as at the date of the Payment Claim, being \$2,360,871.92. In relation to this component, it is evident that the make up being claimed relates to items 7a, 10, 11, 12, 14, 15, 16, 17, 18, 19 and 20. Attachment A to the Payment Claim included copies of invoices issued to the Claimant by its subcontractors and the inclusion of these invoices were intended to support the claims relating to this component of the Claimant's claim.

103. In its Payment Schedule, the Respondent stated that if the Claimant is entitled to the claim amounts for the Trade Packages (which I have decided for the reasons set out above, that it does) then the Respondent has assessed the total value of the work relating to this component at \$1,567,096.23, rather than the total value as stated in the Payment Claim of \$2,360,871.92. The basis upon which the Respondent had arrived at its total assessed value of the Trade Packages component was detailed in Annexure C of the Payment Schedule. Annexure C is a 12-page spreadsheet where the seventh

column sets out the Respondent's assessment in respect to each of the Trade Packages items and where in the eight/final column the Respondent sets out its reasons for the valuation it had given for the various items. The Payment Schedule also referred to the relevant section of the Aston Report, which had also been included with the Payment Schedule. Relevantly, the Aston Report had assessed the total value of the Trade Packages complete, as at the date of the Payment Claim, at \$1,929,212.90.

104. In its AA, the Claimant notes that insofar as the Respondent seeks to reopen the assessments previously given by Slattery, then the Claimant refers to and relies on the contemporaneous assessments made by Slattery during the course of the Project. The Claimant also refers to and relies on the evidence set out in the SDJS, as well as the evidence of its Site Supervisor, Mr Jamie Ells as set out in his Statutory Declaration ("SDJE"). Further, the Claimant has included a spreadsheet at Annexure J of its AA entitled "*Response to Annexure C of the Payment Schedule*". This eleven-page spreadsheet document sets out the Claimant's response to the Respondent's reasons for having given a different assessment of the various items that make up this component of the Payment Claim.
105. In its AR, the Respondent refers me to the relevant section of the SDJS¹²⁷ and submits that the Claimant has failed to value the works completed in the respect of the Trade Packages, but has instead simply passed on the invoices it had received from its various trade contractors:

"(The Claimant) has made no attempt to value the work as it was actually performed. (The Claimant) has instead based its claim on whatever amount the subcontractor claimed, without any attempt to verify that amount".¹²⁸

106. Further, the Respondent submits that the limited invoices that the Claimant provided do not align with the amounts that the Claimant claims in respect of the Trade Packages items¹²⁹. The Respondent submits that the mere passing on of the invoices that the trade contractors had given the Claimant demonstrates that the Claimant had failed to consider whether the amounts set out in the invoices reflect the value of the work performed.¹³⁰ Thus, the Respondent submits:

"Where (the Claimant) has permitted subcontractors to submit claims with next to no particulars and where (the Claimant) has not adduced cogent evidence of the value of the work actually performed by the subcontractors, no weight should be placed on the subcontractor invoices in determining the progress payment, as it is apparent that (the Claimant) has simply passed on those invoices and has not considered their validity".¹³¹

¹²⁷ Specifically, section 42 and 43 of the SDJS.

¹²⁸ Paragraph 24.10 of the AR.

¹²⁹ The Respondent gives the example of the concreting trade package – refer to paragraph 24.13 of the AR.

¹³⁰ The Respondent gives the example of the claim for \$326,136.09 for "*Operational Works*" which had been split in line items 6 and 7 of the Payment Claim but where the scant information set out in the invoices make it impossible to determine which line item each of the invoices related to, let alone the actual works that were the subject of the claim.

¹³¹ Paragraph 24.23 of the AR.

107. The AR also refers me to the Supplementary Aston Report which has had regard to the material that the Claimant had included in its AA and which the Respondent adopts. Relevantly, the author of the Supplementary Report remains of the opinion as to the value of the Trade Packages he had given in the original Report (viz: that the progress value was \$1,929,212.90, or 44.47% of the final forecast trade price based on the Claimant's cost plan).¹³² The Respondent submits that I should prefer the valuation set out in the Aston Reports "*over (the Claimant's) purported and frankly unsubstantiated valuation of the Trade Packages*"¹³³ and that the valuations of the Trade Packages set out in those Reports are "*based on an actual inspection of the works completed on site, as well as the tangible evidence provided by (the Claimant) to date*".¹³⁴
108. Further, in both its Payment Schedule and the AR, the Respondent stated that the Claimant has no entitlement to a progress payment in respect to Trade Packages under which unlicensed building work was performed. The Payment Schedule stated that the Respondent had reviewed the material provided and, as a result, the Respondent has identified that JRT Civil was engaged by the Claimant to carry out unlicensed building work, "*including the provision and the connection of material (such as stormwater pipes and precast headwall) for the stormwater system and various concreting work*"¹³⁵ in circumstances where JRT Civil did not hold a contractor's licence pursuant to the QBCC Act. Consequently (so the Payment Schedule stated) by reason of s42(3) of the QBCC Act, JRT Civil is not entitled to payment except as provided by s42(4) of the QBCC Act.

"...The (Claimant) has not established that:

- (a) any amount is payable pursuant to s42(4) of the QBCC Act;*
- (b) why it is entitled to claim payment from the (Respondent) for unlicensed building work performed by JRT Civil in circumstances where there is no requirement or obligation for the (Claimant) to pay any amount to JRT Civil; and*
- (c) how it has properly performed its obligations as the Construction Manager in engaging unlicensed contractors to perform "building work" and seeking payment from the (Respondent) for that work where, on the current facts, there is no obligation for the (Claimant) to pay JRT Civil"*¹³⁶

109. It seems to me that before carrying out any assessment of the Trade Packages items, it would be appropriate that I first deal with the two significant threshold issues raised by the Respondent, viz: the issue relating to the QBCC licensing and the issue of whether the Claimant had merely passed on the invoices it had received from its trade contractors without satisfying itself whether the amounts set out in the invoices reflect the actual work carried out.

¹³² See paragraph 6(c), page 5, of the Supplementary Aston Report.

¹³³ Paragraph 24.29 of the AR.

¹³⁴ Paragraph 24.30 of the AR.

¹³⁵ Paragraph 11.7 of the Payment Schedule.

¹³⁶ Paragraph 11.9 of the Payment Schedule.

The QBCC Licensing Issue

The Claimant's Submissions

110. In its AA, the Claimant responded to this issue, as follows:

- (a) The Claimant holds a “Builder – Medium Rise Licence”, with no attached conditions¹³⁷. This class of licence is set out in Part 5 of Schedule 2 of the Queensland Building and Construction Commission Regulation 2018 (“QBCC Regulation”) with the following scope of work set out:

- ‘(1) Building work on a class 1 or class 10 building.*
- (2) Building work to a maximum of 3 storeys, but not including Type A construction on classes 4 to 9 buildings.*
- (3) Building work that consists of non-structural work on a building, regardless of –*
- (a) the class for the building; or*
- (b) the gross floor area of the building.*
- (4) Prepare plans and specifications that are –*
- (a) for the licensee's personal use; or*
- (b) for use in building work to be performed by the licensee personally.’*

- (b) Under the QBCC Act and QBCC Regulation, a reference to a “class” for a building means the class of building under the Building Code of Australia (“BCA”). Further, a “Type A” building is a reference to the type of construction under the BCA, being Type A, B and C and the following table sets out the construction classification for building types under the BCA:

Type of Construction		
Rise in storeys	Class of building 2, 3, 9	Class of building 5, 6, 7, 8
4 or more	A	A
3	A	B
2	B	C

- (c) Accordingly given the Claimant's class of licence and the details set out in the above table, the Claimant is allowed to perform:
- (i) structural building work:

¹³⁷ Copy of the Claimant's QBCC License is included in Tab SM-02 of the SDSM.

- on a class 1 or class 10 building being detached house or non-habitable building or structure, or
- on a building to a maximum of 3 storeys that does not include Type A construction on classes 4 to 9 buildings; and

(ii) non-structural work on any class of building;

- (d) From the design documentation it can be seen that the building constructed at the Project does not exceed three storeys and as the building is a processing and production facility, it is a class 8 building. In accordance with the table in (b) above, a class 8 building that is three storeys high is a Type B building and accordingly, the Claimant has not exceeded any limitation placed on its licence and has carried out work within the scope of its licence;
- (e) Insofar as the Payment Schedule had alleged that JRT Civil was not appropriately licenced, such an allegation is incorrect because the definition of “*building work*” in the QBCC Act excludes “*work of a kind excluded by regulation from the ambit of this definition*”. Schedule 1 of the QBC Regulation outlines various categories of “*work that is not building work*” (i.e., work which is excluded from the definition of “building work” and therefore exempt from the QBCC Act’s licensing regime). In *Monadelphous Engineering Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd*¹³⁸ the Queensland Court of Appeal confirmed that such exclusions should be construed broadly:

“In determining whether work falls within an excluded item in ... the Regulation one asks whether the work is of a kind stated in the item. It is not necessary that the work be precisely described by the item. MMM also accepts that in determining whether work falls within an excluded item “a broad and practical interpretation of the item” should be applied.

...

MMM’s argument that a broad interpretation of the exclusion permits parties to, in effect, contract out of the protections the Act intends, is misplaced. It makes an assumption that the legislature intended all building work to be regulated by the Act, subject to narrow exclusions. In fact, the legislature provides for exclusions from the definition of “building work” and these items “should be given a reasonably liberal construction consistent with a practical interpretation application of what the legislature intended.”¹³⁹
(Emphasis that of the Claimant.)

- (f) All the work carried out by JRT Civil was of a kind excluded from the definition of “*building work*” by the QBCC Regulation because:

¹³⁸ [2017] 1 Qd R 190.

¹³⁹ Per Applegarth J at 193.

- (i) Item 11 of Schedule 1 of the QBCC Regulation relates to work for water reticulation systems, sewerage systems or stormwater drains and excludes:

‘Construction, extension, repair or replacement of a water reticulation system, sewerage system or stormwater drain, other than works connecting a particular building to a main of the system or drain.’

- (ii) The stormwater works performed by JRT Civil at the Project involved:

- the excavation of single trench beneath the intended location of a car park external to the building, installation of a pipeline and subsequent backfill of a stormwater line, and the connection of this to council drainage infrastructure; and
- the construction of a bio-basin, being a natural drain where water pools and passes through the earth to the council drainage infrastructure to discharge.

- (iii) Accordingly, the stormwater works performed by JRT Civil were of a minor nature and within the QBCC Regulation’s exemption;

- (iv) JRT Civil did not perform any works connecting a building to a stormwater main or stormwater drain as this work was performed by the Claimant’s subcontractor, Hohmanns who held a QBCC Plumbing and Drainage licence;

- (v) Insofar as the Payment Schedule referred to the precast headwall, this was a prefabricated item that was not constructed by JRT Civil

“This was procured by JRT Civil from a supplier and installed as part of its construction of the single stormwater drain referred to above. As this scope of work related to the construction of a stormwater drain, other than works connecting a particular building to a main of the system or drain, the work carried out by JRT Civil involving the precast headwall falls within the building work exclusion under item 11 of Schedule 1 of the QBCC Regulation”.¹⁴⁰

- (vi) Thus, the small amount of stormwater drainage work performed by JRT Civil, was not building work for which a

¹⁴⁰ Paragraph 30.11 of the AA.

QBCC licence was required, but rather work of a kind excluded by item 11 of Schedule 1 of the QBCC Regulation.

- (vii) Insofar as the Payment Schedule stated that JRT Civil performed “*various concreting work*”, then the Claimant submits that the only concreting work JRT Civil performed related to three concrete crossovers constructed on or within the road reserve relating to Pineapple Drive and were part of the Project’s development application¹⁴¹. In any event, Schedule 1 of the QBCC Regulation also includes an exclusion regarding “*work on road and tunnels*”¹⁴². Accordingly, as Pineapple Drive is a road, the concrete crossovers are structures that are “*in, on, or under a road that is associated with the road*”¹⁴³. This analysis was confirmed in the recent Queensland Court of Appeal’s decision in *Civil Contractors (Aust) Pty Ltd v Galaxy Development Pty Ltd*¹⁴⁴ where it was held that a footpath was part of the relevant road and therefore that a bike rack and bus seat affixed to the footpath were “*structures in, on, or under a road that are associated with the road*” in accordance with Item 14(2)(b)(iii) of Schedule 1 of the QBCC Regulation¹⁴⁵. The Claimant submits:

*“The concrete crossovers, the subject of (the Respondent’s) allegations are more clearly part of Pineapple Drive than a bike rack and bus seat ...)and are therefore) work of a kind excluded by Item 14 of Schedule 1 of the QBCC Regulation and JRT Civil did not require a QBCC licence in order to construct them.”*¹⁴⁶

(g) In any event, the Claimant submits that:

- (i) no amount was claimed in the Payment Claim in respect to concrete crossovers (as the claim relating to this item had been previously claimed and paid for by the Respondent in relation to any earlier payment claim); and
- (ii) only an amount of \$4,842.00 has been claimed in the Payment Claim in relation to line item 7 for work performed by JRT Civil, due to “*an arithmetical error identified in the reconciliation (sic) of all JRT invoices and previous values claimed by (the Claimant)*”.

¹⁴¹ Refer to paragraphs 74-76 of the SDLP as well as Tabs LP-21, LP-23 and LP-25 of the SDLP.

¹⁴² Refer to Item 14 of Schedule 1 of the QBCC Regulation.

¹⁴³ See Item 14(b)(iii) of Schedule 1 of the QBCC Regulation.

¹⁴⁴ [2021] QCA 10.

¹⁴⁵ *Galaxy* at [62].

¹⁴⁶ Paragraph 30.22 of the AA.

The Respondent's Submissions

111. In its AR, the Respondent submits that, by reference to the Claimant's own evidence, it is clear that the Claimant engaged an unlicensed contractor, JRT Civil, to perform "building work", specifically concreting work, where that contractor did not hold the requisite QBCC licence. As a consequence, where the Claimant cannot be indebted to JRT Civil for the amount the Claimant claims in respect of that contractor's work, then the Respondent cannot be indebted to the Claimant for that amount.
112. The Respondent submits that by reference to paragraph 30.14 of the AA and paragraph 76 of the SDLP, the Claimant admits that JRT Civil constructed three concrete crossovers which were to connect the road to the property and that there is no dispute that JRT Civil was not appropriately licensed to complete the crossover concreting, which is the construction of concrete driveways.
113. Insofar as the Claimant contends that such works are excluded from the scope of "building work" under item 14 of Schedule 1 of the QBCC Regulation, then the Claimant's submissions have omitted the following aspects of item 14, which the Respondent has highlighted and with the critical provision highlighted in the red box:

14. Work on roads and tunnels

(1) Construction, maintenance or repair of a road or a tunnel for a road.

(2) In this section –

driveway means –

(a) a surface constructed -

(i) on a private property; and

(ii) for the purpose of driving or riding of motor vehicles to or from the property and a road; and

(iii) for which the right to use the surface is restricted to persons with an interest in the property and their invitees; or

(b) a surface constructed -

(i) between the boundary of a private property and that part of a road used for the driving or riding of motor vehicles; and

(ii) for the purpose of driving or riding of motor vehicles to or from the property and the road.

road -

(a) means an area of land –

(i) whether surveyed or unsurveyed, dedicated, notified or declared to be a road for public use; or

- (ii) whether surveyed or unsurveyed, taken under an Act, for the purpose of a road for public use; or
 - (iii) developed, or to be developed, for the public use of driving or riding of motor vehicles; and
- (b) includes –
 - (i) a street, esplanade, highway, path, thoroughfare, toll road, track or stock route; and
 - (ii) a causeway or culvert in, on, or under a road that is associated with the road; and
 - (iii) a structure in, on, or under a road that is associated with the road; and
- (c) does not include a driveway.

114. The Respondent submits that what JRT Civil had constructed was “concrete driveways”, viz: a surface constructed within the meaning of item 14(b)(i) and (ii) (underlined):

“There can be no doubt the “cross overs” are driveways pursuant to item 14 of Schedule 1 of the QBCC Regulation. As a result, the “work on roads and tunnels” exclusion from building work is not applicable. It is clear that the Queensland Parliament intended that a contractor constructing a driveway was required to hold a QBCC Licence. JRT did not.”¹⁴⁷

115. Further, the Respondent submits that s 42 of the QBCC Act operates such as to have an “all or nothing” result on the amounts payable to JRT Civil. Accordingly, all the amounts claimed by JRT Civil under the subcontract are impacted by the unlicensed building work and, as held in *Dart Holdings Pty Ltd v Total Concept Group Pty Ltd*¹⁴⁸, it does not matter whether the “building work” was originally within the Contract or if it was added by way of a variation.

116. Insofar as the Claimant seeks to rely on the decision of *Galaxy*, then the Respondent submits that that case specifically related to the construction of a footpath within a road reserve and where the bus stop (including the bike rack and seat) was found to be structures “in, on, or under a road”. The Respondent submits that *Galaxy* did not involve the court considering a driveway and, in the present case, “driveways” are excluded from the definition of “road” regardless as to whether they are in the road reserve or not.

117. The Respondent refers to s 42(3) of the Act, which provides:

¹⁴⁷ Paragraph 28.32 of the AR.

¹⁴⁸ [2012] QSC 158.

Subject to subsection (4), a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so.

Section 42(4) of the Act provides:

- (4) A person is not stopped under subsection (3) from claiming reasonable remuneration for carrying out building work, but only if the amount claimed –*
 - (a) is not more than the amount paid by the person in supplying materials and labour for carrying out the building work; and*
 - (b) does not include allowance for any of the following –*
 - (i) the supply of the person's own labour;*
 - (ii) the making of a profit by the person for carrying out the building work;*
 - (iii) costs incurred by the person in supplying materials and labour if, in the circumstances, the costs were not reasonably incurred; and*
 - (c) is not more than any amount agreed to, or purportedly agreed to, as the price for carrying out the building work; and*
 - (d) does not include any amount paid by the person that may fairly be characterised as being, in substance, an amount paid for the person's own direct or indirect benefit.*

The Respondent emphasises that the Claimant did not provide any evidence that it had undertaken the assessment required under s 42(4) to determine whether JRT Civil may be entitled to the amounts referred to within that sub-section of the Act:

“(The Claimant) instead (wrongly) alleges JRT Civil has not performed unlicensed building work. (The Claimant) has taken that approach because its engagement of an unlicensed contractor is a serious matter under the QBCC Act.

Where no evidence has been put before the Adjudicator by (the Claimant) in respect of the amount payable to JRT Civil (despite (the Respondent) putting (the Claimant) on notice of this issue in the payment schedule), once it is found that JRT Civil performed unlicensed building work, it follows that:

- (a) by s 42(3), JRT Civil was not entitled to any monetary consideration for the entering into the subcontract by which it*

agreed to perform building work, and then going on to perform building work;

(b) no amount is or was payable by (the Claimant) to JRT Civil; and

(c) as there is no amount payable by (the Claimant) to JRT Civil, no amount is payable by (the Respondent) to (the Claimant) in respect of the works performed by JRT Civil, noting that (the Claimant's) claim is that (the Respondent) was to "reimburse" (the Claimant)".¹⁴⁹

118. Finally, insofar as the Claimant contends that its present claim does not include a claim for the concrete crossover (as the costs relating to that work had been previously claimed and paid for) and that the only amount relating to JRT Civil is the amount of \$4,832.00 said to be due to "*an arithmetical error*", then the Respondent submits that such argument should be rejected:

"It is not true that (the Claimant) is not claiming payment for the concrete crossovers. As set out above, the unlicensed building work contaminates the entire of the subcontract and any ability for JRT Civil to claim payment under that subcontract.

Further, the Payment Claim claims payment on the basis of a percentage complete of each trade package. It is false and disingenuous for (the Claimant) to allege that the unlicensed building work performed by JRT Civil does not form part of the progress payment (the Claimant) claims.

It is noted (the Claimant) entered into one subcontract with (JRT Civil) on 15 June 2020 (and that that) replaced the earlier subcontract."¹⁵⁰

My Decision

119. Under s 42(1) of the QBCC Act, a person is prohibited from carrying out "building work" unless that person holds a contractor licence of the appropriate class under the QBCC Act. Given that there is no dispute that JRT Civil constructed three concrete crossovers and given that JRT Civil did not hold a concreting licence under the QBCC Act, the question then turns on whether the construction of the crossovers constitutes "building work". If the crossovers do constitute "building work", then the carrying out of such work contravenes s 42(1) of the Act with the consequence that JRT Civil would not have an entitlement to payment for that work. Further, if the Claimant has no obligations to pay the unlicensed work carried out by JRT Civil, then the Claimant can have no entitlement to request payment for that work from the Respondent. Further, by reason of the decision in *Dart*, where s 42(1) of the QBCC Act is engaged, it is not only the work that a contractor undertook in performing unlicensed building work that is in contravention of s 42(1), but rather the entire contract.¹⁵¹

¹⁴⁹ Paragraph 28.38 – 28.39 of the AR.

¹⁵⁰ Paragraph 28.41 of the AR.

¹⁵¹ See *Dart* at [39] and also *Sutton v Zullo Enterprises Pty Ltd* [2000] 2 Qd 196 at 203.

120. In his Statutory Declaration, Mr Perkins sets out the nature of the civil works that JRT Civil carried out. The work relating to the construction of the crossovers is identified as item 7a in the Payment Claim, but no amount is claimed in relation to this item as the work relating to the crossovers had been previously claimed and paid by the Respondent. It is also clear from the diagrams included at paragraphs 74 and 75 of the SDLP that the crossovers were built within the road reserve boundary of Pineapple Drive. I also note from Mr Perkin's evidence that the concreting crossovers were the only item of concreting work that was performed by JRT Civil and that all other concreting works were performed by Ramage Concreting. This however, as pointed out in the above paragraph, does not matter, as the question here is whether the construction of the concrete crossovers constituted "building works" and if it did then it tainted the entire contract that the Claimant had entered into with JRT Civil.
121. Insofar as the Claimant contends that because the crossovers were structures that were "*in, on, or under a road that is associated with the road*" and was therefore work of the kind excluded by item 14 of Schedule 1 of the QBCC Regulation and that accordingly JRT Civil did not require a QBCC licence in order to construct them, then, I disagree. As the Respondent correctly submits, the crossover that JRT Civil constructed clearly falls within the definition of a "driveway" given the wording set out in 14(2)(b)(ii) of the QBCC Regulation, and as such the "work on roads" exclusion does not apply. Accordingly, as JRT Civil did not have the requisite licence to construct a "driveway", it is by reason of s 42(3) of the QBCC Act "*not entitled to any monetary of other consideration*" for doing such work or any other work that fell under the JRT Civil subcontract. In this regard, I note the following passage by McPherson J in *Sutton* (endorsed by McMurdo J in *Dart*):

*"(Section 42(1)) prohibits the very process of formation of contract."*¹⁵²

McMurdo J in *Dart* then went on to say:

*"The consequence of this statutory prohibition is that a court will not enforce the contract, at least in favour of the party which contravenes the prohibition. As the agreed price here was a lump sum price, it could not be said that there was a distinct agreement for the performance of and payment of the awning. Therefore, nothing could be recovered pursuant to the Contract without enforcing that term which required a payment to be made for work which included unlicensed work. The parties did not within this Contract or otherwise agree to apportion the consideration. Therefore, this was an entire contract in that performance by one party was a condition precedent to payment or counter performance by the other."*¹⁵³

Mere passing-on of invoices or proper assessment?

122. As I have stated above, it is appropriate that I also consider the Respondent's argument that by merely passing on the invoices that the Claimant had received from its trade contractors, the Claimant had failed to perform one of the key services

¹⁵² *Sutton* at [203].

¹⁵³ *Dart* at [39].

required of it under the Contract, viz: to consider whether the amounts set out in the trade contractors' invoices reflected the value of the work performed. This is an important issue as it goes to the heart of one of the Respondent's other key arguments, viz: that there had, in effect, been no proper assessment of the Trade Packages work completed to date and that therefore the assessments set out in the Aston Report should be given greater weight than the amounts set out in the Payment Claim.

123. At paragraph 9.5 of the Payment Schedule, the Respondent stated that, contrary to its obligation to manage the trade contractors, which included reviewing the performance of the trade contractor as well as their claims for payment, the Claimant had merely *"passed on ambit claims and failed to assess the value of the work completed by the (trade) contractors"*. Then, at paragraph 9.6 of the Payment Schedule, the Respondent, by reference to the Aston Report, gave specific examples of the various invoices that the Claimant had attached to its Payment Claim, which, because of the scant details set out in those invoices made it difficult to identify what work had been carried out.

124. In its AA, the Claimant seeks to support the quantum of the amounts claimed in relation to the trade contractors work by reference to the evidence of Messrs Milfull and Ells. Relevantly, at paragraph 448 of the SDSM, Mr Milfull states:

"I consider that the amounts claimed in the May Payment Claim, and the percentage of work completed as claimed in that document, accurately represent the work achieved on the Project as at 6 April 2021. In respect to the May Payment Claim, I carried out the process that I described at paragraphs 96 and 97 above."

125. The reference to the process that Mr Milfull describes at paragraphs 96 and 97 was as follows:

"Before (the Claimant) made each progress claim to (the Respondent), I would request from the subcontractors working on the site at the time, their claims for work to date. On receipt of those claims, I would review each claim against the work completed on site by that subcontractor. To do that, I would attend the site to compare the subcontractor's claim with the physical work performed on site. If I considered it necessary, I would also engage directly with a subcontractor to discuss the value of its claim in relation to the work completed."

Once I had assessed each claim, if I was comfortable that the amounts claimed reflected the work completed, I would also include a claim for that amount, together with (the Claimant's) margin, in a progress claim to (the Respondent). (The Claimant) would also make arrangements to pay that subcontractor for its work."

126. Further, and to substantiate that the work being claimed in the present Payment Claim reflected the work that had been carried out at the time when the Claimant ceased work on site (i.e. 6 April 2021), Mr Milfull states that he took a number of

photographs on site “to depict the work completed on the Project”¹⁵⁴. A copy of Mr Milfull’s photographs are included in SM-175 of the SDSM, with Annexure C describing what each photograph depicts. Further, attached to the SDLP is a copy of the diary notes of Mr Perkins which he states “indicate which trades were carrying out work on the site each day, the crew that attended and the type of work that they performed”¹⁵⁵. Further, Mr Ellis (as the Claimant’s Site Supervisor) also took photographs on his phone of the work carried out by the trade contractors and then emailed the photographs to his work email address. A copy of these photographs is attached to the SDJE¹⁵⁶.

127. In its AR, the Respondent submits that, based on the material provided by the Claimant, it is “apparent” that the Claimant had not attempted to value the trade contractor’s work and that it is unacceptable for it to claim payment for work claimed by trade contractors without attempting to verify the amounts set out in those invoices¹⁵⁷. The Respondent also refers me to sections 42 and 43 of the SDJS. Relevantly, in the SDJS, Mr Stewart states that:

- (a) At paragraph 42.22, that under the Contract, the Claimant was required to:

“review, assess and make written recommendations to the Principal in relation to all claims for payment under each Direct Contract”

but that the Claimant failed to complete this “service”;

- (b) At paragraph 42.23, that the Claimant had “without any consideration or scrutiny of the works actually completed or the value of the works”, simply passed on the claims made by trade contractors and that this can be seen from the various tax invoices referred to at paragraph 42.24;
- (c) At paragraph 42.25, Mr Stewart opines that the invoices of the trade contractors set out at paragraph 42.24 of the SDJS “do not contain the detail required for a construction manager to make an informed assessment of the value of the works. The claims do not even contain so much as a percentage complete, with no task breakdown”.
- (d) At paragraph 43.1, that Mr Stewart does not consider that the amounts claimed by the Claimant on behalf of the trade contractors “is reflective of the works actually performed”;
- (e) At paragraph 43.2, that Mr Stewart’s view set out at 43.1 is further confirmed by the Aston Report which had identified rectification costs in the amount of \$294,497.36 and that accordingly, at paragraph 43.3, Mr Stewart opines:

¹⁵⁴ Paragraph 445 of the SDSM.

¹⁵⁵ Paragraph 11 of the SDLP.

¹⁵⁶ Refer to JE-2 of the SDJE.

¹⁵⁷ Refer to paragraphs 24.5 to 24.11 of the AR.

“I consider that if (the Claimant) had acted as a reasonably competent construction manager who was acting in (the Respondent’s) interests, it would have assessed the value of the contractors’ claims having regard to not only the quantity of work performed, but also the quality of the works (including account for the value of defects to be made good in the works). Again, the services performed by (the Claimant) fell short of what I expect would be provided under the Contract.”

My General Observations / Conclusions

128. Given the parties’ submissions relating to this issue as outlined above and given the relevant provisions of the Contract and the Act, I make the following observations and conclusions:

- (a) At paragraph 127(a) above, Mr Stewart refers to what he states to be the Claimant’s obligations as set out under the Contract. Whilst Mr Stewart does not specifically identify the provision within the Contract, it is apparent that he was referring to SC1.8.3, but this provision was not cited in full, as it reads as follows:

“The Construction Manager must:

...

SC1.8.3 review, assess and make written recommendations to the Principal in relation to all claims for payment under each Direct Contract in accordance with Clause 27;

...

(Emphasis added);

- (b) It is entirely unclear to me as to what the reference to the words “*in accordance with Clause 27*”, at the end of SC1.8.3 are intended to mean as Clause 27, entitled “*Default or insolvency*” has no relevance to the issue of a Construction Manager dealing with claims made under Direct Contracts. There is a difference between the general obligation as referred to by Mr Stewart, and the obligation as actually stated in SC1.8.3. The former is not the requirement set out in the Contract, whereas the latter, which reflect the words used in SC1.8.3 with its cross-reference to Clause 27, simply does not make sense;
- (c) Notwithstanding the observation made in (b) above, I believe it is safe to proceed on the basis that the parties had intended that the Construction Manager would perform its services such that, before seeking payment from the Respondent in relation to work claimed by trade contractors, it would satisfy itself that the work set out in the trade contractors’ invoices reflected the work actually carried out. That is what a principal would expect from a reasonable construction manager;

- (d) In this regard, it is relevant to observe that the process that the parties had adopted in the assessment of progress claims during the course of the Project (as outlined by Mr Milfull) involved the Claimant first forwarding the progress claim it proposed to submit to Slattery who would consider such claim, provide the Claimant with its comments/assessment, after which the Claimant would submit the “adjusted” progress claim for Slattery to assess for the purposes of issuing a payment certificate and, once such a certificate had been issued, the Respondent would pay that amount so certified. This is what occurred with the first ten progress payment claims and clearly Slattery must have been satisfied in relation to the work claimed as the process appeared sufficiently rigorous, and if it were otherwise, Slattery would not have issued its various payment certificates. Similarly, it is not unreasonable to assume that the Respondent must have had some degree of confidence with this process, for otherwise it would not have made payment as it did in respect to the first ten payment certificates issued by the quantity surveyor it had engaged for the Project, viz: Slattery;
- (e) The process that the parties had adopted had however clearly come to an end when the Claimant submitted the progress claim that is the subject of the present Payment Claim, given that that document had not previously been forwarded to Slattery for review, but had been directly served on the Respondent. This means that, in the absence of the assessment and certification function that Slattery had previously played, the Claimant is now required to provide the requisite material to satisfy me that the work set out in the various trade contractors invoices has been carried out. Put another way, the Claimant bears of providing the necessary material to enable me to carry out the valuation function set out under the Act;
- (f) Insofar as the Respondent now contends that the work that had been previously assessed and certified does not reflect the value of the work that had been completed up to the date when the Claimant ceased work on the Project given the assessment set out in the Aston Report, then this is a proposition that I have difficulty accepting. As I have outlined above, the Respondent had participated in a process that involved its own quantity surveyor and that this process appeared to have involved a dialogue with the Claimant subsequent to receiving a proposed progress claim (which presumably involved, where necessary, requesting further information)¹⁵⁸ and then assessing the “revised” progress claim before issuing a payment certificate. I agree with the Claimant’s submission that the process that the parties had adopted whereby the Respondent’s quantity surveyor had progressively assessed the progress of the Works based on contemporaneous material should be preferred to the assessment carried out by the author of the Aston Report, particularly as the assessment exercise carried out by Mr Hemms was undertaken well after the Claimant ceased work on the Project;

¹⁵⁸ I draw this inference from the process explained by Mr Milfull in his Statutory Declaration.

- (g) It follows from what I have said above that insofar as the Respondent states at paragraph 24.5 of the AR that the Claimant had failed to value the works completed in respect of the Trade Packages prior to issuing the Payment Claim, then this is also a proposition that I cannot agree with. The value of the works prior to the issuing of the Payment Claim had been assessed by the quantity surveyor that the Respondent had engaged to verify the valuation process, viz: Slattery and that Slattery had progressively valued the work carried out on the Project. Further, it is incorrect for the Respondent to assert (as it does at paragraph 24.6 of the AR) that the Claimant was required to issue progress certificates in respect of the trade contractor claims. There is no provision within the Contract that obliges the Claimant to issue such certificates and indeed the relevant extract of the Construction Management task list in Annexure Part B as set out below makes that abundantly clear:

Manage contractors' performance	☒	☐	
Manage documentation flows required for the project	☒	☐	
Progress claims	Subcontractors	☒	☒ QS to review construction manager
Manage issue of certificates		☐	☒

- (h) There is however an important qualification that I must make in relation to what I have said in (f) and (g) above and that relates to the valuation that Slattery had made (and certified) in regard to the trade works carried out by JRT Civil. It would appear that neither Slattery nor the Respondent were aware that at the time when JRT Civil carried out its works that JRT Civil did not hold the requisite QBCC licence. Yet, nonetheless, given that I have found that the crossovers carried out by JRT Civil was "building work" for which JRT Civil was not licensed to perform and given that the carrying out of that unlicensed building work had the effect of contaminating the entire contract that the Claimant had entered into with JRT Civil, it follows that whatever amount the Claimant may have paid JRT Civil that was not an amount that JRT were entitled to. Accordingly, as no amount is or was payable by the Claimant to JRT Civil, it follows that no amount is or was payable by the Respondent to the Claimant in respect of the works performed by JRT Civil for which the Claimant had included in its previous progress claims. Thus, notwithstanding that Slattery had previously assessed the amount payable to the Claimant in respect of JRT Civil's work at \$339,582.09¹⁵⁹, the Claimant had no entitlement that should have been given for the JRT Civil trade package was \$nil; and

¹⁵⁹ The amount of \$339,582.09 represents the combined value of amounts previously assessed for items 6 (\$101,930.99), 7 (\$219,363.10) and 7a (\$18,288.00).

- (i) Finally, I note that one of the reasons that the Respondent has given as to why its assessment of the Trade Packages component is less than the amount claimed is that the Claimant is seeking payment for defective work carried out by various trade contractors. I propose to deal with this issue when I consider the Respondent's entitlement to set-off the value to be given to defective work from any amounts payable to the Claimant.

Consideration / Assessment of Trade Packages items

Items 6, 7 and 7a

129. Although the Payment Claim only seeks payment for the amount of \$4,842.00 relating to the trade works carried out by JRT Civil (said to represent the amount "*due to an arithmetical error identified in the reconciliation of all JRT Civil's invoices and previous amounts claimed*"), it follows from what I have said at paragraph 128(g) above, that the Claimant has no entitlement to claim any amount in relation to the work carried out by JRT Civil. Whereas the Payment Claim has broken down JRT Civil's work into three separate items – 6, 7 and 7a, with item 6 referring to the subcontract entered into on 17 January 2020 and items 7 and 7a referring to the subcontract dated 9 June 2020, it is nonetheless clear that the "second" subcontract that the Claimant entered into with JRT Civil on 9 June 2020, replaced the earlier agreement of 17 January 2020¹⁶⁰. I accordingly decide that not only is the Claimant not entitled to the amount claimed under item 7, but that it has no entitlement to any amount in respect to items 6, 7 and 7a.

Item 10

130. The Claimant seeks payment for the amount of \$335,284.00, which it stated in the Payment Claim as representing the balance of the amount relating to the steel fabrication Trade Package. The description column next to line item 10 of the Payment Claim was expressed in the following words:

"Structural Steel Fabrication (contract \$649,327 less supplied tonnage rates = \$610,284) – as negotiated with the Principal's Rep. The value of the work relates to the supply and installation of the remaining structural steel, purlins and wall girts to enable the building to be completed, to allow all wall and roof sheeting to be installed."

As an amount of \$275,000.00 had previously been paid in relation to this Trade Package item and as the Claimant contends that this Trade item work is 100% complete, the amount claimed (\$335,284.00) represents the balance remaining from the Trade contract value of \$610,284.00.

131. In its Payment Schedule, the Respondent stated an amount of \$594,511.50 in relation to the total value is to be given for this Trade Package item and gave the following reasons for scheduling a lesser amount than that claimed by the Claimant:

¹⁶⁰ See paragraph 151 of the SDSM.

- (a) The Claimant had failed to sufficiently specify the works that the claim relates;
- (b) The Respondent did not approve a contract for “*Structural Steel Fabrication*”;
- (c) The Claimant has supplied a number of invoices issued by Pierce Engineering and Pierce Rigging which appear to relate to this line item, however:
 - (i) the Claimant has failed to identify the invoice(s) that relate to this line item in the claim; and
 - (ii) the Respondent cannot identify the work that the Claim relates based on bare descriptions such as:
 - (A) “Quoted Progress Claim 1 – Contract Component”;
 - (B) “SUNDRIES Claim #3 on Original Engineering Contract; and
 - (C) “SUPPLY AND INSTALL STRUCTURAL STEEL AND PURLINS FOR TROPICAL PINES PROCESSING PLANT”;

especially in circumstances where the Respondent does not have knowledge of the scope of works that the Contractor(s) was (seemingly) engaged to complete;
- (d) In the alternative, and without prejudice to the above, the Respondent submits that based on the visual inspection carried out by Aston Consult:
 - (i) Aston has assessed the structural steel works to be 100% complete;
 - (ii) However, there are defects in the works that have been identified, including:
 - (A) steel framing that will need to be replaced as:
 - (1) it has been installed unevenly and not vertical and aligned; and
 - (2) does not appear to be erect in accordance with the Respondent’s show drawings pertaining to the ‘Trade Package’;

- (B) steel works which will need to be inspected, cleaned and recoated due to rust, marks, scuffs and stripping of coating in various locations; and
- (C) fire hose reel and copper pipe rough in has been roughly cut through the edge of the internal steel member.

132. In its AA, the Claimant gave the following response to the reasons that were set out in the Payment Schedule:

- (a) The amount claimed in respect to this line item is \$335,284.00 and that is the only amount able to be assessed by the Respondent;
- (b) The amount previously claimed, as at the date of the Payment Claim, is \$275,000.00, as assessed by Slattery and this amount has been paid by the Respondent;
- (c) In respect to the amount previously claimed, the Respondent never disputed the amounts claimed;
- (d) For the reasons set out elsewhere in the AA, the Respondent would have been under no misapprehension as to the fact that the Claimant was engaging subcontractors and claiming for their work;
- (e) There is no ability to open up and re-assess the previously claimed amount (of \$275,000.00) in circumstances where the Respondent does not have a contractual right to set off work they considered defective;
- (f) As set out at paragraphs 227 to 232 of the SDSM, the Respondent instructed the Claimant to engage Pierce to carry out this work;
- (g) The Payment Claim had sufficiently identified the construction work/related goods and services; and
- (h) As set out in the Tsipis Report and to the extent that there are any defects in the structural steel works, then the cost of rectifying those defects is only \$9,010.00 (incl GST).

133. In its AR, the Respondent provided the following submissions in response to the position that the Claimant had advanced in the AA:

- (a) If the Trade Packages amounts are claims able to be made under the Contract, then the previous payments that the Respondent had made in respect to such amounts were payments on account and it is incorrect for the Claimant to assert that only matters raised in the Payment Claim can be considered in an adjudication;

“Section 88(2) requires the Adjudicator to consider the provisions of the construction contract and the Payment Schedule.”¹⁶¹

- (b) Insofar as the Claimant relies on the previous amounts certified by Slattery then the Claimant miscomprehends Slattery’s role and the Claimant’s role as the Respondent’s agent. In this regard, the Respondent refers to Section 4 of the SDJS;
- (c) By reference to its earlier submissions and the evidence set out in the SDJS, the Respondent was not aware, prior to 23 February 2021, of the fact that the Claimant had engaged trade contractors as its subcontractors rather than as agent on behalf of the Respondent and the Respondent never instructed the Claimant to engage any “subcontractors”;
- (d) For the reasons set out earlier in the submissions, the Payment Claim is invalid as it failed to sufficiently identify the construction work/related goods and services; and
- (e) circumstances where its author (Mr Hemms) *“attended the site and has based his assessment of the facts (as opposed to hypothetical scenarios), (the Respondent) maintains that Mr Hemms assessment of the estimated rectification costs should be prepared”*.¹⁶²

My Decision

134. Leaving aside the Respondent’s allegation relating to the defects associated with this Trade Package item (which is a matter that I deal with separately later in my Decision), I consider that the Claimant has established its entitlement to the amount claimed in respect to this item. I have arrived at this conclusion because of the following reasons:

- (a) It is clear that the Respondent gave approval for the Claimant to enter into a contract with the trade contractor in relation to this Trade item. So much is obvious from the email that the Respondent’s representative, Mr Graham Scott sent to Luke Perkins on 25 September 2020, where Mr Scott said:

“Please proceed to engage Pierce Engineering based on Option 2 documentation.”

I have already dealt with the Respondent’s argument that the Claimant was required under the Contract to engage all trade contractors as the Respondent’s agent, and I have concluded that that was not the case. Accordingly, the subcontract agreements that the Claimant entered into with Pierce Engineering and Pierce Rigging (both dated 3 October 2020) for the combined total of \$649,327.00, was as per the quotation that Pierce Engineering had sent on 24 September 2020, which Mr Scott had referred

¹⁶¹ Paragraph 14.14 of the AR.

¹⁶² Annexure B of AR, fifth column.

to in his email to Mr Perkins¹⁶³. (I note that the original quotation of \$649,327.00 was subsequently revised to \$610,284.00 due to changes in tonnage rates.)¹⁶⁴;

- (b) The Claimant had previously submitted two progress claims seeking payment for the work relating to this Trade work item, being for an amount of \$75,000.00 within Progress Claim 7 and \$200,000.00 within Progress Claim 10¹⁶⁵ and these amounts were approved in the Payment Certificates 7 and 10 issued by Slattery¹⁶⁶. The Payment Claim states that the amount being claimed for this Trade item, viz: \$335,284.00 represents the balance of monies outstanding under the contract(s) on the basis that this Trade Package work is 100% complete. Included in the Payment Claim were copies of the three trade invoices that make up the amount of \$335,284.00, viz: Invoice No. 42279, 3949 and 41749/3744-4. Insofar as the Respondent contends that the details set out in those invoices lacked sufficient details to enable the Respondent to understand what was being claimed in respect to this item, I disagree. The invoices that the Claimant had included with its Payment Claim referred to the contract(s), that the Claimant had entered into with Pierce Engineering/Pierce Rigging and a copy of those contracts had previously been provided to the Respondent (viz: February 2021). Within those contract(s), in the box relating to clause 1(a) (on page 1) was a brief description of the Subcontract Works and these set out the structural steel rates, as well as a reference to the quotation W1632A that Pierce Engineering had given on 24 September 2020. In my view, the provision of copies of the invoices which in turn referred to the contract(s) that the trade contractor had entered into with the Claimant (a copy of which had previously been provided to the Respondent), as well as the statement that the Claimant was seeking payment on the basis that this Trade Package item was 100% complete, would have been sufficient to have apprised the Respondent of what was being claimed in respect to this item;
- (c) I am also satisfied that this Trade item had been brought to 100% completion, given that the author of the Aston Report had stated in the relevant spreadsheet page under the (blue) coloured block of columns under the heading “*Aston Assessed Progress Complete/Assessment of Item*” that:

“Structural Steel Work complete but defects have been detected.”

Clearly, if the independent consultant that the Respondent had engaged to review the Claimant’s Payment Claim has made the above statement based on his visual inspection of the Project site, then that is sufficient to satisfy me that this item has been brought to 100% completion.

¹⁶³ A copy of the quotation (No. WT632A) and copies of the subcontracts that the Claimant entered into with Pierce Engineering and Pierce Rigging is included in Tabs SM-80A, SM-81 and SM-82.

¹⁶⁴ See email of Pierce Engineering, dated 6 April 2021, copy of which is included in the bundle of documents that were attached to the Payment Claim.

¹⁶⁵ See SM-92 and SM-137 of the SDSM.

¹⁶⁶ See SM-93 and SM-141 of the SDSM.

135. Thus, for the reasons set out in the above paragraph, I decide that as this item is 100% complete, the amount that the Claimant is entitled to be paid is \$335,284.00.

Item 11

136. In its Payment Claim, the Claimant stated that this Trade Package item was 74% complete, which, given that the total contract value relating to this item is \$584,194.00, meant that the value of the work completed, as at the date of the Payment Claim, was \$433,551.63. Thus, as the Claimant had previously been paid an amount of \$324,534.28 (on the basis that the work was then certified at 55.5% complete), the Claimant now seeks payment for the amount of \$109,017.35. The description column next to line item 11 of the Payment Claim, was worded as follows:

“Hydraulics – tender document supplied by the Principal and Hohmanns submission approved by the Principal as per supporting information. The value of the claim relates to installation of stormwater pits, four fire hose reels, earthworks, concrete works around grease trap lid, installation of PRZ valve, underground drainage, fire line installation, internal hydrants installation, water reticulation, vents within building, stainless steel grates or blue line on plans, stainless steel trench grates.”

137. Other than contesting the Claimant’s entitlement to be paid for Trade Packages under the Contract and the Act (which is a matter I have already dealt with above) and that the Payment Claim failed to sufficiently specify the works that the claimed item relates to, Annexure C of Payment Schedule also stated that:

- (a) 74% of the Trade Package is complete, but the Claimant has claimed payment for an amount equivalent to 74.21% of the “Contract Amount”;
- (b) The Claimant has not provided any “*supporting information*” regarding the Respondent’s purported approval of the plumbing contractor’s (Hohmanns) quotation;
- (c) The Claimant has provided a number of invoices issued by Hohmanns, but the Respondent cannot identify the works that the Claim relates based on bare descriptions such as:
 - (i) *“First Progress Claim on Quoted Price for Plumbing Work at Hidden Valley Harvest Producing Plant”* and
 - (ii) *“Third Progress Claim on Quotes Price for Plumbing Work at Hidden Valley Harvest Producing Plant – Hydraulics – Stormwater – Grease Arrestor Trap”*.
- (d) Notwithstanding the above, for the reasons set out in the Aston Report Spreadsheet, only 57.4% of the Trade Package is complete; and
- (e) There is an overlap in the scope of this “Tender Packages” and the “Operational Works Tender Packages”. As stated at paragraph 6(g) of

the Aston Report, an estimate has been given for the cost of rectifying the defective hydraulic works. *“The Principal has set the full cost of the rectification works against the “Operational Works Trade Package”. However, should it become apparent that any portion of the defective hydraulic works are attributable to this “Hydraulics Trade Packages”, the Principal reserves its right to set off those costs as necessary”.*

138. In its AA, the Claimant gave the following response to the reasons that were set out in the Payment Schedule:

- (a) The amount claimed in respect to this line item is \$109,017.35 and that is the only amount able to be assessed by the Respondent;
- (b) The amount previously claimed, as at the date of the Payment Claim is \$324,534.28, as assessed by Slattery, and this amount was previously paid by the Respondent;
- (c) In respect to the amount previously claimed, the Respondent never disputed the amounts claimed;
- (d) For the reasons set out elsewhere in the AA, the Respondent would have been under no misapprehension as to the fact that the Claimant was engaging subcontractors and claiming for their work;
- (e) There is no ability to open up and re-assess the previously claimed amount (of \$324,534.28) in circumstances where the Respondent does not have a contractual right to set off work it considers to be defective;
- (f) As set out at paragraphs 245 to 247 of the SDSM, the Respondent instructed the Claimant to engage Hohmanns to carry out this work;
- (g) The Payment Claim had sufficiently identified the construction work/related goods and services; and
- (h) In regard to the alleged Hydraulic Trade Defects, the Tsipis Report states that there are no defects because all the “defects” identified in the Aston Report are either not the Claimant’s responsibility, or relate to incomplete work and therefore the rectification of the alleged works is \$nil.

139. In its AR, the submissions that the Respondent provided in relation to this item were worded in identical terms to those that it had given in respect to item 10 and this has been summarised at paragraph 133 above.

My Decision

140. Leaving aside the Respondent’s allegation relating to the defects associated with this Trade Package item (which is a matter that I deal with separately later in my Decision), I have arrived at the following conclusions:

- (a) Based on the following evidence provided by Mr Milfull, I consider that the Respondent's representative, Mr Graham Scott did give approval for the Claimant to enter into a subcontract with Hohmanns Plumbing (Hohmanns):

"245 On 12 October 2020, I was copied into an email from Perkins to Thomasson, Stewart, Cranny, Lightfoot, Scott and Petchell attaching a quote from Hohmanns. A copy of this email is document SM-87.

246 On 14 October 2020, I attended a PCG meeting with Scott, Petchell, Perkins, Thomasson, Lightfoot and Cranny. During the meeting, I was given instruction to proceed with contracting Hohmanns. I also continued raise my concerns about delays and that the Project remained subject to delay costs due to documents not being provided in line with the original procurement plan. A copy of the meeting minutes is document SM-88.

247 On 15 October 2020, I received an email from Perkins stating: 'Are we to proceed with Plumbing (Hohmanns) contractually as well? Once we have email confirmation I'll get lead times'. Later on the same day, I received an email from Scott stating: 'Yes, That was the agreement at the [PCG meeting held on 14 October 2020]. Any changes will be treated as Variations'. A copy of this email chain is SM-89."

- (b) I am also satisfied that the Respondent received a copy of the Subcontract that the Claimant had entered into with Hohmanns¹⁶⁷ in February 2021 (as the Respondent states that it was then that it received a copy of the various Subcontracts that the Claimant entered into that in turn led the Respondent it to serve its Show Cause Notice). Accordingly, the Respondent would have been well aware of the nature of the works that Hohmanns had been engaged to carry out (especially as the Subcontract had annexed a copy of Hohmanns' quote dated 8 October 2020);
- (c) It is clear that the Claimant had in its progress claims included various amounts relating to Hohmanns' works, as can be seen in Progress Claim 8 (where the value of Hohmanns' work, claimed was \$93,471.04), Progress Claim 9 (where the value of Hohmanns' work claimed was \$75,945.22) and Progress Claim 10 (where the value of Hohmanns' work was \$155,118.02), which collectively totalled the sum of \$324,534.28¹⁶⁸. It is also clear that Slattery had approved these amounts, as evidenced in its Payment Certificates 8, 9 and 10.¹⁶⁹

¹⁶⁷ A copy of the Subcontract entered into between Hohmanns and the Claimant is in Tab SM-90 of the SDSM.

¹⁶⁸ For copies of these Progress Claims, see SM-110, SM-128 and SM-137.

¹⁶⁹ For copies of these Payment Certificates see SM-111, SM-129 and SM-141.

(d) The amounts upon which the Claimant seeks to ground its progress claim of \$109,017.33 relates to the following three invoices issued by Hohmanns:

- (i) Invoice #45328, dated 23 February 2021, being for an amount of \$101,425.45;
- (ii) Invoice #45437, dated 29 March 2021, being for an amount of \$6,201.90; and
- (iii) Invoice #4363, dated 1 April 2021, being for an amount of \$1,390.00.

I am satisfied that Invoices 45437 and 4363 sufficiently describe the work said to have been carried out and for which payment is being claimed. I struggle however to understand what specific work Hohmanns claims it had carried out in relation to Invoice 45328. This invoice, which seeks payment for the amount of \$101,435.45, provided only the following details in the Description column:

“Fourth Progress claim on quoted price for plumbing work at Hidden Valley Harvest Producing Plant.

- Hydraulics”

Whatever basis Hohmanns had in arriving at the amount of \$101,425.45 is completely unclear. Further (and this is important), the nature of the description set out in that Invoice was a matter that the Respondent had specifically highlighted in its Payment Schedule (refer to paragraph 137(c)(ii) above), yet the Claimant provided no further information regarding this matter in its AA. The Claimant’s failure to provide the details setting out the basis up on which the amount of \$101,425.45 is being claimed (particularly as this issue had been specifically identified in the Payment Schedule as a reason for withholding payment), leaves me with no alternative but to conclude that the Claimant has failed to establish its entitlement to the amount set out within the invoice. To be clear, I am not prepared to award payment for the amount set out in that invoice, based merely on the single word description of “*hydraulics*”.

141. Accordingly, for the reasons set out in the above paragraph, I decide that the value to be given to this Trade item is \$7,591.90, being the combined value as set out in Hohmanns’ invoices 45437 and 4363.

Item 12

142. In its Payment Claim, the Claimant stated that this Trade Package was 100% complete and that as such, it is entitled to receive the full payment for this item, being the contract sum set out in the Subcontract that the Claimant had entered into with CBC Ramage (“Ramage”), viz: \$440,382.40. Thus, as Slattery had previously certified an amount of \$284,267.68 (on the basis that this Trade item was 65% complete) and as

the Respondent had paid that amount, the Payment Claim now seeks payment of the amount of \$156,114.72, representing the difference between the full Subcontract sum (\$440,382.40) and the amount previously certified (\$284,267.68). The description column next to line item 12 in the Payment Claim was worded as follows:

“Concrete Works (CBC Ramage) – all concreting works as per Principal supplied documentation contracted in accordance with Principal’s instructions. Claim value relates to subcontractor concrete and demobilisation costs, external pavings – pedestrian path and front apron concreting, driveway Grid D to boundary concreting, Grid M to P concreting, external building apron at Grid I column concreting.”

143. Other than contesting the Claimant’s entitlement to be paid for Trade Packages under the Contract and the Act (which is a matter I have already dealt with above) and that the Payment Claim failed to sufficiently specify the works that the claimed item relates, Annexure C of the Payment Schedule also stated that:

- (a) The Claimant has supplied invoices issued by Ramage, but the Respondent cannot identify the works that the Claim relates, based on such bare descriptions as *“Concrete Works”* in circumstances where:
 - (i) the Respondent was not a party to the “Subcontract” between the Claimant and Ramage;
 - (ii) the “Subcontract Works” are described as *“Supply of all concrete works and labour for project as per tender documents provided”*;
- (b) Based on the description provided in the Payment Claim, the Claimant seeks payment for *“demobilisation costs”*. The Respondent does not however consider that the Claimant is entitled to such costs;
- (c) In the alternative and without prejudice to the above, the Respondent submits that based on the visual inspection carried out by Aston Consult:
 - (i) The Respondent has assessed the concrete works to be 100% complete;
 - (ii) However, the Aston Report has identified defects to the concrete works, and the estimated cost of rectifying these defects is \$9,835.00.

144. In its AA, the Claimant provided similar responses to the reasons given in the Payment Schedule as in relation to Trade item 10 (see paragraph 132(a) to (h) above), other than to specifically refer me to the evidence set out at paragraph 277 to 283 of the SDSM and to the relevant section of the Tsipis Report where Mr Tsipis opines that, to the extent that there are any defects with the concreting works, then the cost of rectifying those defects are \$1,000.00.

145. In its AR, the Respondent's submissions in relation to this item was worded in identical terms to those it had given in respect of items 10 and 11 and these have been summarised at paragraph 133 above. The AR did however include the following sub-paragraph:

“(The Respondent) notes that Mr Tsipis’ assessment of the rectification costs exceed the rectification costs proposed by Mr Hemms. (The Respondent) has relied upon Mr Hemms’ initial assessment (as contained in the First Aston Report) in valuing this trade package at Annexure A to the Adjudication Application submissions.”

My Decision

146. Leaving aside the Respondent's allegation relating to the defects associated with this Trade item (which is a matter I deal with separately later in my Decision), I consider that the Claimant has established its entitlement to the amount claimed in respect to this item. I have arrived at this conclusion because of the following reasons:

- (a) I am satisfied that the Respondent gave approval for the Claimant to enter into a contract with Ramage in relation to this Trade Package. The circumstances relating to the engagement of Ramage and the Respondent approving the Claimant engaging that trade contractor are set out in the following paragraphs of the SDSM:

275 *Around 29 October 2020, ASM Builders started negotiating with CBC Group Trust t/a Ramage Concreting Australia (**Ramage**) in respect to the concreting trade package. Ramage is not a subcontractor identified in ASM Builders’ Form 4. When ASM Builders started negotiating this package of works, it contacted the subcontractors identified in ASM Builders’ Form 4, however they did not provide favourable prices for the work so ASM Builders expanded the tender to other subcontractors.*

276 *On 30 October 2020, I received an email from Perkins advising of the suitable businesses to tender for the concreting trade package, including Ramage. A copy of this email is document **SM-102**.*

277 *On 5 November 2020, I was copied into an email from Perkins to Stewart and Scott, attaching Ramage’s tender submission and advising that Oaka Constructions confirmation of submission was due the next day (6 November 2020). A copy of this email is document **SM-102A**.*

278 *On 9 November 2020, I was copied in an email from Perkins to Stewart and Scott advising that Oaka Constructions had missed their submission deadline.*

279 *At 9.20am on 9 November 2020, I was copied in an email from Stewart to Perkins about giving Oaka an opportunity to submit their tender that day.*

280 *At 3.58pm on the same day, I was copied in an email from Scott to Stewart and Perkins asking if Oaka submitted a tender.*

281 *At 4.02pm on the same day, I was copied in an email from Perkins to Scott and Stewart stating that Oaka had submitted a tender by it was non-conforming and a higher price.*

282 *At 5.18pm on the same day, I was copied in an email from Scott to Perkins stating:*

'Thanks Luke

Subject to Jim's approval

I support Ramage tender acceptance'

283 *AT 4.36pm on the same day, I was copied in an email from Stewart to Scott stating: 'Yes, please proceed with the formal award to Ramage'.*

284 *A copy of this email chain, from 5 November 2020 to 9 November 2020, is document **SM-103**. I understood from the emails set out above that HVH had accepted Ramage's price for works and ASM Builders was instructed to engage Ramage on that basis.*

285 *On 13 November 2020, I signed the subcontract between ASM Builders and Ramage. On 30 November 2020, Mark Ramage of Ramage executed the subcontract. A copy of the subcontract is document **SM-104**.*

- (b) I have already dealt with the Respondent's argument that the Contract required the Claimant to engage all trade contractors as the Respondent's agent and I have concluded that that was not the case. Accordingly, the subcontract that the Claimant entered into with Ramage was executed in accordance with the quotation that Ramage submitted on 2 November 2020, which was in turn submitted by Ramage based on the tender return breakdown that Slattery had forwarded to the Claimant on 30 October 2020¹⁷⁰. I therefore agree with the Claimant's submission that the Claimant would have been under no "misapprehension" as to not only the basis upon which the Claimant had engaged Ramage (i.e. as its subcontractor), but also as to the specific concrete works that Ramage was required to carry out;

¹⁷⁰ Refer to Ms Edwards' email of 30 October 2020, copy of which is included in Tab SM-102 of the SDSM.

- (c) The Claimant had previously submitted progress claims seeking payment for Ramage's work in its Payment Claim 9 for an amount of \$105,691.77 and Payment Claim 10 for an amount of \$178,575.91¹⁷¹ and both these amounts were approved in Slattery's Payment Certificates 9 and 10¹⁷², resulting in the Claimant having received a total of \$284,267.68 up to the date of the Payment Claim in respect of this trade item. The Payment Claim states that as the works are 100% complete, payment for the balance of the contract value relating to this trade item, viz: \$156,114.72 is now being sought. The key issue therefore turns on whether this Trade item is 100% complete and, in this regard, I note the following statement at paragraph 82 of the Aston Report:

"Apart from defects, Aston are of the opinion that the Concrete Awarded Trade works are 100% progressed in the awarded value of \$440,382.00 (ex GST)."

Clearly, if the independent consultant that the Respondent has engaged the review the Payment Claim has made the above statement based on his visual inspection of the Project site, then that is sufficient to satisfy me that this Trade item has been brought to 100% completion.

147. Thus, for the reasons set out in the above paragraph, I decide that as this item is 100% complete, the amount that the Claimant is entitled to be paid is \$156,114.72.

Item 14

148. The Contract value relating to this Trade item is \$189,443.00 and the amount that the Claimant previously claimed and been paid for this item was \$4,000.00, on the basis that that Trade item was 2% complete. In its Payment Claim, the Claimant seeks payment of an additional amount of \$4,000.00 on the basis that this item is "3%" complete. The description column next to line item 14 of the Payment Claim was worded as follows:

"Electrical (NR & CL Smoothy Electrical) – Contracted on the basis of Principal supplied plans and specifications and approved by the Principal as per supporting documentation. The value of this claim relates to the installation of the pit adjacent to the transformer and associated conduits, and installation of incoming NBN conduits and pits – as evidenced in photographs."

149. As it has with all of the claimed Trade Package items, the Respondent's Payment Schedule contested the Claimant's entitlement to be paid for such items under the Contract and the Act (which is a matter I have already dealt with above) and that the Payment Claim failed to sufficiently specify the works that the claimed item relates. The Payment Schedule also went on to state that:

¹⁷¹ See copies of Payment Claims 9 and 10 in SM-128 and SM-137 of the SDSM.

¹⁷² See copies of Payment Certificates 9 and 10 in SM-129 and SM-141 of the SDSM.

- (a) The Payment Claim states that 3% of the Trade Package is complete, but the Claimant has claimed payment for an amount of 4.22% of the “Contract Amount”;
 - (b) The Claimant did not provide any “supporting documentation” regarding any “approval” by the Respondent;
 - (c) The Claimant did not provide any photographs to evidence the works; and
 - (d) Notwithstanding the above, the Respondent assessed that 3% for this Trade item is complete.
150. In its AA, the Claimant has provided similar responses to the reasons given in the Payment Schedule as it had provided in relation to the Trade items dealt with above (and as summarised at paragraph 132(a) to (g) above), other than to specifically refer me to paragraphs 235 to 241 of the SDSM.
151. In its AR, the Respondent’s submission in relation to this item was worded in identical terms to those it had given in respect to the Trade items dealt with above (which are summarised at paragraph 133 above).

My Decision

152. I consider that:

- (a) Based on the evidence set out by Mr Milfull at paragraph 235 to 242 of the SDSM, the Respondent gave approval to the Claimant to enter into a contract with Smoothy Electrical in respect to this Trade Package item;
- (b) For the reasons set out above, the contract that the Claimant entered into with Smoothy Electrical was as the Claimant’s subcontractor and not as the Respondent’s agent and that the Respondent would have been under no “misapprehension” as to the basis upon which the Claimant had engaged this trade contractor;
- (c) Other than providing a copy of the invoice of Smoothy Electrical, the Claimant has given no explanation as to the inconsistency within its Payment Claim for seeking an amount greater than the equivalent of 3% of the contract value relating to this trade item. The Respondent had identified this issue in its Payment Schedule, but the Claimant did not address this matter in its AA; and
- (d) In the circumstances, and given that the Respondent had stated in its Payment Schedule that it accepts that this Trade item is 3% complete, I decide that the value to be given to this item is \$1,683.29, being the amount arrived at after deducting the amount previously paid (\$4,000.00) from the 3% value of the trade item contract sum (i.e. 3% of \$189,443.00 = \$5,683.29 - \$4,000.00 = \$1,683.29).

Item 15

153. In its Payment Claim, the Claimant stated that this Trade Package item is 100% complete and that, as such, it is entitled to receive the full payment for this item, being the contract sum set out in the subcontract that the Claimant had entered into with CQ Brick and Blocklaying (“CQ Brick”). The description column next to line item 15 in the Payment Claim was worded as follows:

“Blockwork – CQ Brick and Blocklaying – admin blockwork as per documentation provided by the Principal for tender, contracted as per approval from Principal/Slattery as evidenced. The value of claim relates to the supply and installation of all blockwork walls and feature pillars as shown in photographs and reports.”

154. Other than contesting the Claimant’s entitlement to be paid for Trade Packages under the Contract and the Act (which is a matter I have already dealt with above) and that the Payment Claim failed to sufficiently specify the works that the claimed item relates, Annexure C of the Payment Schedule stated that:

- (a) The Respondent had not approved the contract between the Claimant and CQ Brick;
- (b) The Claimant did not provide *“photographs and reports”* with its Payment Claim;
- (c) In the alternative and without prejudice to the above, the Respondent submits that based on the visual inspection carried out by Aston Consult:
 - (i) Aston has assessed the blockwork to be 100% complete;
 - (ii) However, Aston has identified defects in the works, which requires work to retrofit ties and joints, as well as patching to the base course blockwork;
- (d) The estimated costs to rectify the defective work is \$7,490.00.

155. In its AA, the Claimant gave the following response to the reasons that were set out in the Payment Schedule:

- (a) As no amount in relation to this Trade item had been previously claimed, the Payment Claim seeks payment for the full contract value relating to this item;
- (b) The Aston Report agrees that 100% of this work was completed;
- (c) For the reasons set out elsewhere in the AA, the Respondent could have been under no “misapprehension” as to the basis on which the Claimant was engaging subcontractors and claiming for their work;
- (d) The Respondent instructed the Claimant to engage CQ Brick, as can be seen from the information set out at paragraphs 307 to 311 of the SDSM;

- (e) For the reasons set out elsewhere in the AA, the Payment Claim sufficiently identified the construction works; and
 - (f) To the extent that there are any defects in this work, then the Tsipis Report has assessed the cost to rectify those defects at \$3,120.00.
156. In its AR, the Respondent's submission in relation to this item was worded in identical terms to those it had given in respect to the other Trade items dealt with above (which are summarised at paragraph 133 above).

My Decision

157. Leaving aside the Respondent's allegation relating to the defects associated with this Trade Package item (which is a matter that I deal with separately later in my Decision), I consider that the Claimant has established its entitlement to the amount claimed and I have arrived at this conclusion because of the following reasons:

- (a) It is clear that the Respondent gave approval for the Claimant to enter into a contract with CQ Brick. So much is obvious from the email that Ms Edwards had sent to Luke Perkins on 15 December 2020 stating:

"The blockwork tender as submitted by CQ Brick & Block is acceptable and can be awarded."

- (b) I have already dealt with the Respondent's argument that the Claimant was required under the Contract to engage all trade contractors as the Respondent's agent, and I have concluded that that was not the case. Accordingly, the subcontract that the Claimant entered into with CQ Brick, dated 7 January 2021, for the contract sum of \$56,522.00 was as per the quotation that CQ Brick had sent on 3 December 2020, which as I have noted above, had been approved by the Respondent's representative. It is also apparent that, in February 2021, the Respondent received a copy of the subcontract that the Claimant entered into with CQ Brick. I therefore consider that the Respondent would have been well aware of the nature of the works that CQ Brick had been engaged to carry out;
- (c) A copy of CQ Brick's invoice #3457, dated 15 February 2021, for the amount of \$56,522.00 was included in the Payment Claim and although no "Photographs" or "Reports" were in fact included, it is nonetheless apparent from the following statement in the Aston Report that the author considered this trade work as 100% complete:

*"Apart from defects, Aston are of the opinion that the Blockwork awarded Trade works are 100% progressed, in the awarded value of \$56,522.00."*¹⁷³

¹⁷³ Paragraph 113 of the Aston Report.

Clearly if the independent consultant that the Respondent had engaged to review the Payment Claim has made the above statement based on his visual inspection of the Project site, then that is sufficient to satisfy me that this Trade item is 100% complete.

158. Thus, for the reasons set out in the above paragraph, I decide that as this item is 100% complete, the amount that the claimant is entitled to be paid is \$56,522.00.

Item 16

159. This item is a claim for \$1,356.60, representing the costs relating to the installation of waterproofing membranes to all blockwork openings, *“as approved by the Principal’s Representative (and) includes all window openings, external door openings, shopfront glazing openings to ensure compliance”*.
160. For the same reasons I have given in relation to Trade Item 15, I consider that the Claimant is entitled to the amount claimed, viz: \$1,356.60. In other words, I am satisfied that the Respondent gave approval for the Claimant to engage Wet-Seal to carry out the waterproofing work as set out in its quotation¹⁷⁴, that the Claimant accordingly engaged Wet-Seal to carry out that work, that a copy of Wet-Seal’s invoice relating to the carrying out of that work for the claimed amount was included in the Payment Claim and that the author of the Aston Report confirms that *“the Waterproofing awarded Trade works are 100% progressed, in the awarded value of \$1,356.60”*¹⁷⁵.
161. I therefore decide that as this Trade item is 100% complete, the Claimant is entitled to be paid the amount of \$1,356.60.

Item 17

162. In its Payment Claim, the Claimant seeks payment for the amount of \$262,124.99, which it had stated under the *“Current % Complete”* column as being *“15%”* (sic) complete, although the *“Contract Amount”* column had identified that sum at \$361,712.00. The description column next to line item 17 in the Payment Claim was worded as follows:

“Roofing and Wall Cladding (SQR) – works as per tender documents and submission approved by the Principal. SQR contracted following approval from Principal and Slattery. The value of the claim relates to the supply and installation of all roofing iron, safety mesh and installation of 72% of roof flashings, supply and installation of 63% of wall cladding, 55% of wall flashings, 40% of roofwater (gutters), access equipment costs (scissor lifts and boom lift hire), 46% of soffits in loading/unloading bays, consumables, accommodation, safety handrail installation.”

¹⁷⁴ Refer to email from Graham Scott, dated 2 February 2021, copy of which is included in Tab SM-134 of the SDSM.

¹⁷⁵ Paragraph 151 of the Aston Report.

163. In its Payment Schedule, other than contesting the Claimant's entitlement to be paid for Trade Packages under the Contract and the Act (which is a matter I have already dealt with above) and that the Payment Claim failed to sufficiently specify the works that the claimed item relates, the Respondent also stated that:

- (a) The Payment Claim states that 15% of the Trade Package is complete, but the Claimant has claimed payment for an amount equivalent to 72.47% of the "Contract Amount";
- (b) The Claimant has supplied a number of invoices issued by SQR Constructions which appear to relate to this line item, however the Respondent cannot identify the works that the Claim relates, based on such bare descriptions as:
 - (i) *"Value of Original Contract Value completed to date"*;
 - (ii) *"Other items and Deliveries"*; and
 - (iii) *"Our claim for Release of 100% Retentions held due to termination of Contract"*;
- (c) The Respondent is not a party to the "Contract" between SQR Constructions;
- (d) The Respondent has neither seen nor been provided with a copy of any such contract;
- (e) In the alternative and without prejudice to the above, the Respondent submits that based on the visual inspection carried out by Aston Consult:
 - (i) Aston has assessed that the roofing and the wall cladding is 55.1% complete;
 - (ii) However, Aston has identified defects within this Trade works, with the cost of rectification of same assessed at \$58,680.55.

164. In its AA, the Claimant gave the following response to the reasons that were set out in the Payment Schedule:

- (a) The reference of work completed of 15% in the Payment Claim was an error and should have been 72.47% and the Respondent could have been under no misunderstanding as to the value of work being claimed as no work had previously been claimed in respect of this line item and the description of work completed identifies the percentage of each part of the works that are claimed;
- (b) For the reasons set out elsewhere in the AA, the Respondent could have been under no "misapprehension" as to the basis on which the Claimant was engaging subcontractors and claiming for their work;

- (c) The Respondent instructed the Claimant to engage SQR Constructions, as can be seen at paragraphs 315 to 323 of the SDSM;
 - (d) For the reasons set out elsewhere in the AA, the Payment Claim sufficiently identified the construction work; and
 - (e) The author of the Tsipis Report opines that there are no defects in these works and the “defects” observed in the Aston Report relate to incomplete works and the site being left “idle” for a period of time when the works were not in the care of the Claimant and that, accordingly, the cost to rectify any of the alleged defects is \$nil.
165. In its AR, the Respondent’s submission in relation to this Trade item is worded in similar terms to those it had given to several of the other line items I have dealt with above and these have been summarised at paragraph 133 above. Relevantly however, in relation to the matter set out at paragraph 164(a) above, the Respondent maintains the assessment it had given in its Payment Schedule as to the trade work complete and refers to and relies upon not only the Aston Report and the Supplementary Aston Report but also on the evidence set out in the Statutory Declaration of Patrick Donlan (“SDPD”).

My Decision

166. Leaving aside the Respondent’s allegation relating to the defects associated with this Trade item (which is a matter that I deal with separately later in my Decision), I have arrived at the following conclusions:
- (a) I am satisfied that the Respondent gave approval to the Claimant to enter into a contract with SQR Constructions in relation to this Trade Package item. The circumstances that led the Claimant to receiving the Respondent’s instructions to engage SQR Constructions are detailed at paragraphs 313 to 325 of the SDSM and, in this regard, it is relevant to observe:
 - (i) Although SQR Construction was not a subcontractor identified in the Claimant’s Form 4 document, the Claimant commenced negotiating this package of works with SQR Constructions and another roofing contractor because those subcontractors on the Form 4 document were either unavailable or had withdrawn interest in tendering for the work;
 - (ii) After receiving tenders from SQR Constructions and another contractor, the Claimant recommended proceeding with SQR Constructions;
 - (iii) On 15 December 2020, Ms Edwards of Slattery sent an email to the Claimant’s Mr Perkins, stating that the Claimant was to proceed with the tender submitted by SQR Constructions. Further emails were exchanged between Ms Edwards and Mr Perkins on 16

December 2020, with Mr Stewart being copied to these emails. On the same day, i.e. 16 December 2020, Mr Stewart sent an email to Mr Perkins stating:

“Go with the South Old Roofing Option 2...”¹⁷⁶; and

(iv) At paragraph 322 to 324 of the SDSM, Mr Milfull goes on to state:

“322 On 18 December 2020, I emailed Stewart and Scott to clarify the approval process for engaging subcontractors. Specifically, I stated:

‘We’ve received confirmation this week from Christine she has approved several tenders, including roller doors, painting, glazing, plastering, roofing.

*My understanding is that Christine makes the recommendation, but we require written approval from the **Principal to engage the subcontractors.***

Jim – you have confirmed the roofing quote so we can move ahead with it.

*Whilst I know you were copied into the correspondence, can you confirm we are approved by the Principal to award the roller doors, painting, glazing and plastering as per Christine’s emails?
(Emphasis added)*

323 Later on the same day, I received a response from Stewart that stated:

‘Thanks,

I can confirm all of the approvals that Christine has emailed.

Going forward, she will seek confirmation from me in writing in the first instance and forward that to you as an attachment together with her notice to proceed.

*That way, Christine can approve everything as one point of contact for you but I will have given her my approval prior to that. I am just running around while the borders are open and it is easier/more reliable if we have Christine handle these trade approvals for now.’
A copy of this email chain is document **SM-120***

¹⁷⁶ A copy of the email chain exchanged between the parties on 15 and 16 December 2020 is included in Tab SM-119 of the SDSM.

324 *I understood from the above email chain that ASM Builders was being direct was being directed by HVH to follow a process with Edwards in respect to the engagement of subcontractors. I also understood that HVH had approved ASM Builders to engage the subcontractors for the ‘roller doors, painting, glazing and plastering as per Christine’s emails’.*”

I consider, given the exchange of correspondence outlined above and the parties course of dealing during the Project as also outlined earlier in my Decision, that Mr. Milfull’s understanding that Mr. Stewart had instructed the Claimant to engage SQR Constructions as its subcontractor was reasonable. Accordingly, the subcontract that the Claimant entered into with SQR Constructions (which was of the AS2124-1992 form) dated 6 January 2021, was in accordance with the Respondent’s instructions.¹⁷⁷

- (b) It would have been apparent to the Respondent, given the amount claimed, viz: \$262,124.99, relative to the Trade contract value, viz: \$361,712.00, that the reference to 15% under the “current % complete” column was an error;
- (c) Insofar as the Respondent had stated in its Payment Schedule that it could not identify the works that this Trade item related to, then that comment appears to have disregarded the details that the Claimant had provided in the “Description” column of the Payment Claim. In my view, the details that the Claimant provided in its Payment Claim were sufficient to have apprised the Respondent of what was being claimed in respect to his Trade item and as to how the claimed amount had been assessed;
- (d) On the issue of the valuation to be given to this Trade item, the disparity between the Claimant’s assessment of 72.47% complete and the assessment set out in the Aston Report of 55.1% complete (which the Respondent has adopted) can be summarised in the following table:

	Contract Value	Claimant’s % Complete	Claimant’s Claimed Amount	Aston % Complete	Aston’s Assessment
Roofing Iron	\$60,934.00	100%	\$60,934.00	90%	\$54,840.00
Soffits	\$21,979.00	46.7%	\$10,264.19	0%	\$0.00
Insulation Roof Safety Mesh Roof	\$23,663.00	100%	\$23,663.00	50%	\$11,831.50
Insulation Walls	\$16,359.00	100%	\$16,359.00	80%	\$13,087.20
Roof Flashings	\$13,019.00	72.5%	\$9,438.78	70%	\$9,113.30
Wall Cladding	\$53,999.00	63%	\$34,019.37	50%	\$26,999.50
Wall Cladding Flashings	\$15,712.00	55.4%	\$8,704.15	50%	\$7,856.00
Rainwater	\$29,136.00	40.5%	\$11,800.08	30%	\$8,740.80

¹⁷⁷ A copy of the subcontract that the Claimant executed with SQR Constructions is included in Tab SM-121 of the SDSM.

Access Equipment	\$34,090.00	70.6%	\$24,067.54	50%	\$17,045.00
Other items & Deliveries	\$71,301.00	58%	\$41,354.58	50%	\$35,650.50
Handrail	\$11,607.00	100%	\$11,607.00	65%	\$7,544.55
Craneage	\$9,913.00	100%	\$9,913.00	65%	\$6,443.45
	\$361,712.00	72.47%	\$262,124.99	55.1%	\$199,152.40

To support its position, the Claimant refers me to the various photographs that Mr Milfull took on the day when the Respondent served its Notice of Termination, viz: 6 April 2021¹⁷⁸. On the other hand, the author of the Aston Report states that, (with the exception of the component relating to the soffits), he had arrived at his assessment of the percentage complete based on the site inspection conducted on 2 June 2021¹⁷⁹. I prefer the Claimant's assessment because the batch of photographs it has provided (as included in SM-175) provide me with greater comfort than the assessment set out under the relevant part of the Aston Report. Take, for example, the claim relating to the soffit component where the Claimant contends was 46.7% complete, but where the Aston Report has assessed at 0% complete. When I examine the photograph 160233 included in SM-175 of the SDSM, it shows that the soffits in the incoming goods bay as having been installed and so it is difficult for me to understand how the author of the Aston Report, who states that he had formed his assessment of this component at 0% complete, could have arrived at this view. In any event, I consider, by reference to the photographs that Mr Milfull had taken on 6 April 2021, as providing a more reliable reference for the purposes of arriving at an assessment of this Trade item than the assessment upon which the author of the Aston Report had made based on his site inspection on 2 June 2021. Thus, when I look at photographs 160015, 166017, 160135, 160206, 160233, 160323, 160400 and 160456, I consider that the assessment of 72.47% complete for this Trade item is more likely to have reflected the work that had been carried out as at the date when the Claimant left the Project site.

167. Accordingly, for the reasons set out in the above paragraph, I decide that the amount that the Claimant is entitled to be paid is for this Trade item is \$262,124.99.

Item 18

168. In its Payment Claim, the Claimant states that it has completed 96% of the work relating to this Trade item and therefore, as the full Contract amount of this item is \$23,480.00, the Claimant seeks payment for the amount of \$22,515.21. The description column next to item 18 in the Payment Claim was worded as follows:

“Glazing (G James) – Windows and glazing as per Principal supplied documentation, as noted in the G James tender submission which was approved by the Principal and contracted accordingly. The value of the claim relates to

¹⁷⁸ Those photographs are included in Tab SM-175 of the SDSM

¹⁷⁹ Refer to the final column of the spreadsheet in Tab C6 of the Aston Report.

the supply and installation of shopfront glazing, entry doors, glass sliding doors and glazing at lunchroom, all windows, all louvres as shown on plans.”

169. In its Payment Schedule, other than contesting the Claimant’s entitlement to be paid for Trade Packages under the Contract and the Act (which is a matter I have already dealt with above) and that the Payment Claim failed to sufficiently specify the works that the claimed item relates, the Respondent also stated that:
- (a) Whereas the Claimant has provided an invoice issued by G James, the Respondent cannot identify the works that the claim relates based on bare descriptions such as “*Supply & install aluminium, joinery and glazing as quoted*”; and
 - (b) For the reasons set out in the relevant spreadsheet of the Aston Report and noting that no quality assurance documentation has been provided, the Respondent has assessed this Trade item at 90% complete.
170. In its AA, the Claimant stated that the Payment Claim and the details set out in respect to this Trade item had been sufficiently identified for the purposes of the Act and the Claimant notes that the Aston Report had agreed that 90% of this item is complete. The AA also referred me to paragraph 327 to 329 of the SDSM that sets out the circumstances where the Respondent had instructed the Claimant to engage G James to carry out the work relating to this Trade item.
171. In its AR, the Respondent’s submission relating to this item was worded in similar terms to those it had given to the various Trade items dealt with above (which are summarised at paragraph 133 above).

My Decision

172. Based on the parties’ submissions and the material provided, I have arrived at the following conclusions:
- (a) It is clear that the Respondent was fully aware of the nature of the work that G James were to carry out in relation to this Trade item, given that Mr Milfull had sent a copy of G James’ detailed tender to Messrs Stewart and Scott, and Ms Edwards on 14 December 2020¹⁸⁰;
 - (b) It is also clear that, from Ms Edwards’ emails of 15 and 16 December 2020, that the Claimant was given approval to proceed with the G James tender¹⁸¹;
 - (c) For the reasons set out above, the subcontract that the Claimant executed with G James (in the AS2124-1992 form)¹⁸², dated 8 January 2021, was not entered into as the Respondent’s agent, and the Respondent would

¹⁸⁰ A copy of Mr Milfull’s email, dated 14 December 2020, is included in Tab SM-122 of the SDSM.

¹⁸¹ Refer to paragraph 328 and 329 of the SDSM.

¹⁸² Copy of the subcontract entered into between the Claimant and G James is included in Tab SM-122 of the SDSM.

have been under no “misapprehension” as to the basis upon which the Claimant had engaged this trade contractor. Further, as it would appear that the Respondent had been provided with a copy of this subcontract in February 2021 and as that subcontract had annexed a copy of the G James’ tender, the Respondent would have been aware of the specific work that was to be carried out in respect to this Trade item; and

- (d) In regard to the value to be given to the work claimed to have been carried out in relation to this Trade item, I prefer the assessment set out in the Aston Report based on 90% complete. The Payment Schedule had stated that the author of the Aston Report had given a lower assessment in relation to this Trade item because no quality assurance documentation had been provided and this was not contested by the Claimant when it submitted its AA. I consider that the setting aside of an allowance equivalent to 10% of the Trade contract amount for the provision of the quality assurance documentation is reasonable.

173. Accordingly, for the reasons set out in the above paragraph, I decide that the amount that the Claimant is entitled to be paid for this Trade item is \$21,132.00.

Item 19

174. This item is a claim for \$4,394.50 and is said to relate to an instruction that the Claimant received from Mr Petchell (Slattery) requesting the Claimant to remove the excess fill from the Project site and place it on the neighbouring property (owned by one of the Respondent’s director, Mr Michael Cranny). The Claimant refers me to paragraph 179 to 181 of the SDSM and to the emails that were exchanged between Messrs Petchell and Perkins, to support the basis upon which this claimed item has been presented. The Claimant submits that it had been requested not to present the work relating to this item as a variation, but rather as an item under the Civil Trade item “*as it was already required work*”¹⁸³. In its Payment Schedule, the Respondent disputed this item for a range of reasons, including the absence of any supporting documentation.

My Decision

175. This claimed item relates to work said to have been carried out by JRT Civil. I have however earlier in my Decision, concluded that because JRT Civil had carried out “building work” for which it was not licensed to carry out and this had the effect of contaminating the entire subcontract works, such that JRT Civil was not able to enforce payment¹⁸⁴. Thus, as the Claimant had no obligation to pay JRT Civil for the work carried out under the subcontract, the Claimant cannot have an entitlement to seek payment from the Respondent for any of the work relating to the JRT Civil subcontract. I accordingly decide that the amount that the Claimant is entitled to be paid for this claimed item is \$nil.

Item 20

¹⁸³ Paragraph 181 of the SDSM.

¹⁸⁴ See paragraph 121 above.

176. This item is a claim for \$3,765.25, which the Description column of the Payment Claim stated was in respect to:

“(The Claimant’s) grouting of columns (part of Structural Steel package as approved by (Graham Scott) 24.02.2021, but not included in either the s/steel or concreter’s scope). The work involved the supply and installation of cementitious (sic) grout under all structural steel columns prior to the completion of concreting works.”

177. In its Payment Schedule, other than contesting the Claimant’s entitlement to be paid for Trade Packages under the Contract and the Act (which is a matter I have already dealt with above) and that the Payment Claim failed to sufficiently specify the works that the claimed item relates, the Respondent also stated that:

(a) As identified in the Spreadsheet in the Aston Report:

- (i) based on a visual inspection, it appears that 100% of these “Trade Packages” is complete; and
- (ii) however, not only is the workmanship for these works is poor, but the Claimant has also failed to:

- (A) provide any documentation to support the amount claimed;
- (B) demonstrate why the work was not included within another “Trade Package”; and
- (C) provide any quality assurance documentation for the works;

(b) The Respondent has accordingly assessed the value of the work completed at \$0.00.

178. In its AA, the Claimant explains, by reference to paragraph 406 to 409 of the SDSM, that although the Claimant was initially requested to proceed with the grouting work as a variation to the Structural Steel trade package, Mr Graham Scott had subsequently written to the Claimant stating:

“It’s not a Variation the Scope of the Project, just anticipated work that hasn’t been included in any of the packages.

Ok to proceed.”¹⁸⁵

Thus, as the Respondent instructed the Claimant to carry out this work but not include it as a variation and as the Aston Report states that this work is 100% complete, the

¹⁸⁵ Graham Scott’s email to Perkins dated 24 February 2021 is included in the email chain in Tab SM-153A.

Claimant submits that it is entitled to the amount claimed in respect to this item. Further, to the extent that there may be any defects relating to this work, the Claimant refers me to the relevant section of the Tsipis Report.

179. In its AR, the Respondent's submissions relating to this item was worded in similar terms to those it had given to the various Trade items dealt with above (which are summarised at paragraph 133). The Respondent also submitted that when considering the issue relating to defects, I should give greater weight to the evidence set out in the Aston Report, rather than the opinion set out in the Tsipis Report.

My Decision

180. Leaving aside the Respondent's allegation relating to the defects associated with this item of work (which is a matter I deal with separately later in my Decision), I consider that the Claimant has not established its entitlement to this claimed amount and I have arrived at this conclusion because:

- (a) As this item is not variation work (and by reason of this being presented under the heading of "Trade Packages" indicates that the Claimant agrees that it is also not a variation), it follows that it is work that falls either under the Structural Steel or Concrete trade package, in which case I fail to understand how this work is being claimed as a separate Trade item;
- (b) In any event, the Claimant has provided no documentation to support the amount being claimed, whether by way of an invoice or setting out how the claimed amount has been arrived at. This was a reason that the Respondent had given in its Payment Schedule for rejecting this item, yet when submitted its AA, the Claimant failed to address this issue. Absent such detail, even if I had concluded that the Claimant had an entitlement to this item, I would not have any information upon which to arrive at any assessment of this claimed work.

181. Thus, for the reasons set out in the above paragraph, I decide that the value to be given to this item is \$nil.

Summary of Decisions relating to Trade Packages

182. For the reasons set out above, I have assessed the value to be given to the Trade Packages component of the Payment Claim at \$502,227.50 and this amount represents the aggregate of the following Trade items:

<u>Items 6, 7 and 7(a)</u>	(\$339,852.00)
	see paragraph 129 above
<u>Item 10</u>	\$335,284.00
	see paragraph 134-135 above
<u>Item 11</u>	\$7,591.90
	see paragraph 140-141 above
<u>Item 12</u>	\$156,114.72

<u>Item 14</u>	see paragraph 146-147 above \$1,683.29
<u>Item 15</u>	see paragraph 152 above \$56,522.00
<u>Item 16</u>	see paragraph 157-158 above \$1,356.00
<u>Item 17</u>	see paragraph 159-161 above \$262,124.99
<u>Item 18</u>	see paragraph 166-167 above \$21,132.00
<u>Item 19</u>	see paragraph 172-173 above \$nil
<u>Item 20</u>	paragraph 175 above \$nil paragraph 180-181 above

Consideration / Assessment of Trade Packages Variations

183. In its Payment Claim, as “Value C”, the Claimant claims an amount of \$88,284.35 as Variations to its Trade Packages and these were set out in the Spreadsheet that accompanied the Payment Claim as follows:

Date	Description	Contract Amount	Previous % Complete	Previous Amount Complete	Current % Complete	Current Amount Complete	Amount This Claim
	Subcontractor Trade Packages Variations (approved)						
28.02.20	JRT V06 Stand down due to design levels	\$11,285.00	100%	\$11,285.00	100%	\$11,285.00	\$0.00
28.02.20	JRTV09 Dewatering of site	\$790.00	100%	\$790.00	100%	\$790.00	\$0.00
28.02.20	JRT V10 Trench for stormwater	\$220.00	100%	\$220.00	100%	\$220.00	\$0.00
28.02.20	JRT V12 Demobilisation due to stand down	\$1,288.00	100%	\$1,288.00	100%	\$1,288.00	\$0.00
24.07.20	JRT – Repairs to irrigation	\$3,457.25	100%	\$3,457.25	100%	\$3,457.25	\$0.00
24.07.20	JRT- Platform and level changes (loading bay)	\$1,113.75	100%	\$1,113.75	100%	\$1,113.75	\$0.00
24.07.20	JRT-Cut back pad	\$1,177.00	100%	\$1,177.00	100%	\$1,177.00	\$0.00
15.12.20	VPR01 – Electrical – carpark pit and pipe access (requested and approved by Principal’s Rep 15.12.2020). The amount claimed includes the 10% margin for ASM Builders.	\$2,167.00	0%	\$ -	100%	\$2,167.00	\$2,167.00
24.11.20	VPR2 – Hydraulics (changes to pits)	\$1,074.70	100%	\$1,074.70	100%	\$1,074.70	\$0.00
09.12.20	VRP8 – Stormwater (approved by JS 09.12.2020 at cost. NB margin has been added since Dec claim)	\$2,196.69	100%	\$2,196.69	100%	\$2,196.69	\$0.00
05.01.21	VPR09 deleted see below – Pierce changes \$10,714 (GS approved 05.01.21) stairs are removed – value was \$6,330.50		0%	\$ -	0%	\$ -	\$0.00
05.01.21	VPR3 Basin in batching room, add pit and stormwater changes. The amount claimed includes the 10% margin for ASM Builders	\$5,283.30	0%	\$ -	100%	\$5,283.30	\$5,283.30
24.01.21	Email instruction from JS to increase pad (CBC Ramage work) 20.01.21 – CBC price \$3,370	\$3,707.00	100%	\$3,707.00	100%	\$3,707.00	\$0.00
23.02.21	VPR04 Variation to basins in processing room by Hohmanns (underslab work completed and variation sent to GS). The amount claimed includes the 10% margin for ASM Builder.	\$2,009.70	0%	\$ -	100%	\$2,009.70	\$2,009.70

05.01.21	VPR07 Changes to stormwater pits. The amount claimed includes the 10% margin for ASM Builders	\$217.80	0%	\$ -	100%	\$217.80	\$217.80
06.11.20	Change to round bottom strip drains (JS approval 06.11.2020). The amount claimed includes the 10% margin for ASM Builders.	\$26,112.90	0%	\$ -	100%	\$26,112.90	\$26,112.90
19.02.21	Installation of strip drains (GS approval 19.02.2021). The amount claimed includes the 10% margin for ASM Builders.	\$6,560.40	0%	\$6,560.40	100%	\$6,560.40	\$6,560.40
21.01.21	Connection of aggy drain to swale (email from GS). The amount claimed includes the 10% margin for ASM Builders.	\$3,339.60	0%	\$ -	100%	\$3,339.60	\$3,339.60
16.12.20	Change to floor waste config in cleaners room due to footing clash (direction from GS/CE to forward variation). The amount claimed includes the 10% margin for ASM Builders.	\$672.10	0%	\$ -	100%	\$672.10	\$672.10
10.02.21	Pierce – Supply and install steel 0 angle trimmers (email from GS). The amount claimed includes the 10% margin for ASM Builders.	\$4,246.00	0%	\$ -	100%	\$4,246.00	\$4,246.00
11.02.21	Pierce – Cut two columns down by 70mm (Quote M1727) email from GS). The amount claimed includes the 10% margin for ASM Builders.	\$871.20	0%	\$ -	100%	\$871.20	\$871.20
05.01.21	Pierce – alter steel and girts (was in original VPR9 which is deleted). The amount claimed includes the 10% margin for ASM Builders.	\$3,432.00	0%	\$ -	100%	\$3,432.00	\$3,432.00
05.01.21	Pierce – supply and install 40 of 65x65 x 2 galv pressed angles (was in original VPR9 which is deleted). The amount claimed includes the 10% margin for ASM Builders.	\$951.50	0%	\$ -	100%	\$951.50	\$951.50
29.03.21	Hohmanns – Booster relocation – direction to complete works by GS (not complete cost – cabinet and block pan cost to come). The amount claimed includes the 10% margin for ASM Builders.	\$17,822.20	0%	\$ -	100%	\$17,822.20	\$17,822.20
29.03.21	Hohmanns – change basin to wash trough in Dirty/Clean Ante Room (underslab works only completed). The amount claimed includes the 10% margin for ASM Builders.	\$799.70	0%	\$ -	100%	\$799.70	\$799.70
29.03.21	Hohmanns – change cold room tundishes to go direct to drain. The amount claimed includes the 10% margin for ASM Builders.	\$811.80	0%	\$ -	100%	\$811.80	\$811.80
29.03.21	Hohmanns – connect basin direct to drain in ante clean/dirty room (underslab only). The amount claimed includes the 10% margin for ASM Builders.	\$1,087.90	0%	\$ -	100%	\$1,087.90	\$1,087.90
10.02.21	Pierce – design and fabricate screen mullions (GS email approving quote). The amount claimed includes the 10% margin for ASM Builders.	\$5,087.90	0%	\$ -	100%	\$5,087.90	\$5,087.90
20.01.21	JRT – cut 25mm from outgoing goods area due to concrete thickness increasing (as directed by PR 10.01.2021). The amount claimed includes the 10% margin for ASM Builders.	\$481.25	0%	\$ -	100%	\$481.25	\$481.25
23.02.21	Pierce – steel angles, supply and install stairs, grating, handrails and later door openings (refer GS advice Line 45). The amount claimed includes the 10% margin for ASM Builders.	\$6,330.50	0%	\$ -	100%	\$6,330.50	\$6,330.50
Value C	Subcontractor Packages Variations (approved) to Date	\$114,594.64		\$26,310.29		\$114,594.64	\$88,284.35

184. As can be seen from the above table, the Claimant contends that the total value of the “approved” Variations to the Trade Packages is \$114,594.64. Of that amount, the Claimant has previously claimed and been paid the sum of \$26,310.29 pursuant to payment certificates issued by Slattery. In the present Payment Claim, the Claimant seeks payment for the sum of \$88,284.35 in relation to the following Variations:

- (a) *Variation ‘VPR04 Variation to basins in processing room by Hohmanns’* which appears at row 48 of the Payment Claim and the background information of which is set out at paragraphs 292 to 294 of the SDSM;
- (b) *Variation ‘Change to round bottom strip drains’* which appears at row 50 of the Payment Claim and the background information of which is set out at paragraphs 331 to 335 of the SDSM;
- (c) *Variation ‘Change to floor waste config in cleaners room due to footing clash’* which appears at row 53 of the Payment Claim and the background information of which is set out at paragraphs 336 to 338 of the SDSM;
- (d) *Variation ‘VPR01 – Electrical – carpark pit and pipe access’* which appears at row 42 of the Payment Claim and the background information of which is set out at paragraphs 339 to 342 of the SDSM;
- (e) *Variation ‘Pierce – alter steel and girts’* which appears at row 56 of the Payment Claim and the background information of which is set out at paragraphs 335 to 359 of the SDSM;
- (f) *Variation ‘Pierce – supply and install 40 of 65x65 x 2 galv pressed angles’* which appears at row 57 of the Payment Claim and the background information of which is set out at paragraphs 355 to 359 of the SDSM;
- (g) *Variation ‘Pierce – steel angles, supply (sic) and install stairs, grating, handrails and alter door openings’* which appears at row 64 of the Payment Claim and the background information of which is set out at paragraphs 355 to 359 of the SDSM;
- (h) *Variation ‘VPR3 Basin in batching room, add pit and stormwater changes’* which appears at row 46 of the Payment Claim and the background information of which is set out at paragraphs 360 to 362 of the SDSM;
- (i) *Variation ‘Connection of aggy drain to swale’* which appears at row 52 of the Payment Claim and the background information of which is set out at paragraphs 363 to 366 of the SDSM;
- (j) *Variation ‘VPR07 Changes to stormwater pits’* which appears at row 49 of the Payment Claim and the background information of which is set out at paragraphs 367 to 368 of the SDSM;

- (k) Variation '*JRT – cut 25mm from outgoing goods area due to concrete thickness increasing*' which appears at row 63 of the Payment Claim and the background information of which is set out at paragraphs 369 to 370 of the SDSM;
- (l) Variation '*Pierce – Supply and install steel 60 angle trimmers*' which appears at row 54 of the Payment Claim and the background information of which is set out at paragraphs 403 to 405 of the SDSM;
- (m) Variation '*Pierce – Cut two columns down by 70mm (Quote M1727)*' which appears at row 55 of the Payment Claim and the background information of which is also set out at paragraphs 403 to 405 of the SDSM;
- (n) Variation '*Pierce – design and fabricate screen mullions*' which appears at row 62 of the Payment Claim and the background information of which is also set out at paragraphs 403 to 405 of the SDSM;
- (o) Variation '*Hohmanns – Booster relocation*' which appears at row 58 of the Payment Claim and the background information of which is set out at paragraphs 411 to 413 of the SDSM;
- (p) Variation '*Installation of strip drains*' which appears at row 51 of the Payment Claim and the background information of which is set out at paragraphs 414 to 417 of the SDSM;
- (q) Variation '*Hohmanns - change basin to wash trough in Dirty/Clean Ante Room*' which appears at row 59 of the Payment Claim and the background information of which is set out at paragraphs 418 to 419 of the SDSM;
- (r) Variation '*Hohmanns – change cold room tundishes to go direct to drain*' which appears at row 60 of the Payment Claim and the background information of which is also set out at paragraphs 418 to 419 of the SDSM; and
- (s) Variation '*Hohmanns – connect basin direct to ante clean/dirty room*' which appears at row 61 of the Payment Claim and the background information of which is also set out at paragraphs 418 to 419 of the SDSM.

185. In its Payment Schedule, the Respondent rejected the Claimant's entitlement to claim payment for the Variations to the Trade Packages. This is because the Claimant was required to engage trade contractors as agent for the Respondent but, in fundamental breach of the Contract, the Claimant had engaged subcontractors to complete the Trade Packages works. Thus (so it was stated in the Payment Schedule) if the claims for the Trade Packages works are not able to be made under the Contract, it follows that the Claimant can have no entitlement to claim payment for any Variations to those Trade packages.

186. Annexure D of the Payment Schedule, however, went on to state that, in the alternative, the Claimant is not entitled to payment in respect of the “Trade Packages Variations” because of the following reasons:

- (a) The Respondent cannot assess the validity or the value of the variations, in circumstances where:
 - (i) the Claimant let the “Trade Packages” under subcontracts entered in its own name;
 - (ii) the Respondent did not approve the subcontracts and they were not authorised under the Contract; and
 - (iii) the Respondent had no knowledge of the scope of works that the trade contractors were contracted to complete,
- (b) The Claimant has failed to sufficiently specify the works that the “Trade Packages Variations” relate, in that:
 - (i) the description of the work provided in the Payment Claim does not provide the Respondent with meaningful information that allows it to assess the basis of the claim;
 - (ii) the Claimant has failed to provide any evidence to substantiate the value of the works claimed; and
 - (iii) the Claimant has not identified the construction work or related goods and services for which it claims a progress payment;
- (c) the Claimant has not identified the basis upon which it claims to have an entitlement to payment for the Trade Packages Variations;
- (d) the Respondent confirms that:
 - (i) it had not directed the Claimant to vary its Services in respect of the items within the Trade Packages Variations;
 - (ii) it had not directed the Claimant, pursuant to clause 24.1 of the Contract, in respect of the items within the Trade Packages Variations; and
 - (iii) any variation to the Trade Packages is not a variation under the Contract, or to the Services, and that therefore, the Claimant is not entitled to any additional amount;
- (e) Further, in the event that the Claimant is entitled to payment for the “Trade Packages Variations”, then:

- (i) Each of the amounts claimed in respect of the “Trade Packages Variations” include a margin for the Claimant;
- (ii) The Claimant’s claim for a margin is not a claim pursuant to the Contract, because the Claimant is only entitled to a Fee Adjustment for variations directed in writing to the Services not to the contractors;
- (iii) No such variation direction has been issued pursuant to clause 24.1 of the Contract, or at all;
- (iv) The Respondent notes that pursuant to the Contract, the Claimant’s Services (pursuant to Annexure Part B) included:
 - (A) the carrying out all administrative procedures necessary for the efficient management of the Project; and
 - (B) the processing claims;
- (v) The Claimant’s involvement in the management and processing of contractors’ variations falls within the scope of the Claimant’s Services and the Claimant is therefore not entitled to a Fee Adjustment (nor a margin) in respect of the variations.

187. In its AA (and specifically at Annexure K), the Claimant provided the following response to the matters the Respondent had raised in the Payment Schedule:

- (a) The Claimant only claims the amount of \$88,284.35 in the Payment Claim in respect to Variations. The Respondent is not able to reopen and reassess claims for Variations that the Claimant had previously made and which the Respondent has paid in full;
- (b) The Respondent has misconstrued the nature of the Payment Claim, as it is not a claim for all work done with deductions for amounts already paid, (i.e., a claim reconciling all construction work carried out at the date of the claim and all payments previously paid). Rather the Payment Claim is a claim only in respect of work carried out that has not already been claimed, assessed and paid;
- (c) The amount previously claimed for Variations was \$26,310.29, and this related to variation work previously claimed by the Claimant, assessed by Slattery and paid in full by the Respondent prior to the present Payment Claim having been issued. In respect to that amount, at no time prior to the Payment Schedule did the Respondent dispute:
 - (i) the amounts claimed;

- (ii) the variation work which had been completed by the Claimant's subcontractors; or
 - (iii) the way in which this variation work was being claimed;
- (d) The Respondent cannot depart from the course of conduct that it engaged in and encouraged over the course of a 12 month period, during which it assessed and paid 10 previous progress claims made by the Claimant, which included Variations based on the same basis as the Variations now being claimed in the present Payment Claim;
- (e) For the reasons set out earlier in its submissions, the Respondent could have been under no "misapprehension" as to the basis on which the Claimant engaged and paid its subcontractors and was claiming payment for their work. Further, and by reference to the evidence set out in the SDSM, the Respondent had been directly involved in negotiating the scope of work and price for each subcontractor that it had instructed the Claimant to engage. It is therefore incorrect for the Respondent to now assert that it did not approve the subcontracts or have knowledge of the scope of works being undertaken by the subcontractors;
- (f) The Respondent was also under no misapprehension about the way in which the Variations were being claimed. In this regard, the Claimant gives the example of the Variation claim it had made in respect to Variations carried out by JRT Civil in the Claimant's Progress Claim 2¹⁸⁶;
- (g) The Respondent had approved all of the Variations claimed by the Claimant in the Payment Claim and in this regard, the Claimant refers to and relies on the evidence set out at paragraphs 292, 333, 337, 340, 356, 361, 364, 404, 411 and 415 of the SDSM. The only exception relate to those Variations set out in sub-paragraphs 1, (r) and (s) at paragraph 184 above, as the Claimant has not been able to locate the emails approving these Variations. Nonetheless, these were additional work required to be carried out and the Respondent has received the benefit of that work;
- (h) Contrary to the Respondent's submission, the Respondent approved the 10% margin, and in this regard, the Claimant refers to and relies on the email that Mr Petchell had sent to Messrs Stewart and Milfull (and copy to Graham Scott), dated 2 July 2020, where he stated:

"I have reviewed the costs provided by the retaining wall works and can confirm the amount of \$47,014 (inclusive of the 10% subcontractor markup) is fair and reasonable for the works.

... ”¹⁸⁷

¹⁸⁶ The Claimant refers to the documents in Tabs SM-31, SM-32 and SM-33 that shows the Progress Claim 2 assessed by Slattery which included the amount for variations and which the Respondent paid to the Claimant.

¹⁸⁷ Copy of Mr Petchell's email is included in Tab SM-52 of the SDSM.

The Claimant submits that from Progress Claim 4 onwards, it claimed its approved 10% margin on Variations, Slattery had assessed an amount of Variations as payable that included the Claimant's 10% margin and the Respondent paid the assessed amount as payable to the Claimant. That process was adopted for all Variations that had been claimed in Progress Claims 4 to 10 and the Respondent should be held to its agreement relating to this;

- (i) There is no ability to open up and reassess the previously claimed and paid for Variations (being of the amount of \$26,310.29) in circumstances where:
 - (i) they are not the subject of the Payment Claim;
 - (ii) for the reasons set out elsewhere in the AA, the Respondent does not have a contractual right to set-off¹⁸⁸;
 - (iii) for the reasons also set out elsewhere in the AA, the amount previously claimed in respect to Variations were payments properly made under clause 26 of the Contract, or alternatively as disbursements, but in either case, the Respondent's previous assessments and payment were not made "on-account", but rather on a final basis¹⁸⁹;
- (j) For all the reasons set out earlier in its AA, the Claimant submits that the Payment Claim is a valid payment claim and sufficiently identified the construction work and/or goods and services to which the progress claim relates, including the details relating to the claimed Variations.

188. In its AR, the Respondent maintains the position it had set out in its Payment Schedule, viz: that the Claimant has no contractual entitlement to claim payment in respect of the Trade Packages and Variations to those Trade Packages. However, in the event that it were to be found that the Claimant did have a contractual entitlement in respect of the Trade Packages and therefore Variations to the Trade Packages, then the Respondent submits, by reference to the evidence set out in the SDJS, that:

- (a) at the time that the Respondent approved Variations to Trade Packages, those approvals were to vary the scope of work to be provided pursuant to the contracts that the Claimant had entered into with the contractors in the capacity as the Respondent's agent; and
- (b) in some instances, to account for the extra negotiations and services involved in dealing with the Variations to the Trade Packages, the Respondent approved a Variation to the Claimant's services and allowed the Claimant to claim a fee adjustment priced at 10% of the Variation price agreed with the trade contractor.

¹⁸⁸ The Claimant's submission relating to the Respondent's entitlement to a set-off is set out at Section H of the AA.

¹⁸⁹ See also the Claimant's submissions in Part C of the AA.

Thus, where in the AA the Claimant submits that there had been an agreement to claim a 10% margin in respect to the claimed amounts relating to work carried out by subcontractors for variations, Mr Stewart makes the following statement:

*“I do not agree that (the Respondent) ever agreed that (the Claimant) was entitled to a 10% margin on subcontractors. Firstly, (the Respondent) never agreed to (the Claimant) engaging subcontractors to perform the trade packages. Secondly, (the Claimant) agreed to a lump sum for the Management Fee, which included (the Claimant’s) margin on trades. I understood that amount was fixed. I do not agree that where there were variations to the trade packages, in some instances that would result in a variation to (the Claimant’s) additional fee (or fee adjustment) would be priced at 10% of the variation price agree with the trade contractor.”*¹⁹⁰

My Decision

189. In considering the Respondent’s arguments for rejecting this part of the Claimant’s claim, I have arrived at the following conclusions:

- (a) I have already dealt with the Respondent’s argument that it did not approve the Claimant entering into subcontracts with trade contractors and that the Claimant was contractually obliged to enter into contracts with trade contractors as agent for the Respondent. In this regard, I have found that the agreement that the parties had entered into was of a Construction and Construction Management nature (see paragraph 76(a) above). I have also found that the Respondent did give written approval to the Claimant to engage various subcontractors (see paragraph 76(b) above) and that, contrary to the Respondent’s submission, such approval was not given on the basis that the Claimant was to enter into contracts as agent for the Respondent (see paragraph 76(c)(i) to (iv) above);
- (b) I have also concluded that the parties had a conventional basis for the engagement of subcontractors and the claiming by the Claimant of subcontractor payment and that the conventional understanding, or common assumption that the parties adopted as to their legal relationship was as set out at paragraph 79 above, viz:
 - (i) The Claimant’s scope of work included the construction and construction management of the Project;
 - (ii) The Claimant was to engage the trade contractors as its subcontractors in accordance with the written instructions given by the Respondent and that as such, the Claimant was to pay those subcontractors for the work they performed;
 - (iii) The Claimant was entitled to claim from the Respondent the amounts relating to the approved work carried out by the subcontractors and that that included the variation works directed by the Respondent;

¹⁹⁰ Paragraph 21.6(k) of the SDJS and also repeated at paragraph 21.9(d) of the SDJS.

- (iv) Where variation work had been approved, the Claimant was entitled to claim a margin of 10%; and
 - (v) Subject to Slattery's assessment/certification, the Respondent was to pay to the Claimant the amounts so certified;
- (c) Notwithstanding what Mr Stewart stated in his Statutory Declaration to have been his understanding as to how the 10% margin was to be applied, I consider (as outlined in (b)(iv) above) that the parties proceeded on the basis that any approved Variations to the Trade Packages would entitle the Claimant to apply a 10% margin on such Variations. In his email, dated 2 July 2020 (see paragraph 187(h) above), Mr Petchell stated that he considered that a margin of 10% to be applied by the Claimant on that particular Variation was "*fair and reasonable*" and, relevantly, that margin was then included in Progress Claims/Payment Certificate 4 to 10. It seems to me that Mr Stewart's understanding as to the basis upon which the 10% margin was to be applied is inconsistent with how the parties proceeded subsequent to Mr Petchell's email of 2 July 2020 regarding the assessment of Variations. It is inconceivable that Slattery would have certified variation payments by applying a 10% margin if it had the same understanding as Mr Stewart and it is also inconceivable that Mr Stewart (as the Respondent's director) would have agreed to make progressive payments to the Claimant if such payments did not accord with his understanding of how such Variations were to be assessed;
- (d) Further, insofar as the Respondent contends that it had no knowledge of the scope of works of the subcontractors and was therefore not able to determine whether the work now claimed as a Variation was an extra over the subcontractor's original scope, then I disagree. As outlined above, the Respondent (including its representatives) had been actively involved in the process relating to the calling for tenders of the Trade Packages and then subsequently provided the Claimant with written approval to engage the various subcontractors. It would therefore seem incongruous for the Respondent to now contend that it was not aware of the subcontractors' work and was therefore not able to identify whether the work claimed in fact constituted a Variation;
- (e) Insofar as the Respondent contends that the Payment Claim did not sufficiently identify the work relating to the claimed Variations, then I disagree. In my view, the details that were set out in the spreadsheet that was included in the Payment Claim (see the table at paragraph 183 above) together with the copies of subcontractors' invoices relating to those claimed Variations, would have been sufficient to apprise the Respondent of what was being claimed and so decide whether to agree to pay for that claimed item or dispute it by including it in its Payment Schedule;
- (f) I am satisfied that the Respondent gave approval in relation to the following claimed Variations:

- (i) In relation to the claimed Variation set out at paragraph 184(b) above, following the email that Perkins had sent to Messrs Scott and Stewart on 6 November 2020 on-forwarding Hohmanns' options and where Mr Stewart responded by way of an email (later that day) giving approval to proceed with the option to use round bottom strip drains "*asap*";¹⁹¹;
- (ii) In relation to the claimed Variation set out at paragraph 184(c) above, following Mr Perkins' email of 16 December 2020 requesting a "*VPR*" for the extra work that Hohmanns carried out to resolve the design clash for a floor waste gully in the cleaners room and where Ms Edwards responded by way of an email later that day stating: "*If this work has already been carried out can you just forward the priced variation*" (which a copy being sent to Messrs Scott and Stewart)¹⁹²;
- (iii) In relation to the claimed Variation set out at paragraph 184(d) above, Smoothy Electrical had raised a number of issues in relation to the MSB generator connection and underground electrical conduits and that this led Messrs Perkins and Scott to discuss how these matters could be resolved. It would appear that a decision was made not to proceed with any generator connection works, but that the conduit for carpark lighting was approved to proceed. Thus, Mr Scott sent Mr Perkins an email on 15 December 2020 under the subject heading Re: VPR 01 MSB Generator connection to proceed with the conduit for carpark lighting¹⁹³;
- (iv) In relation to the claimed variations set out a paragraph 184(e), (f) and (g) above, Mr Milfull provides the following statement to support the Claimant's position that it had received written approval to proceed:

"355 *Works continued to be carried out in December and January 2021. On 4 January 2021, I was copied into an email from Perkins to Stewart, Scott, Edwards and Thomasson requesting approval for a variation to the Pierce Engineering structural steel package.*

356 *In response, on 5 January 2021, I was copied into an email from Scott approving a variation to the Pierce Engineering structural steel package. Specifically, the email stated:*

'In order to avoid any delay,

¹⁹¹ See SM-124 and also paragraph 331 to 335 of the SDSM.

¹⁹² See SM-125 and also paragraph 335 to 337 of the SDSM.

¹⁹³ See SM-126 and paragraph 339 to 342 of the SDSM.

Please advise Pierce to proceed with this work.

The agreed price for this Variation is \$9740 excl GST.

We will need to capture this with a VPR instruction.

Lets make it VPR9'

357 *A copy of this email chain is document **SM-130**.*

358 *On 2 February 2021, I was copied into an email from Perkins to Stewart, Scott and Edwards attaching two quotes from Pierce to undertake variation works in relation to extra angle trimmers and the fabrication of screen mullions. A copy of this email and attached quotes is document **SM-131**.*

359 *That variation is claimed in the May Payment Claim at rows 56, 57 and 64 which are entitled '05.01.21', '05.01.21', respectively. When ASM Builders' margin (being 10%) is taken into account, the amounts claimed for those items cumulatively add up to the price approved by Scott in his email above, being \$9,740."*

- (v) In relation to the claimed Variation set out at paragraph 184(h) above, where on 5 January 2021, under the subject heading "VPR3", Mr Scott sent an email to Messrs Perkins and Stewart stating:

"Confirming this VPR now relates to the underslab work from the basis to the existing drainage and for the additional roofwater pit and approx.. 22m of 150 pipe and connection to existing stormwater.

*This amended VPR is approved being \$4802 excl GST."*¹⁹⁴

- (vi) In relation to the claimed Variation set out at paragraph 184(i) above, where Scott sent an email to Messrs Perkins and Stewart on 21 January 2021, stating:

"Please proceed to install ag drain as per attached sketch from Glenn (attached).

*This will be a VPR."*¹⁹⁵

¹⁹⁴ Copy of Mr Scott's email is included in Tab SM-132 of the SDSM.

¹⁹⁵ Copy of Mr Scott's email is included in Tab SM-133 of SDSM.

(vii) In relation to the claimed Variation set out at paragraph 184(j) above, where on 5 January 2021, Mr Scott sent an email to Mr Perkins (copy also given to Ms Edwards, and Messrs Stewart and Cranny) to support a VPR for a “*change to SW Pit and Pipe sizes*”¹⁹⁶;

(viii) In relation to the claimed Variations set out at paragraphs 184(l), (m) and (n) above, Mr Milfull provides the following statement to support the Claimant’s position that it had received written approval to proceed:

“403 On 2 February 2021, I was copied to an email from Perkins to Stewart, Scott and Edwards. The subject of that email was ‘Structural steel VPR list’. That email attached two quotes from Pierce for variations for ‘Extra Angle trimmers’ and for ‘posts on Louvered screens’. It also attached an email chain between various people including Scott and Perkins. The email chain between Scott and Perkins dealt with the slab ‘setdown’ and Perkins proposed two options, one of which was for Pierce to ‘cut down two columns by 70ml’. A copy of that email with its attachments is referenced above as document **SM-131**.

404 On 11 February 2021, I was copied to an email from Scott to Perkins to Stewart. That email was also copied to Lightfoot, Cranny, Edwards, Ellis, Butterworth and Thomasson. In that email, Scott approved the variations set out in Perkins email of 2 February 2021 by reference to the subject matter of Perkins’ email, being ‘Structural steel VPR list’. A copy of that email is document **SM-153**.

405 In accordance with Scott’s instruction, this work was carried out and has been claimed as a variation at rows 54, 55 and 62 of the May Payment Claim under the headings ‘10.02.21’, ‘11.02.21’ and ‘10.02.21’.”

(ix) In relation to the claimed Variation set out at paragraph 184(o) above, where Mr Scott sent an email to Mr Milfull (copy to Ms Edwards and Mr Cranny) on 9 February 2021, requesting the Claimant “*to engage Hohmanns to construct the booster (assembly) in new location as per attached. Please submit price for review as soon as possible.*”¹⁹⁷

(x) In relation to the claimed Variation set out at paragraph 184(p) above, where, pursuant to Mr Perkins’ email of 18 February 2021 requesting advice on Hohmanns’ VPR request relating to the installation of strip drain, Mr Scott responded

¹⁹⁶ See SM-133B of the SDSM.

¹⁹⁷ See SM-154 of SDSM.

by way of email on 19 February 2021 (copy to Mr Stewart and Ms Edwards stating, “*Ok for Hohmanns to VPR installation*”).¹⁹⁸

I could not identify any document evidencing written approval given by the Respondent in relation to those Variations set out at paragraph 184(a), (k), (q), (r) and (s) (noting the Claimant’s concession that it had not been able to locate any email approving the Variations set out at paragraph 184(q), (r) and (s)).¹⁹⁹ I also note that in most of the Variations where approval had been given to the Claimant, a copy of such approval was given to the Respondent’s director, Mr Jim Stewart;

- (g) The Claimant provided copies of the tax invoices issued by the relevant subcontractors for all the claimed Variations. A copy of these invoices were included with the Payment Claim; and
- (h) Finally, I note that the Variation set out at paragraph 184(k) relates to variation work that was carried out by JRT Civil. Given my earlier conclusion that because JRT Civil carried out “building work” when it did not have the requisite QBCC licence and that the carrying out of such work had contaminated the entire subcontract that the Claimant had entered into with JRT Civil, it followed that the Claimant cannot look to the Respondent to make payments to it in respect of any work carried out by JRT Civil. This therefore means not only that the Claimant has no entitlement to be paid in relation to the Variation described at paragraph 184(k) above, but also that it had no entitlement to all of those Variations that JRT Civil had carried out for which the Claimant had previously claimed and been paid, viz: those Variations set out in row 35 to 41 of the Payment Claim spreadsheet, which collectively total an amount of \$19,331.00.

190. Accordingly, given the conclusions I have set out in the above paragraph, I have assessed the value to be given the claimed Variations, which the Respondent must pay to the Claimant at \$63,763.70. This amount has been arrived at by making the following deductions from the claimed Variation sum of \$88,284.35:

- (a) \$19,331.00 – representing the aggregate of the JRT Civil variation previously claimed and paid and as set out in row 25 to 41 of the Payment Claim spreadsheet;
- (b) \$481.25 – representing the JRT Civil variation claim set out at paragraph 184(k) above;
- (c) \$2,009.70 – representing the variation claim set out at paragraph 184(a) above, but where the Claimant has provided no evidence of having been provided with a written request to carry out this work;

¹⁹⁸ See email chain at Tab SM-155 of the SDSM.

¹⁹⁹ Refer to paragraph 10 of Attachment K of the AA.

- (d) \$799.70 – representing the variation claim set out at paragraph 184(q) above, but where the Claimant has provided no evidence of having been provided with a written request to carry out this work;
- (e) \$811.80 – representing the variation claim set out at paragraph 184(r) above, but where the Claimant has provided no evidence of having been provided with a written request to carry out this work; and
- (f) \$1,087.90 – representing the variation claim set out at paragraph 184(s) above, but where the Claimant has provided no evidence of having been provided with a written request to carry out this work.

Set-Off and Damages

The Parties Submissions

191. In its Payment Schedule the Respondent sought to set-off the following amounts:

Item	Amount (\$)
Extra Over Management Fee	\$276,063.07
Defects	\$294,497.36
Breach of the Contract (Civil Works)	[\$202,497.31 – sum already included in set off figure for Defects]
Breach of Contract (Insurances)	\$55,242.67
Total:	\$625,803.10

192. The Payment Schedule gave the following reasons regarding its entitlement to the above amounts:

(a) **Re: Extra Over Management Fee**

As set out in Annexure B and elsewhere in the Payment Schedule, the Claimant failed to perform the Services in accordance with the Contract and to a standard expected of a reasonable construction manager, which as a result of the Claimant's substantial breaches of Contract, led to the Respondent to terminate the Contract. This has resulted in the Respondent having to engage a new construction manager to complete the Services and to bring the Project to completion. The Respondent is therefore entitled to recover the additional costs incurred as a consequence of engaging another construction manager to complete the Services, with such costs being \$276,063.07. This amount has been calculated as follows:

Total cost of completing the Services the subject of the Management Fee	
Amount payable by the Principal to the Construction Manager for Services performed to date	\$81,475.57
Cost to complete the Services (refer to Aston Report for calculations)	\$726,607.50

Subtotal	\$808,083.07
Less Management Fee payable pursuant to the Contract	\$532,020.00
Total: additional cost incurred to complete the Services as a consequence of the Construction Manager's failure to perform the Services in accordance with the Contract	\$276,063.07

The reference in the above table to the Aston Report relating to the cost to complete the Services of \$726,607.50, relates to the details set out in Tab D1 of that Report and this refers to a Fee Quotation the Respondent obtained from CES;

(b) Re: Estimated costs of rectifying defects

By clause 6.3 of the Contract, the Claimant is liable for the acts, default and omissions of its subcontractors as if they were the acts of the Claimant. Further, pursuant to s72(2)(b)(iv) of the Act, the Claimant is liable for the costs of rectifying any defective works and the Respondent is entitled to set off the estimated rectification cost against the amount payable to the Claimant. Thus, if it were to be found that the Claimant is entitled to any amount in respect of the Trade Packages or the Trade Packages Variations, then that amount is to be reduced by the damages arising from the failure of those works to be constructed in accordance with:

- (i) the designs provided by the Respondent;
- (ii) the National Construction Code ("NCC") and applicable Australian Standards ("Standards");
- (iii) the terms of AS2124-1992; and
- (iv) the standard expected of a competent and experienced subcontractor.

As set out at Annexure C and paragraph 210 of the Aston Report, the Respondent is entitled to a set-off of a total of \$294,497.36 for making good defects in the works performed as part of the Trade Packages and Trade Packages Variations. Paragraph 210 of the Aston Report includes the following table that summarises how the rectification costs have been assessed:

Defective Work	Value (Ex GST)
Civil Trade Defects	\$202,719.31
Hydraulic Trade Defects	Incl
Concrete Trade Defects	\$9,835.00
Steel Package Trade Defects	\$15,772.50
Blockwork Trade Defects	\$7,490.00
Metal Roofing/Cladding Trade Defects	\$58,680.55
Total:	\$294,497.36

(c) Damages for breach of the Contract (Civil Works)

It will be noted from the table at paragraph 191 above that the estimated cost of defects included the amount of \$202,719.31, which has been identified under the sub-heading “Breach of Contract (Civil Works)”. In this regard, the Payment Schedule stated that the Respondent has incurred damage of that amount in being required to rectify civil works partially performed due to the Claimant’s failure to properly perform Services, thereby requiring the Respondent to engage a contractor to carry out rectification works to the following parts of the civil works:

- Mobilise to site
- Remove stockpiles of spoil from work area, cart to rear of site and spread (uncompacted)
- Remove concrete from site (Provisional Quantity 16m3)
- Clear site and cart spoil to rear of site and spread
- Clean out bio retention basins
- Re-trim open drains
- Install stormwater drainage
- Re-compact existing stormwater drainage
- Clean out existing pits and headwalls
- Level off existing stockpiles to rear of site
- Trim open ground areas ready for topsoil
- Trim and compact type 2.3 subgrade
- Import place and compact 30mm corrector course (Provisional Quantity 100m3)
- Complete previous contract works not completed
- HV and LV asphalt surfaces to be place at same time
- Watering of turf and hydromulch as (daily for two weeks then 3 days per week for 5 weeks)
- Use of existing onsite amenities or general power, rubbish to be pace in onsite bins supplied by others
- Testing
- Survey
- AS-Constructed survey and drawing
- Demobilise from site

The extra-over amount of \$202,719.31 has been derived from a quote that CES obtained from JRT Civil on 6 May 2021 for the amount of \$503,126.91, a copy of which was included as Annexure E in the Payment Schedule and the make-up of which can be summarised in the following table:

NO.	DESCRIPTION	VALUE (Ex GST)
0	Preliminaries	\$38,113.71
1	Earthworks	\$1,836.00
2	Roadworks	\$248,951.78
3	Stormwater	\$40,324.58
4	Sewer (by others)	-
5	Water (by others)	-
6	Erosion Control	\$55,429.56
7	Additional Works	\$118,471.27

	Total Rectification Value	\$503,126.91
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At paragraph 60 of the Aston Report, the author has produced the following table that summarises how the extra over costs have been assessed:

Item	Value (Ex GST)
A Civil Subcontract Value	\$491,895.10
B Civil Trade Work Complete	\$191,487.50
C Balance Outstanding (A-B)	\$300,407.60
D Civil Quote to Complete/Rectify Work	\$503,126.91
E Total Cost Outstanding: (C+D)	\$694,614.41
F Less Original Contract Sum: E-A) (<i>extra over amount</i>)	\$202,719.31

The Payment Schedule stated that the rectification work relating to the civil works arose as a result of the Claimant's failure to:

- (i) Establish and maintain exclusion measures and environmental controls which formed part of the Claimant's "preliminaries" at Form 2 – Schedule of Preliminaries, Profit and Attendance to the Contract and that, as a result, the civil works was damaged by other trades and inclement weather;
 - (ii) Properly manage other trades, such that levels on the site were disturbed by the activities of other trades; and
 - (iii) Ensure the work was properly performed by the contractor that the Claimant had engaged.
- (d) Damages for breach of Contract (insurances)

Under clause 10 of the Contract and Annexure Part B and the Construction Manager's "Form 2 – Schedule of Preliminaries, Profit and Attendance", the Claimant was required to effect and maintain project insurance as the Respondent's agent. However, as a result of the Claimant's failure to perform the Services to the standard required under the Contract, the Claimant has allowed for a duplication of insurance by there being both project insurance and the subcontractors engaged pursuant to the Trade Packages also holding works insurance. The Aston Report has estimated the costs associated with this duplicate insurance at \$55,242.67²⁰⁰.

193. In its AA, the Claimant submits that the Respondent does not have any right of set-off under the Contract until the final certificate has been issued under clause 25.2. Insofar as the Respondent seeks to ground its right of set-off under clause 25.4 of the Contract, then the Claimant submits that this is misplaced:

²⁰⁰ Refer to paragraph 214 of the Aston Report.

“That clause does not give (the Respondent) a right of set-off. It gives (the Respondent) the right to claim monies that are “due and payable” other than in connection with the Contract as “due” under the Contract. It confers no right of set-off on (the Respondent).

*To satisfy clause 25.4, (the Respondent) must have monies due and payable to it other than under the Contract or in connection with the subject matter of the Contract. That means the amount must have become due to (the Respondent) as a result of something unconnected with the Project. Further, the use of the words “due and payable” means something more than a mere asserted claim is required (i.e. (the Respondent) must have established elsewhere, such as before a Court, that an alleged claim arising other than under the Contract or in connection with its subject matter is in fact payable by (the Claimant) to it). (The Respondent) has not presented any claim in its Payment Schedule that satisfies that criteria.”*²⁰¹ (Emphasis that of the Claimant.)

194. Similarly, the Claimant submits that insofar as the Respondent seeks to rely on its right of set-off on s 72(1)(b)(iv) of the Act, then that section does not apply to the Contract, because the Contract:

- (a) provided a lump sum for the Management Fee in subclause 1.1 of Annexure Part C against which claims for the management fee were to be valued; and
- (b) stated a target price of \$3.7 million (excluding management fee) at item 10 of Annexure Part A for the Trade Package work against which claims for the Trade Package works was to be valued,

meaning the Contract provided for the valuation of work performed by the Claimant for the purpose of s 72(1)(a) of the Act and therefore s 72(1)(b) does not operate.

195. Even if however, it were to be found that the Contract did not provide for how construction work was to be valued such that s 72(1)(b) of the Act were to apply, then the Claimant submits that any right of set-off under that section must be confined to the assessment of construction work claimed under the Payment Claim, or that is able to be reassessed under the Contract. The Claimant draws my attention to the fact that, in the present case, many of the Respondent’s reasons for non-payment relate to claims that the Claimant had previously made and that had been assessed as payable and paid by the Respondent. However, as the present Payment Claim did not include the items previously assessed and paid, there can be no basis upon which these items can be the subject of adjudication. In this regard, the Claimant refers me to the recent decision of *LKB Group Pty Ltd v Niclin Constructions Pty Ltd*²⁰², where an adjudicator’s decision was challenged on the basis that the adjudicator had purported to value eight variations that had been previously claimed, assessed and paid by the Respondent and therefore not claimed in the payment claim that was the subject of the adjudication. Thus, where the adjudicator had determined that the full value of

²⁰¹ Paragraph 32.3 – 32.4 of the AA.

²⁰² [2021] QSC93.

each of the previous variations as part of the adjudicated amount, Jackson J expressed the view that the adjudicator had exceeded his jurisdiction:

“... the jurisdiction of the adjudicator is limited to deciding the amount of progress payment by reference to the amount stated in the payment claim as the amount that the claimant claims. The adjudicator cannot add any other amounts that are not included in the claimed amount. If the adjudicator does so, in my view, he or she acts in excess of the statutory jurisdiction to decide the adjudication application.

*In the present case, the amount stated in payment claim 12 as payable by the principal did not include any amount for the zero amount variations. To that extent, the adjudicator acted in excess of jurisdiction ...”*²⁰³

196. The Claimant also submits that the Respondent’s set-off, in truth, is a claim for damages which is not able to be decided under the Act. In this regard, the Claimant refers me to the judicial pronouncements expressed in the following court decisions:

- (a) Per Hodgson JA in *Coordinated Construction Co Pty Ltd v J.M. Hargreaves (NSW) Pty Ltd & Ors*²⁰⁴:

*“In my opinion, the circumstances that a particular amount may be characterised by a contract as “damages” ... cannot be conclusive as to whether or not such an amount is for construction work carried out or for related services supplied. Rather, any amount that a construction contract requires to be paid as part of the total price of construction work is generally, in my opinion, an amount due for that construction work, even if the contract labels it as “damages” ... while on the other hand, any amount which is truly payable as damages for breach of contract is generally not an amount due for that construction work”*²⁰⁵ (Emphasis that of the Claimant.)

- (b) Per Keifel CJ, Bell, Gageler, Keane and Gordon JJ in *Southern Han Breakfast Point Pty Ltd (in Liquidation) v Lewence Construction Pty Ltd*²⁰⁶:

*“That limitation is that the Act is concerned to provide a statutory mechanism for securing payment of an amount claimed to be payable in partial or total discharge of an obligation to pay for work (or for goods and services supplied) imposed by contractual force of a construction contract. The Act is not concerned to provide security for payment of an amount claimed by way of damages for breach of a construction contract.”*²⁰⁷

²⁰³ At [21] – [22].

²⁰⁴ [2005] 63NSWLR 385.

²⁰⁵ At [41].

²⁰⁶ (2016) 260 CLR 340.

²⁰⁷ At [66].

197. The Claimant submits that the various categories of the set-off amounts as set out in Section 12 of the Payment Schedule, are each “*at their core, ... alleged claim(s) for damages and not amounts due for construction work*”. The Claimant provides the following submissions in support of its position that each of the set-off categories are claims for damages and not claims made under the Contract:

- (a) Re: Extra-over Management Fee/Failure to perform the Services - The Claimant submits that whereas the Respondent relies on its assertions in respect to breaches of the Contract to justify engaging a new construction manager and asserting an entitlement to recover the additional costs incurred as a consequence, the only basis on which the Respondent could assert any such “entitlement” is by way of a damages claim. However, as set out above, “*(the Respondent) does not have any contractual right of set-off. It also has no contractual right entitling it to additional costs it incurs as a result of exercising a right to terminate under clause 27.4 of the Contract (the clause pursuant to which (the Respondent) purported to terminate the Contract).*”²⁰⁸
- (b) Re: Costs of Defects - The Claimant notes that at paragraph 12.8 of the Payment Schedule, the Respondent submits that if it were found that the Claimant were to be entitled to an amount for the Trade Packages works, then that amount is “*to be reduced by the damages from the failure of those works to be constructed in accordance with*” various standards, including the designs provided by the Respondent and the standard of a competent and experienced contractor. The Claimant however highlights that the Respondent has not identified any specific clauses under which it asserts that those standards are imposed under the Contract. Thus, the Claimant submits:

“Any alleged failure to have works constructed in accordance with the Contract or standard imposed by the Contract (if any, which (the Claimant) denies), would be a breach of contract sounding in damages. For the reasons set out above, (the Respondent) has no contractual right of set-off. It also has limited contractual right in respect of defects.

(The Respondent’s) contractual rights in respect to defects is limited to rights under SC1.8.7 or SC4.0 of the Special Conditions. SC1.8.7 of the Special Conditions does not give (the Respondent) a contractual entitlement to the payment of money or to withhold the payment of money as a result of a defect in the works. SC4.0 gives (the Respondent) rights in respect to defects only in the defects liability period. During the defects liability period, (the Respondent) could have given (the Claimant) a direction to rectify a defect and claim the cost of rectifying the defect from (the Claimant) if it failed to comply with that direction.

²⁰⁸ Paragraph 33.7 of the ar.

As a consequence of the termination of the Contract, the defects liability period will never arrive and neither will (the Claimant's) defect liability obligations."²⁰⁹

- (c) Re: Damages for breach of Contract (Civil Works) - By its very description (and therefore by its own admission), this claim cannot be made under the Act. The Respondent asserts an entitlement to the extra costs to complete civil works due to the Claimant's failure to engage JRT Civil in accordance with the Contract and its failure to perform services in accordance with the Contract, specifically by failing to properly manage the civil works carried out by JRT Civil. The Claimant submits that the basis upon which the Respondent seeks to ground this claim constitutes a claim for damages said to arise from an alleged breach of Contract (which the Claimant denies); and
- (d) Re: Damages for breach of Contract (insurances) – The Claimant submits that, as in (c) above, the very description given by the Respondent, identifies this as a damages claim and a claim which cannot be made under the Act;

198. Further, the Claimant submits:

- (a) In respect of the alleged defects as set out, in the Aston Report, the Claimant adopts and relies on the view set out in the Tsipis Report, the evidence set out in the SDLP and the evidence set out in the Statutory Declaration of Mr Barry Carter ("SDBC"); and
- (b) In respect of the Respondent's reliance on the JRT Civil quotation as the basis for its assessment of the costs of rectifying the alleged defects in the civil works, the Claimant refers to the email it had received from JRT Civil on 13 July 2021 confirming that it would have been able to complete its works for the original price it had agreed with the Claimant²¹⁰ and that the assessment set out in the Aston Report relating to this item is therefore unreliable and the Respondent could likely have obtained a more competitive price for the works if it had tested the market. *"Further, any increased costs have arisen because of (the Respondent's) repudiation of the Contract and (the Respondent) should not be entitled to take advantage of its wrongful termination of the Contract to withhold payment of monies otherwise due to (the Claimant)."*²¹¹

199. In its AR, the Respondent expands on the position it had set out in its Payment Schedule as well as responding to the arguments that the Claimant had made in its AA. Thus, the Respondent submits that:

²⁰⁹ Paragraph 33.9 – 33.11 of the AA.

²¹⁰ A copy of JRT Civil's email of 13 July 2021 is located at Tab SM-180 of the SDSM.

²¹¹ Paragraph 36.4 of the AA.

(a) In regard to the Respondent's entitlement to set-off from any amounts payable to the Claimant:

- (i) As the Contract only provides for the lump sum of Construction Management Services, the Claimant has no entitlement to be paid for the Trade Packages works. If however it were to be found that the Claimant is entitled to be paid for the Trade Packages works, then s 72(1)(b) is applicable. In such circumstances, the valuation exercise must, by reason of s 72(1)(b)(iv), also have regard to the estimated cost of rectifying any defective work;
- (ii) In addition, a common law right of set-off will exist, absent express wording with a contract that removes the entitlement to such set-off²¹². In the present case, there is no provision that excludes the right of set-off:

*"This is not the case where the (Respondent) is attempting to set-off against a certificate issued by the superintendent...(T)his is not that type of contract. The Contract has no limit on the (Respondent's) right to set-Off."*²¹³

- (iii) There is no provision within the Contract that places any limit on the Respondent's entitlements to set-off from the amounts otherwise payable to the Claimant. Clause 25.1 of the Contract provides that the Principal is entitled to pay the Construction Manager less than the amount claimed, provided the Principal *"provides reasons for the difference"*, which in the present case, the Respondent has done. Insofar as the Claimant contends that clause 25.1 pertains only to payments flowing from the Respondent to the Claimant, the Respondent disagrees, as clause 25.1 cannot be read in isolation. When the Contract is read as a whole it can be seen that under Special Conditions 6.0 (Security), the Contract contemplates circumstances where the Claimant may be indebted to the Respondent (i.e., where the Respondent has recourse to the security).
- (iv) Clause 25.4 confirms that the Respondent is entitled to set-off, both for amounts in connection with the Contract and for amounts also due to the Respondent. Thus, where the Claimant contends that no right to set-off arises from clause 25.4 because that clause only provides the Respondent with the right to claim monies that are *"due and payable"* other than in connection with the Contract as *"due under the contract,"* such as

²¹²*Federal Commerce and Navigation v Molena Alpha Inc [1978] Q. B. 927, per Robert Goff J at 981.*

²¹³ Paragraph 35.9 of the AR.

interpretation is misplaced, as can be seen from the wording of the clause:

“The Principal may elect that money due and owing otherwise than in connection with the subject matter of the Contract also be due to the Principal pursuant to the contract.” (Emphasis that of the Respondent.)

The Respondent emphasises that the word “also” confirms its right to set-off both in respect of the subject matter of the Contract, and for other amounts payable by the Construction Manager to the Principal;

- (v) Insofar as the Claimant contends that the Respondent does not have a right to set-off until the final certificate is issued under clause 25.2 of the Contract, then the Respondent disagrees:

“The suggestion that (the Respondent) is not entitled to set-off any amount before the final certificate is absurd and has no support in the terms of the Contract.

Clause 25.4 confirms (the Respondent) has a broad right to set-off.

*Further, (the Respondent) retains its common law right of set-off as the Contract does not include express words limiting that right.”*²¹⁴

- (b) As stated in the Payment Schedule, the Respondent contends that the Claimant’s liability in relation to defects on the Project arose not only because of the Claimant’s liability for the acts of its subcontractors (as set out in clause 6.3 of the Contract), but also because of the Claimant’s failure to perform the Services it was engaged to carry out under the Contract. In this regard, the Respondent refers me to Section 42 of the SDJS and to the Aston Report that detail the various services, that the Claimant failed to perform to the requisite standard. The Respondent also submits that the Claimant had failed to comply with the requirement set out under s43C of the QBCC Act, which requires a construction manager to ensure that the building work is adequately supervised. Accordingly (so the Respondent contends), the Claimant was also in breach of clause 9.1 of the Contract, which requires the Claimant to satisfy all legislative requirements necessary to carry out the Services, which as a result led to the defects;
- (c) It was the Claimant’s failure to perform the Services that caused the Respondent to terminate the Contract and as a consequence, the Claimant is indebted to the Respondent for:

²¹⁴ Paragraph 35.20 – 35.22 of the AR.

- (i) the cost to complete the Services the Claimant was required to perform under the Contract, but which the Claimant did not perform; and
- (ii) the additional costs the Respondent will incur in completing the Services.

In its Payment Schedule, those costs were stated to amount to \$276,063.07, the make-up of which is set out at paragraph 192(a) above, but in its AR, the amount is stated at \$277,107.97 which, at paragraph 37.15, is said to have been arrived at as follows:

Total cost of completing the Services the subject of the Management Fee:	
Value of the Services performed to date by ASM (excluding adjustments to that amount, for instance variations and Fee Adjustments for applicable extensions of time) <i>(note this amount will need to be adjusted if the Adjudicator determines the Services have a different value)</i>	\$81,475.57
Cost HVH will incur to have the replacement construction manager to complete the Services (as set out at paragraph XX (sic) of the Stewart Declaration) (excluding adjustments to that amount, for instance variations and Fee Adjustments for applicable extensions of time)	\$727,715.40
<i>Subtotal</i>	<i>\$809,190.97</i>
Less (lump sum) Management Fee pursuant to the Contract (excluding adjustments to that amount, for instance variations and Fee Adjustments for applicable extensions of time)	-\$532,020.00
Total: additional cost incurred to complete the Services	\$277,170.97

The reference to the engagement of a new construction manager is a reference to the engagement of CES and this is detailed at Section 44 of the SDJS and the rates that CES had applied to its staff, is set out in Tab JFS-11 of the SDJS;

- (d) Where, at paragraph 17(b)(ii) of the Tsipis Report, the author expresses the following opinion in respect to the engagement of the new construction manager:

“The Contract was purportedly terminated and therefore the requirement for a replacement construction manager is a consequence of the purported termination. (the Claimant) is not responsible for the purported termination and therefore is not responsible for any increase cost incurred by (the Respondent) for the replacement construction manager.”

then, Mr Stewart refers to the circumstances that led to the termination of the Claimant's Contract and states that the engagement of the new construction manager is a direct consequence of the Claimant's breach of contract and failure to perform the services:

*"But for (the Claimant's) substantial and repeated breach of Contract, there would have (been) no need for (the Respondent) to terminate (the Claimant) and engage a new construction manager."*²¹⁵

- (e) In regard to the value of the defects, the Respondent refers to and relies on the evidence set out in the Aston Report, the Supplementary Aston Report, the SDJS and the Statutory Declaration of Mr Patrick Donlan ("SDPD"). At paragraph 36.6 of the AR, the Respondent provides the following table which summarises the defects and the rectification costs:

Defect	Estimated defect rectification costs (excluding GST)	Basis for HVH's valuation
Civil Works (including unmaintained sediment controls, subsided trenches, incomplete works, waste stockpiles throughout the site, drains blocked with sediment, and base course erosion.)	\$130,679.23	HVH refers to and relies upon the Supplementary Aston Report, at section 9.1 in making this assessment. Refer also to the Donlan Declaration.
Hydraulic Works (including incomplete works, unprotected and damages stormwater drains, subsided services trenches, broken culvert apron)	\$Nil	HVH considers that the rectification costs for the hydraulic works are captured within the 'Civil Works' rectification costs. In making this assessment HVH refers to and relies upon: • Section 4.1.10 of the First Aston Report; and • Section 9.2 of the Supplementary Aston Report • Section 4.1.20 of the First Aston Report • Section 10 of the Supplementary Aston Report;

²¹⁵ Paragraph 44.10 of the SDJS.

		• “Figure 17: Defect Scott Schedule” to the Supplementary Aston Report.
Blockwork (including to base course work, block ties, and wall joints sealant)	\$7,490.00	HVH refers to and relies upon: • Section 4.1.25 of the First Aston Report; • Section 10 of the Supplementary Aston Report; • “Figure 17: Defect Scott Schedule” to the Supplementary Aston Report.
Roofing and Cladding (including external wall cladding gap to slab and water ingress to roof cladding)	\$58,690.55	HVH refers to and relies upon: • Section 4.1.30 of the First Aston Report; • Section 10 of the Supplementary Aston Report; • “Figure 17: Defect Scott Schedule” to the Supplementary Aston Report. • The Domain Declaration.
Total demonstrated rectification costs:		\$216,832.28

(f) Further, the Respondent disagrees with the following arguments that the Claimant had advanced in its AA:

- (i) That the Respondent’s contractual rights in respect to defects are limited to rights under SC1.8.7 and SC4.0; and
- (ii) That the Claimant would have attended to the defects in the defects liability period, but because the Contract was terminated, “*the defects liability period will never arrive and neither will (the Claimant’s) defects liability obligations.*”²¹⁶

In this regard, the Respondent submits:

- (i) No term in the Contract operates to exclude or limit the Claimant’s liability for defects;
- (ii) The Claimant’s approach only confirms that the estoppel it alleges does not exist:

²¹⁶ See paragraph 33.11 of the AA.

“If the Claimant had done what the Contract required, (the Respondent) could compel the rectification of defects both before and after practical completion pursuant to the terms of AS2124-1992 contracts with the contractors. (The Claimant) effectively alleges (the Respondent) agreed to have no rights in respect of defects. The suggestion is preposterous.”²¹⁷

- (iii) The termination of the Contract does not alter the Claimant’s liability for the defects and the defects liability period is not the Respondent’s only remedy for defects;
- (iv) Where the Contract has been terminated, the Claimant has lost the “first right to rectify” that a defects liability period typically provides, but that does not alter the Claimant’s liability for the defects;
- (v) The termination also does not alter the fact that the valuation of the works is to be based on the work performed and not with the notion whereby the Claimant could claim full payment now for defective work, with the defects to be rectified at some time in the future; and
- (vi) It is not an answer for the Claimant to contend that because the Contract was terminated it could not attend to the defects.

“If (the Claimant) had complied with the Contract, (the Respondent) would still be able to enforce its contracts with the trade contractors. (The Claimant’s) conduct deprived (the Respondent) of that opportunity.”²¹⁸

- (g) Insofar as the Tsipis Report contends that incomplete work does not constitute a defect²¹⁹, then the Respondent submits that such a proposition is misplaced. The Respondent submits that because the Project is based in Queensland, guidance as to what work is regarded as “defective” can be obtained by reference to the QBCC Act, which provides:

“defective, in relation to building work includes faulty or unsatisfactory.”

Further, SC1.0 of the Contract defines “defect” as having “the meaning in clause 4.0 and includes omissions.”

- (h) In regard to the defects relating to the civil works, the Aston Report found that the majority of those defects arose as a direct result of the Claimant’s failure to implement and maintain adequate controls to protect the civil

²¹⁷ Paragraph 36.12 of the AR.

²¹⁸ Paragraph 36.16 of the AR.

²¹⁹ Refer to paragraph 75-76 of the Tsipis Report.

works performed by JRT Civil. The Respondent also refers to the SDPD, where Mr Donlan confirms that the defect arose because of the Claimant's failure to act with the due care and skill expected of a competent construction manager. As a result of the Claimant's failure to provide the Services, the Respondent will be incurring substantial costs in rectifying the civil defects on site. In this regard the Respondent refers to the quote it obtained from JRT Civil, a copy of which is included in Tab JFS-13 of the SDJS. Insofar as the Claimant contends that the JRT quote is unreliable, then the Respondent refers me to the following statement in the SDJS:

"39.11 Paragraph 36.2 of (the Claimant's) Adjudication Application submissions includes an extract of email sent from JRT Civil to ASM on 13 July 2021 regarding the pricing included in the JRT Quote. Having regard to that email, at paragraphs 36.3 and 36.4 of the submissions, (the Claimant's) suggests that the JRT Quote is inflated and an unreliable basis for determining civil works rectification costs.

39.12 I have reviewed the copy of JRT Civil's email which is included at "SM-180" to the Milfill Declaration. Conveniently, the extract of the email included in the Adjudication Application does not include the final line of JRT Civil's email which, I have extracted below:"

I trust this meets your requirements.

Regards
Brad

Brad Neven

(i) In regard to the significant defects relating to the roofing and cladding works, which had the effect of damaging the insulation installed in the walls and roof of the Project facility, the Respondent refers me to the following evidence:

(i) The photographs taken by Mr Donlan several weeks prior to the termination of the Contract (copies of which are included in the SDPD) which demonstrate that the Claimant's failure to:

- A. Co-ordinate trade contractors in an appropriate manner to ensure the insulation was protected from weather; and
- B. Implement any interim measures to protect the insulation while arranging for trade package works to be completed;

- (ii) The Supplementary Aston Report which identifies that, as a direct result of the Claimant's failure to protect the works rectification costs in the amount of \$58,680.55 will likely be incurred;
- (j) Finally, having regard to the material that the Claimant has provided in both its Payment Claim and the AA, the Claimant is claiming twice for the following:
 - (i) Insurance – The Respondent considers that the Claimant is claiming for the cost of subcontractor insurances where the Contract records that insurance forms part of the lump sum Management Fee. The Respondent has calculated that double-dipping at \$55,242.67;
 - (ii) Craneage – Craneage forms part of the preliminaries that the Claimant was responsible for providing as part of the lump sum Management Fee, yet the Claimant is claiming payment for craneage both under the Management Fee and also under the trade packages. The Respondent has estimated the double dipping claimed relating to this at \$9,913.00; and
 - (iii) Scaffolding - The Respondent submits that scaffolding formed part of the preliminaries of the lump sum Management Fee, yet the Claimant is claiming both the Management Fee and the cost of scaffolding under the trade packages. The Respondent has estimated the double dipping relating to this at \$11,200.00.

My Decision

General Conclusions

200. I commence my analysis by setting out the following conclusions:

- (a) As I have determined that the Claimant has a contractual entitlement to claim an amount for the Trade Packages and the Trade Packages Variations and as I have also assessed the values to be given to the various items that make up the Claimant's claim relating to those two components, it is necessary that I consider whether, as part of the valuation process, the Respondent has an entitlement to set-off from the amount payable to the Claimant, the estimated cost for rectifying any defective work and, if so, on what basis. Section 72(1) of the AA provides that construction work is to be valued on the basis set out in the Contract, but, if the Contract does not provide for how such work is to be valued, then by having regard to –
 - “(i) the contract price for the work; and
 - (ii) any other rates or prices stated in the contract; and

- (iii) *any variation agreed to by the parties to the contract by which the contract price, or any other rate or price stated in the contract is to be adjusted by a specific amount; and*
- (iv) *if any of the work is defective, the estimated cost of rectifying the defect.”*

I consider that, in the present case, the Contract does not provide for the valuation of the Construction Manager Fee nor the Trade Packages. In regard to the Construction Management Fee, Annexure Part C of the Contract provides for a lump sum amount, but there is no provision that sets out how the Fee is to be progressively assessed. In regard to the Trade Packages work, Item 10 of Annexure Part A of the Contract sets out a “Target Price” of \$3.7 Million, but the Contract does not set out how the work items within the Trade Packages are to be valued. Accordingly, I consider that s 72(i)(b) of the Act applies;

- (b) From the conclusion set out in (a) above, it follows that, by reason of s 72(1)(b)(iv), I must in the valuing of the construction work, have regard to the estimated costs of rectifying defects. Section 64 of the Act does not include a definition as to what meaning is to be given to the expression “defects”, or work that is “defective”. Accordingly, in my view, those expressions must be given their natural meaning, which I construe to mean something that is faulty or deviates from the intended condition. It does not, contrary to the Respondent’s submission, include work that is incomplete. The Respondent’s reference to the expression “defective” under the QBCC Act does not assist its argument as the definition within that Act states that such term includes building work that is “*faulty or unsatisfactory*”. In other words, the definition does not state that it includes building work that is incomplete. Similarly, insofar as the Respondent refers me to the definition of “defects” in Special Conditions SC1.0 of the Contract, then that definition states that defects “*has the meaning in SC4.0 and includes omissions*”, but the reference to SC4.0 specifically refers to defects during the defects liability period which, in the present case, does not apply because there is no date of practical completion. In my view, the opinion that Mr Tsipis states at paragraph 75 and 76 of the Tsipis Report correctly reflects the conclusion I have arrived at regarding this matter:

“I note that the Collins English Dictionary defines a “defect” in British English as a “lack of something necessary for completeness or perfection; shortcoming; deficiency” and “an imperfection, failing or blemish”.

In my experience, a “defect” in relation to construction refers to a shortcoming, deficiency, imperfection, failing or blemishing as measured against the requirements as set out in a contract or regulatory requirement.

Incomplete work is not considered to be a “defect”, as this circumstance is corrected by completing the incomplete work, whilst a “defect” is rectified by applying different work. For example, the lack of a second coat of paint on a wall is incomplete work corrected by the application of a second coat of paint, and not a “defect”. However, a paint thickness of 20 microns when compared to a required thickness of 25 microns is a “defect” rectified by another coat of paint.”

- (c) Insofar as the Claimant contends that the Respondent’s contractual rights in respect to defects are “*limited to rights under SC1.8.7*”, viz: the requirement to manage defects rectification under Direct Contracts) and SC4.1 (defects liability period)²²⁰, then I agree with the Respondent’s submissions that the Contract does not limit the Respondent’s remedy relating to only those defects that occur during the defects liability period. Ultimately, I am required to value the works based on the works performed and, in carrying out this valuation task, I am obliged where any aspect of the Claimant’s work is defective, to take into account the estimated costs of rectifying such defects.
- (d) Insofar as the Respondent seeks to set-off the cost of engaging CES as the new construction manager so as to complete the Construction Management services under the Contract, then I make the following observations:
 - (i) This set-off is premised on the basis that the Claimant had been in substantial breach of contract and that the Respondent had validly terminated the Contract by complying with the procedure set out under clause 27.3 and 27.4 of the Contract. However, from the observations I have made earlier in my Decision, I am not satisfied that the Claimant was in substantial breach of contract and nor am I satisfied that the notice of termination that the Respondent had given on 6 April 2021 was a valid notice. Indeed, it is arguable that by giving its notice of termination on grounds where the Claimant had not been given the opportunity to show reasonable cause (in particular relating to the allegation that the Claimant, contrary to the requirements in the Contract, had failed to engage trade contractors as agent for the Respondent), the Respondent had repudiated the Contract, in which case, the Respondent can have no entitlement to claim damages;
 - (ii) In any event, and even if the observation I have set out above were to be incorrect, I consider that the Respondent’s claim in respect to the costs it will incur in engaging a new construction manager is a claim sounding in damages and therefore not a claim that the Respondent is able to make

²²⁰ See paragraph 33.10 of the AA.

under the Act. As the Claimant correctly submits, the Contract does not give the Respondent an entitlement to the additional costs it incurs as a result of exercising a right to terminate under clause 27.4 of the Contract. Accordingly, absent a contractual entitlement to the additional costs flowing from termination, the Respondent's set-off for the costs relating to the engagement of a new construction manager is a claim made outside the Contract and therefore not able to be made under the Act.

(e) In relation to the set-off that the Respondent seeks to apply under the heading "*Damages for breach of the Contract (insurances)*", I make the following observations:

- (i) This claim seeks to recover what the Respondent contends to be the duplicated insurance costs that the Claimant has claimed on the Project. The Respondent contends that these costs have been duplicated because under clause 10 of the Contract when read together with the relevant provisions of Annexure Part B of the Contract, the Claimant was required to effect, maintain and manage insurance during both the pre-construction and construction phase of the Project. At the same time, and by reference to the evidence set out in the SDJS²²¹, the Claimant had in all the subcontracts that it had entered into with its subcontractors arranged for the subcontractors to obtain construction work insurance and then include those costs in its progress claims to the Respondent. This set-off claim is however presented as a claim for damages, which is said to have arisen due to the Claimant's failure to manage the insurance requirements set out under the Contract, and therefore damages that flow from a breach of the Contract²²². Indeed, the heading under which this set-off is made, expressly refers to the set-off as a damages claim for breach of Contract, but this is not a claim that the Respondent is able to make under the Act;
- (ii) Notwithstanding the heading that the Respondent had given in relation to set-off, I have construed this set-off as a claim relating to the Claimant double claiming for the same construction work. I am satisfied, based on the evidence provided by Mr Stewart that the Claimant had required its subcontractors to obtain Contract Works Insurance as well as claiming for Project insurance under the Preliminaries component of the Construction Management Fee. I also accept the estimate relating to the Contract Works Insurance set out in the Aston Report, noting that Mr Tsipis also

²²¹ Refer to paragraph 42.14 of the SDJS.

²²² In this regard, refer also to paragraph 42.16 of the SDJS.

considers the amount of \$55,242.67 to be reasonable.²²³ Accordingly, I consider that the Respondent has established its entitlement to the set-off amount of \$55,242.67 relating to this double-claim; and

- (iii) Insofar as in its AR, the Respondent seeks to expand the items falling under the “revised” heading of “*Duplicated amount*”²²⁴ to now include the Claimant claiming twice for craneage and scaffolding then these were not matters that the Respondent had included in its Payment Schedule. Accordingly, the claims relating to craneage and scaffolding are new reasons given in the AR, which the Respondent is not permitted to do by reason of s 82(4) of the Act and also not matters that I can consider in the making of my Decision.²²⁵

201. In setting out the conclusions outlined in the above paragraph, I have determined that the Respondent has no entitlement to its set-off relating to its Extra-Over Management Fee, but that it is entitled to a credit for the Claimant’s double claiming relating to insurances. I have also concluded that I am required, as part of my valuation task, to have regard, where the Claimant’s work is defective, to the estimated costs of rectifying such defects. Accordingly, I now proceed with considering the Respondent’s set-off relating to defects.

Assessment of Respondent’s set-off relating to defects

202. As set out in the table at paragraph 191 above, the Respondent stated in its Payment Schedule that the amount of its set-off for defects was \$294,497.36 and that included within that amount were the defects it claimed in relation to the civil works, which it had assessed at \$202,719.31. However, as can be seen from the table at paragraph 199(e) above, in its AR, the value of the estimated costs for rectifying the claimed defects is stated to be \$216,832.28, of which the estimated costs of rectifying the civil works defects has been reduced from \$202,719.31 to \$130,679.23. The Respondent’s revised valuation of its defects claim is based on the assessment set out in the Supplementary Aston Report. Helpfully, the author of the Supplementary Aston Report has provided a (12 page) Scott Schedule relating to the many defects identified by the Respondent. The Scott Schedule compares the assessment as originally set out in the Aston Report, the position and assessment relating to each defect as set out in the Tsipis Report and the revised position adopted in the Supplementary Aston Report²²⁶. The following table (included as Figure 15 of the Supplementary Aston Report) is a summary of the Scott Schedule:

Trade Defects	E3 Position (\$ Ex GST)	Aston Position First Report (\$ Ex GST)	Aston Revised Position (\$ Ex GST)	Comments
Civil Trade Defects	\$0.00	\$202,719.31	\$130, 679.23	Reconsidered civil scope
Hydraulic Trade Defects	Incl	Incl	Incl	

²²³ See paragraph 17(1)(a) of the Tsipis Report.

²²⁴ See page 136 of the AR.

²²⁵ See s88(3)(b) of the Act.

²²⁶ Figure 16, Section 10, pages 58 – 69 of the Supplementary Report sets out the Scott Schedule.

Concrete Trade Defects	\$1,000.00	\$9,835.00	\$4,210.00	Excluded survey and engineer costs
Steel Trade Defects	\$9,010.00	\$15,772.50	\$15,772.50	Opinion unchanged
Blockwork Trade Defects	\$3,120.00	\$7,490.00	\$7,490.00	Opinion unchanged
Metal Roofing Trade Defects	\$0.00	\$58,680.55	\$58,680.55	Opinion unchanged
Total Defects	\$13,130.00	\$294,497.36	\$216,832.28	

203. I now proceed with the assessment of the Respondent's defects claim, starting with the civil works component.

Re: Civil Works

204. As set out above, the Claimant was instructed by the Respondent to engage JRT Civil to carry out civil works on the Project and, up to the date when the Claimant's Contract was terminated (i.e., 6 April 2021), the Claimant had claimed and been paid an amount of \$326,136.09 in relation to JRT Civil's works. In his Statutory Declaration, Mr Donlan, who is an employee of CES, states that after the Respondent had engaged CES as consultant in early 2021, he arranged to visit the site. Thus, between 18 to 22 March 2021, Mr Donlan visited the site and prepared a Site Report. The Report stated that the standard of work on site was "*poor*"²²⁷. Then, subsequent to the Respondent having terminated the Claimant's Contract (i.e., 6 April 2021), Mr Donlan visited the site again. At Section 11 of his Statutory Declaration, Mr Donlan provides the following evidence:

"11. Civil works

11.1 *As set out below, since being appointed as HVH's construction manager, CES has become aware of a number of issues with the civil works completed under ASM's supervision.*

11.2 *When CES took over the site on 7 April 2021, I considered that the civil works that had previously been carried out on site had fallen into disrepair. In particular, it was apparent that:*

- (a) *concrete had been washed out at various locations across the site;*
- (b) *there were various stockpiles of loose material located across the site that did not have appropriate sediment controls placed around them. As a result of the non-existent sediment controls the material was able to wash across the site when it rained;*
- (c) *no protective measures had been implemented to the drains and pits on the site to prevent sediment running into the pipework and headwalls. Based on my visual inspection, I could see that the pipework had already begun to block-up;*
- (d) *although some sediment controls had previously been set up within the bio-retention basin, I could see silt build up around*

²²⁷ A copy of Mr Donlan's Site Report is included in Tab PD-8 of the SDPD.

these controls with the effect that they were wholly ineffective. Based on my experience, I considered that the controls had fallen into disrepair due to lack of maintenance;

- (e) although it appeared that the civil contractor had applied subgrade across various locations on the site, as a result of subsequent trenching (likely by other trades) that subgrade had been disturbed and required rework;*
- (f) there were a number of areas with subsidence, most of which appeared to be in areas where trenches had been backfilled after pipes had been installed. I was aware that the previous contractors had used imported materials to backfill the trenches, so it seemed that the subsidence was a result of the trenches not being properly compacted. Based on my experience, I considered that the areas would likely need to be re-graded and corrector course placed over the top to tidy up the works.*

11.3 Based on my experience, I consider that each of the above issues likely arose as a result of ASM's failure to:

- (a) implement and maintain appropriate civil controls and quality assurance on site; and*
- (b) to protect the works from the activities carried out by contractors that attended the site after the civil contractor departed.*

*11.4 Having regard to the matters listed at paragraph 11.2 above, around the time that CES took over the site I contacted JRT Civil Pty Ltd (**JRT Civil**), the incumbent civil contractor for the Project to discuss the history of the job and to obtain a quote for completing the civil works trade package on HVH's behalf.*

11.5 On 17 April 2021 (10 days after CES took over the site) I carried out a site walk with Jason Thomasson, the director of JRT Civil. At that time, Jason advised me that they would need to carry out a large amount of work to restore the site to the previous stage that it was at when JRT Civil departed in around June 2020.

11.6 On 6 May 2021, I received a quote from JRT Civil (on HVH's behalf) to restore the site to the previous construct stage and to complete the scope of works included in the civil works trade package that it was previously awarded by ASM."

205. Mr Donlan's reference to the JRT Civil quote of 6 May 2021 is a reference to the quote that the Respondent obtained from JRT Civil. JRT Civil's quote was for an amount of \$503,127.00 and a copy of which is included in Tab JFS-13 of the SDSJ. This quote comprised of two parts:

- (a) an amount of \$118,471.00 to complete the remainder of the civil trade package; and
- (b) an amount of \$384,656.00 to restore the civil works to the condition they were in when JRT Civil demolished from site on 22 July 2020.

At paragraph 39.9 of the SDJS, Mr Stewart states that:

“I consider the “cost to restore the site to previous construction site”²²⁸ only arises as a consequence of (the Claimant’s) failure to perform the services. In this regard, I note (the Claimant) was to provide the environmental controls as part of the Preliminaries it was engaged to perform. That cost would not have been incurred but for (the Claimant’s) failure to perform the Services.”

206. Subsequent to its engagement, the author of the Aston Report carried out a visual inspection of the site on 2 June 2021, where he states he observed various defects²²⁹. The author, based his assessment, not only on what he observed during his site visit, but also on the following documents:

- (i) The list of civil works defects prepared by CES;
- (ii) The Respondent’s Defect Register, dated 25 March 2021; and
- (iii) Project photographs.

The Aston Report assessed the costs of rectifying the civil works defects at \$202,791.31.

207. In the Supplementary Aston Report, the author states that after reviewing the information set out in the Claimant’s AA, he has revised the estimate of the civil works defects from \$202,791.31 to \$130,679.23. At paragraph 191 to 193 of the Supplementary Report, the author explains the basis of his reassessment of the civil works defects as follows:

“191. I have re-considered JRT’s civil rectification quotation 3863 dated 06 May 2021, which set out the work and price to rectify and complete the civil work. I have amended my assessment solely to reflect the additional works required to make good civil and erosion control defects, which I derive as follows: -

- a. Additional Works \$114,758.07 (Ex GST)*
- b. Reinstate Erosion Control \$6,804.00 (Ex GST)*

192. The percentage for preliminaries based upon the quotation of \$38,113.72 (Ex GST) (quoted preliminaries) divided by \$503,126.91 (Ex GST) (total cost) is 7.5%. Applying this percentage to these works

²²⁸ This is a reference at page 5 of JRT Civil’s quotation.

²²⁹ Paragraph 208 of the Aston Report.

allows for an apportionment of quoted preliminaries which equates to an overall sum of \$130,679.23 (Ex GST) as shown within Figure 12 below.

Figure 12: Civil Defect Revised Estimate

Work	Value (Ex GST)
Additional Works	\$114,758.07
Erosion Control	\$6,804.00
Prelims	\$9,117.16
Total	\$130,679.23

193. The additional works and erosion control works have been identified by the Civil trade contractor (JRT) within its quote 3863, which was issued just one month after the termination date of ASM's Contract and after detailed inspection of the site. The quotation was requested by CES (HVH's new construction manager) and was sought to rectify civil issues on site including degraded civil work and failed erosion and sediment controls. CES had identified these defects in dilapidation reports it prepared in January and March 2021, prior to the date of termination of ASM's contract."

208. The make-up of the "Additional Works" and "Erosion Control" components in the table set out in the above paragraph was detailed in Figure 13 of the Supplementary Aston Report, which is reproduced below:

Figure 13: Civil Defect Rectification Works

Item	Description	Value (Ex GST)	Source	Explanation
64	Erosion Control			
72	Temporary erosion control measures during and after construction as specified completion in place.			
73	Silt fences	\$3,680.00	JRT Civil Trade Contract, JRT Quote 3348	ASM and JRT claim that this was completed, but CES has demonstrated that prior to termination, these measures had degraded and were insufficient. ASM claim that this is because the site was left for two months, however this quote from JRT was issued only one month after termination, and the evidence shows that these measures were defective prior to termination and were left largely unmaintained since installation (in early 2020). Therefore, these works need to be reinstated, the trade contract sum for these items is as follows: - Silt fences \$3,680 - Sandbag check dam \$699 - Rock spill check dam \$2,425
74	Sandbag check dam	\$699.00	JRT Civil Trade Contract, JRT Quote 3348	
75	Rock spill check dam	\$2,425.00	JRT Civil Trade Contract, JRT Quote 3348	
		\$6,804.00		
78	Groundworks			
79	Remove spoil from site and spread at rear of site	\$0.00	JRT Rectification Quote 3863	This would qualify as outstanding work, not a defect
80	Allow to remove any concrete left on site that has been left behind from	\$2,459.76	JRT Rectification Quote 3863	A concrete wash out point should have been maintained. It is not acceptable to leave concrete

	concrete wash out or discarded onto stockpiles			around site and allow for it to be cleaned up in the final site clean.
81	Allow to level of stockpiles left at the rear of the site	\$28,815.57	JRT Rectification Quote 3863	These stockpiles should have been progressively disposed from site. It is not acceptable to leave stockpiles around site (covered in weeds) and allow for it to be cleaned up in the final site clean.
82	Clear and grub	\$3,468.90	JRT Rectification Quote 3863	The clear and grub had already been carried out and claimed by JRT and ASM as 100% completed. The site should have been properly maintained and weed sprayed. It was not, meaning that a clear and grub is now required to be carried out again.
83	Clear and grub channel 2 area	\$5,413.34	JRT Rectification Quote 3863	The clear and grub had already been carried out and claimed by JRT and ASM as 100% completed. The site should have been properly maintained and weed sprayed. It was not, meaning that a clear and grub is now required to be carried out again.
84	Trim and compact subgrade to pavement	\$8,130.23	JRT Rectification Quote 3863	The pavement subgrade had already been trimmed and claimed (by JRT and ASM) as 100% completed with final grade to be completed. It had been left uncompacted and needs to be re-trimmed.
85	Re-trim open drains	\$6,409.18	JRT Rectification Quote 3863	This work is re-work to rectify the drains and open ground areas.
86	Re-trim open drains channel 2	\$4,110.46	JRT Rectification Quote 3863	This work is re-work to rectify the drains and open ground areas.
87	Trim open ground areas	\$7,419.15	JRT Rectification Quote 3863	This work is re-work to rectify the drains and open ground areas.
88	Prov. MR type 2.3 Subbase Course – 300mm Compacted Depth in 2 layers		JRT Rectification Quote 3863	
89	Provide 30mm corrector course over existing surface to bring surface back up to correct reduced levels	\$15,356.91	JRT Rectification Quote 3863	JRT had already installed the pavement 2.3 Subbase Course and claimed by JRT and ASM as 100% completed this is rework to correct the surface levels. ASM's Rev 4 Construction program did not show subsequent asphalt works until 13/05/21 after JRT's quote. This degradation of the works is not caused by the one-month period after termination and the area would have been exposed in any case per the Rev 4 Construction Program.
90	Trim and compact subbase to pavement	\$11,855.89	JRT Rectification Quote 3863	JRT had already installed the pavement 2.3 Subbase Course and claimed by JRT and ASM as 100% completed this is rework. This degradation of the works is not caused by the one-month period after termination.
91	Stormwater			
92	Recompact existing trenches	\$3,695.77	JRT Rectification Quote 3863	One month after termination, JRT (the civil trade contractor) had identified work involved with recompacting the subsided trenches on site. CES had identified these defects prior to termination of ASM's contract. This is defect rectification scope. Despite this work being completed months earlier, ASM's Rev 4 Construction program did not show subsequent asphalt works until 13/05/21 after JRT's quote. This degradation of the works is not caused by the one-month period after termination and the area would have been exposed in any case per the Rev 4 Construction Program.
93	Provisional Quantity filling from onsite stockpiles, to bring surfaces back up to	\$7,764.98	JRT Rectification Quote 3863	One month after termination, JRT (the civil trade contractor) had identified work involved with reworking site levels (which had already allegedly been done). CES had identified these defects prior

	reduced levels and compact			to termination of ASM's contract. This is defect rectification scope.
94	Clean out stormwater pits	\$355.41	JRT Rectification Quote 3863	One month after termination, JRT (the civil trade contractor) had identified work involved with cleaning out stormwater pits. CES had identified these defects prior to termination of ASM's contract. This is defect rectification scope.
95	Clean out stormwater headwalls	\$266.56	JRT Rectification Quote 3863	One month after termination, JRT (the civil trade contractor) had identified work involved with cleaning out stormwater headwalls. CES had identified these defects prior to termination of ASM's contract. This is defect rectification scope.
96	Erosion Control			
97	Respread Topsoil from Stockpile	\$11,235.96	JRT Rectification Quote 3863	This is required due to ASM's insufficient erosion control carried out on site this is defect rectification scope.
		\$114,758.07		

209. The Claimant's position relating to the Respondent's civil works defects are detailed in the SDLP and the Tsipis Report. At paragraph 94 to 127 of the SDLP, Mr Perkins set out his opinion in regard to Defect 30 to Defect 43 which are the defects identified in the Aston Report that relate to the civil works. At paragraph 222 to 302 of the Tsipis Report, Mr Tsipis sets out his opinion relating to Defect 30 to Defect 43 and the following is an extract obtained from Table 46 of the Tsipis Report where the author summarises his comments relating to those defects.

Defect	Is it a Defect?	Reasons
30	No	Relates to the sediment controls established by ASM, that have been unmaintained since the purported termination of the Contract on 6 April 2021, so that they have deteriorated and require repair. This circumstance has been caused by the purported termination of the Contract and is not the responsibility of ASM.
31	No	Relates to the stormwater drains constructed by ASM, that have been unmaintained since the purported termination of the Contract on 6 April 2021, so that they were unprotected and contain sediment. This circumstance has been caused by the purported termination of the Contract and is not the responsibility of ASM.
32	No	Relates to concrete left on site from concrete wash out, which is not a 'defect', but instead related to site clean-up work that is part of the work to complete the Project.
33	No	Relates to circumstances that have been caused by the purported termination of the Contract and are not the responsibility of ASM, and to spoil on site which is not a 'defect', but instead related to site-clean-up work that is part of the work to complete the Project.
34	No	Relates to circumstances that have been caused by the purported termination of the Contract and are not the responsibility of ASM.
35	No	Duplicate with Defect 24.
36	No	Relates to circumstances that have been caused by the purported termination of the Contract and are not the responsibility of ASM.
37	No	Relates to site surface treatment which is not a 'defect', but instead related to the site trim and finishing work that is part of the work to complete the Project.
38	No	Relates to stormwater drains constructed by ASM that have been unmaintained since the purported termination of the Contract on 6 April 2021, so that they were unprotected and contain sediment. This circumstance has been caused by the purported termination of the Contract and is not the responsibility of ASM.
39	No	No evidence provided.
40	No	Duplicate of the other alleged defects, including Defect 32, Defect 33, Defect 36 and Defect 37.
41	No	Duplicate of the other alleged defects, including Defect 25, Defect 30, Defect 31 and Defect 38.
42	No	Described as 'Not Used' in Tab F of the Aston Review Spreadsheet
43	No	Duplicate of Defect 34.

210. In regard to the methodology the Aston Report had adopted in assessing the proposed defect rectification works relating to the civil trade works, Mr Tsipis expresses the following opinion:

“The calculation of the amount of \$202,719.31 assessed by Aston for the rectification of the alleged defects in civil trade works is explained in section 4.1.5 of the Aston Report and is tabulated as follows:

Figure 37: Aston Valuation of Alleged Civil Trade Defect Rectification

Item	Value (Ex GST)
A Civil Subcontract Value	\$491,895.10
B Civil Trade Work Complete	\$191,487.50
C Balance Outstanding (A-B)	\$300,407.60
D Civil Quote to Complete/Rectify Work	\$503,126.91
E Total Cost Outstanding: (C+D)	\$694,614.41
F Less Original Contract Sum: (E-A) (extra over amount)	\$202,719.31

Therefore, instead of simply valuing the rectification work for the alleged defects, as would be logical, Aston has inexplicably valued the increased cost of completing all of the civil works as shown in the comparison between the value of \$503,126.91 in JRT Civil Quote No. 3863 for the completion of the civil works and the amount of \$300,407.60 for the remaining civil works as assessed by Aston based upon the original amount for the civil works as shown in JRT Civil Quote No. 3348.”²³⁰

211. In Mr Tsipis’ view, as the Aston Report seeks to ground its assessment on the JRT Civil quote dated 6 May 2021, the only part within that quote that directly relates to the alleged civil works defects is the amount of \$118,471.00. However, for the reasons outlined earlier in his Report (and summarised in the table at paragraph 209 above), Mr Tsipis opines that because *“all of the alleged civil works defects are either not the responsibility of (the Claimant) or are correctly defined as incomplete works, in my opinion, the value of the rectification of the alleged civil works defects is \$0.00”*.²³¹ Insofar as the Aston Report contends that incomplete works constitute defects (which Mr Tsipis does not agree to be the case), then the valuation of such incomplete works relating to the civil works would be \$95,152.59.²³² However, Mr Tsipis goes on to state that *“these costs would have been paid by (the Respondent) as part of the cost of the Project and therefore are not extra costs incurred due to the actions of (the Claimant).”*²³³

212. I have deliberately outlined the opinions set out in the parties’ respective expert reports so as to highlight the differing viewpoints relating to the following issues:

²³⁰ Paragraph 306 – 307 of the Tsipis Report.

²³¹ Paragraph 312 of the Tsipis Report.

²³² For the basis as to how this amount has been assessed, refer to Figure 48 at page 107/8 of the Tsipis Report.

²³³ Paragraph 313 of the Tsipis Report.

- (a) Whether the items referred to as defects in the Aston Report are in fact:
 - (i) defects, or whether they refer to items of work that would have been completed had the Respondent not issued its notice of termination on 6 April 2021; or
 - (ii) deterioration of the works caused by that part of the Project works being left unprotected and unmaintained subsequent to the Claimant having left the site on 6 April 2021; and
- (b) If the items are in fact defects, then what is the value to be given to each of those defects?

213. At paragraph 200(b) above, I determined that the meaning to be given to “defect” is such that it does not include incomplete work. This however begs the question as to whether, for example, the “faulty” nature of a particular item of work arose from that item having been left unprotected or not maintained prior to or after the Respondent’s notice of termination issued on 6 April 2021. Clearly, if the evidence supports the view that that item of work had deteriorated after 6 April 2021, then that would obviously not be a defect for which the Claimant ought to be held responsible. But what if the evidence supports the view that prior to 6 April 2021, the Claimant had allowed an item to be unprotected and unmaintained? It does not necessarily follow that because an item of the civil works had not been protected or maintained prior to 6 April 2021 that any deterioration of such works can be attributable to the Claimant and so entitle the Respondent to set-off the estimated costs of rectifying such works. It may well be that had the Respondent not terminated the Claimant’s Contract, the Claimant would have been able to have performed the necessary grading/clean-up as part of the completion of that Trade Package Works. This is a relevant consideration, given the view that I have earlier expressed regarding the validity of the Respondent’s notice of termination.

214. Noting the above observations, my view regarding each of the Respondent’s Defects relating to the civil works, are as follows:

- (a) Re: Defect 30 – The Aston Report describes this Defect as:

“Un-maintained sediment controls caused by lack of site management during the construction phase of the project. Good common practice is to walk the boundary with a two-week inspection and rectify as required.”

In his Statutory Declaration, Mr Perkins states that the Payment Schedule had not included any evidence relating to this defect, and that:

“The construction of the sediment controls was performed by (the Claimant) and JRT Civil during the Civil Works First Stage in consultation with Chris Shields of Calibre. At the time of termination of the Contract, all controls applied were in good working order.”

The sediment controls have likely deteriorated during the two months between the departure of (the Claimant) from the Project and the inspection by Aston Consult.”²³⁴

In his Statutory Declaration however, Mr Donlan disagrees with Mr Perkins’ statement:

“This statement is incorrect. As I identified during my inspection in March 2021 (see paragraph 9.2(a) above), no sediment controls have been implemented around the perimeter fencing. Also note my comments at paragraph 8.4 above in respect of photos of (the Claimant’s) sediment controls that were taken in January 2021, particularly the fact that any sediment controls previously implemented had clearly deteriorated by that time and were wholly insufficient.”²³⁵

The photographs referred to by Mr Donlan relate to those taken by CES’s Mr Tim O’Connor during his site visit in January 2021 as well as those taken by Mr Donlan during his site visit in March 2021²³⁶, but these photographs were not included in the Payment Schedule, so it was not possible for the Claimant to have specifically commented on those when submitting its AA. In any event, the only photograph in the January Report that is referred to at paragraph 8.4 of the SDPD relates to that which depicts the channel drain at the perimeter of the site and whilst the photograph does show the build up on some silt around the sandbag, that photograph, on its own, is insufficient to satisfy me that the Claimant had not, at the time, implemented adequate environmental controls. Similarly, the two photographs taken by Mr Donlan during his site visit in March 2021 referred to at paragraph 9.2(a) of the SDPD (viz: photo 1 and 5) whilst not showing any sandbagging at the perimeter fencing, is also insufficient to satisfy me that the Claimant had failed to implement appropriate sediment controls throughout the site. Of the bundle of photographs that the Respondent had included in the Payment Schedule, those were the photographs that the author of the Aston Report had taken during his site visit on 2 June 2021. Neither the Respondent nor the Aston Report have however been able to specifically refer me as to which photographs within the bundle are intended to substantiate or be provided as evidence of “*unmaintained sediment controls*”. Even if it could be said that within the bundle of photographs included in the Aston Report there is evidence of site deterioration due to inadequate sediment controls, then the Respondent has not shown, or sufficiently satisfied me, that this was not due to its failure to implement the necessary maintenance measures during the period of 6 April 2021 and 2 June 2021. Further, even if I were to accept the Respondent’s position that the Claimant had

²³⁴ Paragraph 96-97 of the SDLP.

²³⁵ Paragraph 9.3 of the SDPD.

²³⁶ Copies of Mr O’Connor’s photographs are included in the CES January 2021 Report in Tab PD-07 of the SDPD and the photographs taken by Mr Donlan that the specifically refers to in relation to Defect 30 are included in his March Report in Tab PD-08 of the SDPD.

not maintained appropriate sediment control measures, then, as pointed out in the Tsipis Report, it is unclear as to which Code within the JRT Civil quotation relates to the relevant rectification work that will address such defect²³⁷ and without such clarification I have no basis upon which to assess the rectification cost relating to this Defect. This was an issue that the Respondent could have addressed when submitting its AR as it had been provided with a copy of the Tsipis Report, yet I could not identify this issue having been addressed in the Supplementary Aston Report.

- (b) Re: Defect 31 – In the Aston Report, this Defect is described as “*Stormwater drains left unprotected now contain sediment run-off from uncontrolled file*”. At paragraph 96 and 97 of the SDLP, Mr Perkins states:

“The construction of the sediment controls was performed by (the Claimant) and JRT Civil during the Civil Works First Stage in consultation with Chris Shields of Calibre. At the time of termination of the Contract, all controls applied were in good working order.

The sediments have likely deteriorated during the two months between the departure of (the Claimant) from the Project and the inspection by Aston Consult.”

Mr Perkins’ statement is not specifically contested by Mr Donlan within his Statutory Declaration. In the circumstances, I agree with the viewpoint expressed by Mr Tsipis that the sediment controls that the Claimant had established were unmaintained and unprotected subsequent to 6 April 2021 such that they deteriorated and required repair and that this was not the responsibility of the Claimant;

- (c) Re: Defect 32 – The Aston Report describes this as “*Various locations around the site concrete trucks and pumps have washed out in uncontrolled locations*” and that the proposed rectification requires:

“All leftover slurry and concrete to be picked up and removed to landfill. Correct process is to have a designated concrete washout location which would have earth or gravel bunded sides, a layer of geofab is put down, a layer of gravel, a (further) layer of geofab and a final layer of gravel. As part of the induction process the area should be identified to everyone on site and periodically cleaned out as required and reinstated. Again, this is a result of poor (sic) site management practices.”

Mr Tsipis disagrees with the proposed rectification work and opines that this work relates to the site clean-up that would usually be carried out to complete the Project:

²³⁷ See paragraph 225 to 227 of the Tsipis Report.

“In my experience, such practices for concrete washout are only applied on large projects that can absorb the cost of constructing and maintaining the washout facilities, where there are sensitive environmental considerations, such as works on or near marine/estuarine areas and where there is restricted space such as on inner-city building projects. Given the relatively small scale of the Project and the large site area, I consider that a dedicated concrete washout facility is not appropriate.

Further, I have not found any complaint from HVH regarding the concrete washout practices on the site up to the purported termination of the Contract on 6 April 2021, so that the practices suggested by Aston were not considered necessary by HVH for the period of on-site work from December 2020 to early April 2021.

Further, Aston refers to JRT Civil Quote No. 3863 which is provided in Annexure E of the May 2021 Payment Schedule as being for the completion of the remaining civil works as at the purported termination of the Contract on 6 April 2021, including the rectification of alleged defects. I have reviewed this Quote and note that Code 80 ‘Allow to remove any concrete left on site that has been left behind from concrete wash out or discarded onto stock piles’ may be related to Defect 32. In my opinion, this quoted work is for the usual practice of removing surplus concrete on any project and would have been a cost of the Project regardless of the purported termination of the Contract on 6 April 2021.

In this respect, I note that the program attached to the PCG Monthly Progress Report dated 31 March 2021 includes a planned allowance of 2 days for ‘Clean Site’ that I assume would include the removal of surplus concrete on the site.”²³⁸

Whereas the Supplementary Aston Report states that a concrete wash out should have been maintained and that it is not acceptable to leave concrete around the site for it to be cleaned up in the final clean, I prefer the viewpoint expressed by Mr Tsipis for the reasons outlined above and therefore consider this not to be a defect;

- (d) Re: Defect 33 – This item relates to waste stockpiles left throughout the site and the details set out in the Aston Report together with the proposed rectification work were stated as follows:

“Excavated materials or uncontrolled fill has been left in stockpiles around the site rather than having them removed. As a result of this, increased sediment run off across the site has been happening. With drains unprotected and the materials spreading will require completed areas to be regraded, stockpiles removed and storm water lines to be washed out. Good practice is to remove excavated

²³⁸ Paragraph 238 to 240 of the Tsipis Report.

excess materials from site as soon as possible. Again, poor site management has created more issues that require rectification.”

Mr Tsipis opines that this Defect is similar to Defect 31 and relates to the site and stormwater drains not having been maintained subsequent to 6 April 2021 so that they were unprotected and filled with sediment. Further, the proposed rectification work set out in the JRT Civil quote involved *“removing the spoil from the site and spreading it at rear of project”*, but Mr Tsipis opines that this work would *“have been a cost of the Project regardless of the purported termination of the Contract on 6 April 2021”*²³⁹.

Mr Donlan in the SDPD expresses the view that the stockpiles should have been progressively disposed from the site and that it was not good practice to leave stockpiles around site (covered in weeds) to be cleaned up in the final site clean. I accept Mr Tsipis’ view that the stockpile of spoil that were on the site on 6 April 2021 does not constitute a defect, but related to work which, but for the Respondent’s notice of termination, would have been carried out as part of the work to complete the Project;

- (e) Defect 34 – This Defect is said to relate to trenches that have subsided due to not having been compacted correctly. In his Statutory Declaration, Mr Perkins states that the Respondent had not provided any evidence of subsided service trenches and that, to his knowledge, no subsidence had occurred at the time when the Claimant left the site on 6 April 2021. Mr Perkins states that prior to leaving the site he took a number of photographs including a photograph of the service trenches when Hohmanns was carrying out the trench backfilling and a copy of that photograph is included at paragraph 106 of the SDLP. In regard to the information set out in that photograph, Mr Perkins states:

*“The photo ... depicts Hohmanns’ director Daniel Hohmann supervising the operation of a compactor plate in the trench, which was done in 300 millimetre layers. Any subsidence that has occurred has happened after (the Claimant) departed the Project. Regarding the landscaped areas; I instructed Hohmanns that these areas did not need to be compacted as these areas would be addressed at the landscaping stage. The landscaping package required the tilling of soils and therefore, compacting these areas was not required. ...”*²⁴⁰

In the Tsipis Report, Mr Tsipis, by reference to the photograph taken by Mr Perkins, states that *“if it is correct that the service trenches have subsided, I note the service trenches have been unprotected since (6 April 2021), so that they have been exposed to inclement weather (and) that may have affected the stability of the trenches”*²⁴¹

²³⁹ Paragraph 248 of the Tsipis Report.

²⁴⁰ Paragraph 106 – 107 of the SDLP.

²⁴¹ Paragraph 256 of the Tsipis Report.

Mr Donlan however disagrees with the statements made by Messrs Perkins and Tsipis:

“The photo included (at paragraph 106 of the SDLP) does not confirm that the trench is compacted or back filled adequately. I understand that all of the trenches that were back filled on site prior to CES taking over on 7 April 2021 were back filled using high grade imported material. For this reason, I do not consider that the subsidence issue arise as a result of the poor quality material. In my experience, with any deep excavation it is best to engage either with an engineer or a geotechnical engineer and to complete dynamic cone penetration testing to confirm that the trench is adequately compacted and to avoid subsidence down the track. It is clear ... that the compaction methods implemented under (the Claimant’s) supervision were not adequate given major subsidence has occurred with in the 4 months subsequent to (the Claimant’s) departure from site.

...

The subsidence was apparent when CES took over the site on 7 April 2021. Had the compaction process carried out under (the Claimant’s) supervision been completed appropriately, subsidence would not have occurred. Further, the only way to protect compacted trenches to prevent water from soaking in is to apply a spray seal to freshly compacted trenches. (The Claimant) could have completed this, or engaged a contractor to carry out the works, at the time JRT Civil demobilised from the site, which I understand occurred in around June 2020. It was too late for CES to undertake this process when it arrived on site as the subsidence had already occurred. Instead CES was required to engage contractors to rectify the subsidence.”

I agree with Mr Donlan’s statement that the photograph at paragraph 106 of the SDLP does not demonstrate that the trench had been compacted adequately. Accordingly, based on Mr Donlan’s evidence, I consider that the subsidence occurred due to the trenches not having been correctly compacted and that the appropriate compaction process should have been implemented shortly after JRT Civil demobilisation back in June 2020. It was therefore too late for that compaction process to have been implemented around 6 April 2021 and this necessitated the rectification work as outlined in item 92 of the JRT Civil quote (refer to the table at paragraph 208 above);

- (f) Defect 35 – This Defect, whilst identified in the Aston Report as falling under External Civil Work is described as “*Wet roof insulation above office*” and (not surprisingly) there is no reference to this item in the JRT Civil quotation. I will therefore deal with this issue when considering the Defect claims that fall under the Metal Roofing and Cladding Trade;

- (g) Defect 36 – In the SDLP, Mr Perkins states that the Respondent had not included any photographs relating to this alleged defect, but, in any event, Mr Perkins refers to the various compaction certificates as evidence of the compliant compaction of the sub-slab materials.²⁴² Mr Perkins then goes on to state:

*“No subsidence to any concreting was evident at the time of departure from the Project , which can be identified in the progress photos contained at page 31 of the Aston Report. Any subsidence has occurred in the two months that (the Claimant) departed the Project.”*²⁴³

The Tsipis Report notes that, based on the four photographs that were taken on 6 April 2021, the state of the slabs do not match the description given in the Aston Report. Further, Mr Tsipis states that he could not find any reference to undermined slab edges in the JRT Civil quote. I could find no specific response in either the SDPD or the Supplementary Aston Report regarding the statements made by Messrs Perkins and Tsipis relating to this Defect claim and nor could I find any reference to any proposed rectification work within the JRT Civil quote relating to undermined slab edges. Accordingly, in the circumstances, I can only conclude that the Respondent has not established its entitlement to its claim relating to Defect 36;

- (h) Defect 37 – This Defect is described in the Aston Report Spreadsheet as *“Site wide grade and clean up”* and the proposed rectification would require the site to have *“a complete grade compaction roll and test 2.3 material layer completed and brought back to design level before 2.1 material placed”*. In the SDLP, Mr Perkins states that a site wide grade and clean up was to be performed as part of the Civil Works Second Stage, but that the Contract was terminated before this could occur. In the Tsipis Report, Mr Tsipis notes that insofar as this Defect is based on the surface conditions failing to achieve design level, then this was unsurprising as, by reference to the photographs included at paragraph 274 of the Tsipis Report (taken at the time of termination of Contract), the finishing surface treatment had not been completed. Mr Tsipis then goes on to highlight that the Payment Claim had claimed that the civil trade were 45.30% complete and the Aston Report had assessed this trade packages at 38.9% complete and therefore, this alleged defect reflects the fact that this part of the works were incomplete. Further, Mr Tsipis notes that in assessing the civil trade package, the Aston Report had measured that the type 2.3 sub-base course had been completed, which is therefore inconsistent with the allegation in Defect 37 that stated that the 2.3 material layer had not been completed. Further, Mr Tsipis also notes that the program that was attached to the PCG Monthly Progress Report dated 31 March 2021 included a planned allowance of 3 days for *“Trim +*

²⁴² See the table at paragraph 111 of the SDLP as well as LP-42 to LP-44.

²⁴³ Paragraph 112 of the SDLP.

Finish Type 2.3 (6,670m²)” from 16 to 20 April 2021, which appears to align with the works described in Defect 37, but the Contract was terminated before this work could be carried out. I could find nothing in the SDPD or in the Supplementary Aston Report that specifically addresses the comments made by Messrs Perkins and Tsipis and accordingly, based on the evidence presented, I agree with the opinion set out in the Tsipis Report that Defect 37 is not a “defect” but rather relates to the site trim and finish work that was part of the work to complete the Project, which the Claimant was not able to carry out because the Contract had been terminated;

- (i) Defect 38 – This Defect is described in the Aston Report as “*Stormwater line flush*” and the proposed rectification would require “*all stormwater lines to be flushed out and cameraed to ensure they are clear*”. The stormwater line was said to require such rectification work because of the Claimant’s “*lack of sediment control*”. In the SDLP, Mr Perkins states that:

*“All stormwater lines were clear at the time of departure from the Project (by the Claimant). There was no requirement for (the Claimant) to perform a stormwater flush.”*²⁴⁴

In the Tsipis Report, Mr Tsipis notes Mr Perkins’ above statement and that the Defect appears to have been identified by the author of the Aston Report based on a site inspection conducted on 2 June 2021, which was approximately two months after the Claimant had left the site. “*This means that (the Claimant) was not able to maintain stormwater drains during the time and consequently (the Claimant) cannot be responsible for the “lack of sediment control (on) all stormwater lines”*”.²⁴⁵

In his Statutory Declaration, Mr Donlan refers to the site inspection he conducted on March 2021 and his observation on the lack of sediment control on site. I have read Mr Donlan’s March Report²⁴⁶ and the various photographs included in that Report. Whereas photograph 6 depicts a drain with some sediment around the perimeter, I do not consider that this depicts the drain necessarily being blocked. Accordingly, if the Aston Report had identified any blocked stormwater lines (and there is no evidence within the bundle of photographs that discloses such blockage), then I agree with Mr Tsipis’ opinion that this may have been due to the accumulation of sediment caused by the site not being maintained between the period of 6 April 2021 and 2 June 2021. I am therefore not satisfied that this is a defect for which the Claimant is responsible.

²⁴⁴ Paragraph 117 of the SDLP.

²⁴⁵ Paragraph 285 of the Tsipis Report.

²⁴⁶ Copy of Mr Donlan’s March Report is at Tab PD-08 of the SDPD.

- (j) Defect 39 – The Aston Report identifies this Defect as a “*Broken culvert apron*”. At paragraph 119 of the SDLP, Mr Perkins states that:

“(The Respondent) has not provided any evidence of a culvert apron. All culverts were in good condition at the time of departure from the Project by (the Claimant).”

In the Tsipis Report, Mr Tsipis also states that he could find no evidence within the Aston Report to support this Defect. Mr Tsipis also observes that on review of the JRT Civil quote he could not find any reference to the repair of a broken culvert apron.

I could find no photograph of a broken culvert apron in the bundle of photographs that were included in the Aston Report and I could find no specific response to the statements made by Messrs Perkins and Tsipis. I could also (like Mr Tsipis) find no evidence within the JRT Civil quotation that included any rectification work relating to a broken culvert apron (noting that this would have been “building work” for which JRT Civil was not licensed to carry out). In the circumstances, due to the absence of evidence, I can only conclude that the Respondent has not established its entitlement to this claimed defect;

- (k) Defect 40 – The Aston Report, by reference to a group of photographs²⁴⁷ states “*upon inspection, Aston have confirmed the defects identified by CES, namely site wide incomplete civil grade, stockpile removal and clean up*”. The general description given to this defect makes it difficult to understand as to how this item differs from some of the other alleged Civil Works defects, such as for example, Defect 37. At paragraph 121 of the SDLP, Mr Perkins states that “*(the) civil grade was to be complete in the Civil Work Second Stage, which included a final trim and compaction of a “2.3 road base” type gravel base material*”, but that the Claimant was unable to carry out that work due to the Respondent’s termination of the Contract. Insofar as the photographs disclose that at the time when the Claimant left the Project the site required a further trim grade and clean up, then, as in the case with Defect 37, I agree with the position set out in the evidence of Messrs Perkins and Tsipis, that this was not a “defect” but rather work that the Claimant was not able to complete due to the Respondent having terminated the Claimant’s Contract.
- (l) Defect 41 – The Aston Report, by reference to a group of photographs²⁴⁸ states “*upon inspection, Aston have confirmed the defects identified by CES, namely failed sediment control, environmental contracts and site damage*”. It is difficult to understand how this Defect, which refers to “defects” that are said to have been caused by the Claimant’s failure to implement sediment environmental controls and site drainage, differs from other claimed Defects, such as, for example, Defect 38. In any event, at paragraphs 124 and 125 of the SDLP, Mr Perkins states that the

²⁴⁷ Paragraph 120 of the SDLP reproduces eight photographs.

²⁴⁸ Paragraph 123 of the SDLP reproduces nine photographs.

photographs do not show incomplete environmental or sediment controls, but rather demonstrate the sandbagging that the sediment controls have been completed. In his Statutory Declaration, Mr Donlan disagrees:

*“The photos ... demonstrate that the sandbagging that had been implemented was inadequate and had deteriorated. As water is able to wash over the top of the sandbags, it is clear that the sandbag completed is not a sufficient measure for combating sediment run off.”*²⁴⁹

It is not clear from the photographs whether they in fact disclose defective work, but if they do show any erosion then, given that the photographs were taken on 2 June 2021 (i.e. some two months after the Claimant left the site) it may well be (as opined by Mr Tsipis) that that may have been due to the site having been left “idle” for a lengthy period after 6 April 2021 and accordingly, I consider that the Claimant should not be held responsible for any damage that may have occurred.

- (m) Defect 42 – The Aston Report Spreadsheet states that this Defect is “*Not Used*”; and
- (n) Defect 43 – This Defect which is described as “*Subsidised Trenches*” and expanded as “*Upon inspection, Aston has confirmed the defects identified by CES, namely subsidised trenches for the Fire Water Hydraulic Installations*”, appears similar to Defect 34. In other words, it is unclear as to how this Defect differs from Defect 34. This is relevant because as I have accepted the Respondent’s argument that the inadequate compaction methods adopted by the Claimant had caused the subsidence of the trenches, then the only rectification work that I could identify within the JRT Civil quote that relates to this issue is Code 92, being for the cost of \$3,695.77, but this rectification work would relate to both Defect 34 and Defect 43.

215. In summary, for all the reasons set out above, I consider that of the Defects that the Respondent has identified within the Civil Works, it has only established its entitlement in respect of Defect 34 and Defect 43, and that the estimated costs relating to the rectification of both those Defects is \$3,695.77.

Re: Metal Cladding & Roofing Defects

216. Defect 24 – As set out in the table at paragraph 202 above, the Respondent contends, by reference to the Aston Report, that because the roof and external wall metal cladding had not been properly sealed, water ingress occurred, which in turn caused damage to the insulation. The Aston Report considered that remedial works will be required to ensure that the roofing and cladding works are brought into compliance and this will involve:

- (a) Removal and replacement of metal cladding;

²⁴⁹ Paragraph 19.3 of the SDPD.

- (b) Investigating and testing water damage;
- (c) Removing and replacing insulation;
- (d) Certification; and
- (e) Access, Craneage and consumables.

The Aston Report has assessed the rectification costs at \$58,680.55 and this amount was stated as having been arrived at as follows:

Ref	Description	Unit	Qty	Rate	Value	Remark
Defect 29	The Flashing (Metal Cladding) on the internal face of the entry way, is beat and damaged at its base. This will impact the life of the product and is not acceptable. Place section of metal flashing					Minor repair work
	Allow to replace flashing, approximately 3m in length	Item	1	\$450.00	\$450.00	
Defect 24	The roof and external wall metal cladding have not been properly sealed, allowing for water ingress (which was witness due to rain during site inspection). This may lead to moisture build up, mould and damage to insulation. Removal					
	The related items from the roofing quotation are used. A reasonable percentage is applied to allow for required elements to be removed and replaced to rectify water damages insulation					
	Roofing Iron	%	10%	\$60,934.00	\$6,093.40	Remove and replace around
	Soffits	%	80%	\$21,979.00	\$17,583.20	Remove and replace
	Insulation Roof & Safety Mesh Roof	%	15%	\$23,663.00	\$3,549.45	Remove and replace around
	Insulation Walls	%	15%	\$16,359.00	\$2,453.85	Remove and replace around
	Roof Flashings	%	10%	\$13,019.00	\$1,301.90	Remove and replace around
	Wall Cladding	%	10%	\$53,999.00	\$5,399.90	Remove and replace around
	Wall Cladding Flashing	%	10%	\$15,712.00	\$1,571.20	Remove and replace around
	Rainwater	%	5%	\$29,136.00	\$1,456.80	Remove and replace around
	Access Equipment	%	10%	\$34,090.00	\$3,409.00	Access equipment fixed cost needed to make safe access.
	Other Items & Deliveries	%	10%	\$71,301.00	\$7,130.10	Allow for disposal and misc. works
	Handrail	%	50%	\$11,607.00	\$5,803.50	Fixed cost needed to make safe access.

	Craneage	%	25%	\$9,913.00	\$2,478.25	Cranage fixed cost to allow for works
				Total	\$58,680.55	

217. In the SDLP, Mr Perkins notes that the photographs referred to in the Aston Report relating to Defect 24, were taken on 2 June 2021 and evidence fibre cement sheeting and soffit works having been performed, but such works were carried out after the Claimant had left the site following the termination of the Contract:

“At the time of termination of the Contract, only structural steel frames had been erected. A deduction is now being applied to the Payment Claim for water damage that has occurred as a result of subsequent contractors failed to seal the works.”²⁵⁰

218. Further, the trade contractor who the Claimant had engaged to carry out the metal roofing, cladding, soffit and rainwater package, SQR Constructions, through its representative, Mr Barry Carter, gives the following evidence by way of a statutory declaration (“SDBC”) in relation to this defect:

- “19 SQR was unable to install the flashing to that gap prior to departing site on 28 April 2021, as HVH’s new head contractor had not arranged for its carpenter to install the fibre cement for the soffits and parapet, on which the flashing would be installed.*
- 20 If there has been any water ingress in that particular corner, HVH’s new head contractor is responsible for not having arranged the relevant carpentry work to be carried out (being the fibre cement for the soffits and parapet), which precedes the installation of the flashings.*
- 21 Even if there has been water ingress, it would not be necessary for the roofing iron, soffits, insulation roof, safety mesh roof, insulation walls, roof flashings, wall cladding flashing and rainwater to be removed and replaced as Aston Consulting suggests. Indeed, it would only require the soffit to be replaced in that corner of the office ceiling, which would be one sheet of fibre cement it would only affect that corner where the flashing had not been installed, not the entirety of the ceiling.*
- 22 It is also necessary that I identify that there is no method for a roofing contractor to protect its work or the building from water ingress. While the roofing contractor installs the roof, the building cannot be protected from any rain events.*
- 23 In this regard, it is incumbent on the principal and head contractor to ensure that building works are carried out as quickly as possible, including ensuring that the relevant trades have performed their work to allow the roofing contractor to perform and complete its work.*

²⁵⁰ Paragraph 305 of the SDLP.

- 24 *In this instance, HVH's new head contractor failed to ensure that the carpenter had installed the fibre cement, to allow SQR to complete the installation of flashings at this area in the building. Further HVH's new head contractor failed to pay SQR for the work it carried out. HVH's new head contractor or HVH should have arranged the carpenter to install the fibre cement, and a roofer to install the flashings in the corner, after SQR departed site.*
- 25 *As HVH's new head contractor would not provide confirmation as to where SQR was to finish all of the roller door flashings (and still to this date have not received any confirmation on where these are to finish), the flashings have been left longer so they can be cut off at the correct heights at a later date. SQR cannot be held responsible for the lack of instructions or confirmation from HVH's new head contractor in this regard.*
- 26 *In summary, the flashing is not damaged it is has been left longer to be cut off once a height has been ascertained and provided.*
- 27 *ASM Builders did not carry out this work. It is also relevant to note that the work in respect of the ceiling of the office was not undertaken when ASM Builders was on-site. It was undertaken after ASM Builders departed site (i.e. after 6 April 2021) and ASM Builders is not responsible for that work."*

219. In his Statutory Declaration, Mr Donlan states that:

- (a) Based on his inspection of the site on 18 March 2021, he considers that the issues relating to the roof insulation were apparent well before 6 April 2021:

"Firstly, on 18 March 2021, I observed that neither the insulation nor the wool blanket installed above the soffit had been sealed or covered. In my experience, a competent contractor or construction manager would have at least covered the works with a tarp to protect it from inclement weather prior to the building being sealed off;

I also noticed that wall insulation had been installed, but as the walls had not been completed, a portion of the insulation was again not sealed and exposed to the weather;

*As a result of the insulation being installed before the walls were completed, water was able to ingress into the Facility and wet the unsealed insulation and wool blanket installed in the roof."*²⁵¹

²⁵¹ Paragraphs 10.8 to 10.10 of the SDPD.

To support the above statement, Mr Donlan refers to the various photographs, as well as a video of the water entering the Facility and penetrating the insulation²⁵²;

- (b) He held a conversation with one of SQR's employees whilst on site on 18 March, who advised that:
 - (i) The Claimant was behind the program and that the roofing and cladding should have been completed by that time; and
 - (ii) SQR was unable to make the building watertight until the fibre cement sheets had been installed into the fascia trusses, which would then have allowed the cladding to be installed over the top and flash down the roof;
- (c) Insofar as Mr Carter asserts that SQR was unable to install the flashing prior to departing the site on 28 April 2021 as the Respondent's new head contractor had not arranged for a carpenter to install the fibre cement for the soffits and parapet on which the flashing out be installed, Mr Donlan states that SQR had, subsequent to 6 April 2021 been engaged by CES (as agent for the Respondent) to complete the wall sheeting, gutters, downpipes and flashing and, accordingly, Mr Donlan disagrees with Mr Carter's statement:

- “(a) The core issue here is that (the Claimant) should have coordinated the roofing and the carpenter so that the fibre cement sheeting was installed, either before SQR installed the insulation, or directly after, and protect the works. That did not occur;*
- (b) SQR had started the flashing works before 6 April 2021. That flashing work continued after 6 April 2021 when SQR attended the site to complete the flashing;*
- (c) Mr Carter is incorrect that the fibre cement had not been arranged as at 28 April 2021. The contractor engaged by (the Respondent) (i.e. CES, as the Respondent's agent) commenced work installing fibre cement sheeting on 21 April 2021;*
- (d) that fibre cement sheeting contractor targeted areas that SQR was required to attend to as a matter of priority, and then moved on to complete the balance of sheeting;*
- (e) the insulation under the flashing in issue was subjected to (and likely damaged by) wet weather back in March 2021 prior to SQR installing the flashing.”²⁵³*

²⁵² A copy of Mr Donlan's video is included at Tab PD-3 of the SDPD.

²⁵³ Paragraph 10.13 of the SDPD.

- (d) Insofar as Mr Carter had stated (at paragraph 22 of the SDBC) that there is no method for a roofing contractor to protect its works from water ingress, then Mr Donlan considers that assertion to be incorrect:

“If it is the case that fibre cement sheeting cannot be installed directly after insulation works are carried out, a competent contractor and construction manager would ensure that there is a contingency plan in place to protect those insulation works.

It does not appear that any such measures were ever implemented. Again, I consider that reflects an absence of proper management and coordination on site.

For instance, at the very least, an excess of silver papers used for insulation should be left at the end (and exposed section of) insulation and should be wrapped over and secured to ensure that the insulation and wool blanket is not exposed to water.

This is because I would consider it to be common knowledge that any insulation manufacturer’s warranty would not be honoured if the insulation becomes wet.

Just because SQR could not complete the flashing works immediately does not mean that the insulation should have proceeded without any protection, as occurred here.”²⁵⁴

- (e) As a result of the issues relating to the metal cladding and roofing, Mr Donlan anticipates that *“prior to the Facility reaching completion the roofing will need to be removed to allow the insulation to be replaced.”²⁵⁵*

220. I have difficulty in reconciling the evidence relating to this issue. It is apparent, based on Mr Donlan’s evidence, that some water ingress had occurred prior to the Claimant leaving the site on 6 April 2021, but what I am unable to understand is how CES, as the construction manager that the Respondent had engaged to replace the Claimant on 7 April 2021 to complete the Facility²⁵⁶ had allowed the same roofing contractor to progress its works without immediately addressing the water ingress that Mr Donlan had witnessed during his site visit on 18 March 2021. It seems to me that a reasonable construction manager who witnessed water ingress within parts of the Facility just prior to being engaged would upon taking over the Facility take immediate steps to address that issue, rather than allow the roofing contractor to proceed with the completion of its trade works. This is particularly so, given that Mr Donlan states of his awareness that any wetness on insulation would void the manufacturer’s warranty. Mr Donlan states that at the time of making his Statutory Declaration viz: 7 September 2021, he was in discussion with the Respondent to determining the most appropriate way to resolve the way forward, but I am left asking

²⁵⁴ Paragraph 11.13 of the SDPD.

²⁵⁵ Paragraph 10.14 of the SDPD.

²⁵⁶ Refer to paragraph 3.3 of the SDPD.

the obvious question as to why this issue had not been considered some 5 months earlier. The only logical inference I can draw is that CES, as an experienced construction/project manager (and Mr Donlan, in particular) did not and does not consider the level of water ingress in the roof area to be of such a magnitude as to require it to be redressed by implementing the rectification process outlined in the Aston Report. It is difficult to countenance that a construction manager who had witnessed water ingress of a magnitude that it may risk voiding the manufacturer's warranty rather than take immediate measures to address this issue would rather allow the roofing works and other parts of the Facility works to proceed, only to subsequently remove the roofing so as to replace the insulation. The more likely explanation is that CES did not consider the water ingress to have been of the scale that had caused damage to the insulation.

221. Accordingly, for the reasons set out in the above paragraph, I am not satisfied that Defect 24, if it is indeed a defect, is of a magnitude that necessitates the rectification work proposed in the Aston Report. In the circumstances, I decide that the value to be given to this item is \$nil.

Steel Trade Defects

222. As can be seen from the table at paragraph 202 above, the Respondent, by reference to the evidence and estimate set out in the Aston Report, seeks to set-off an amount of \$15,572.00 representing the costs of rectifying a number of defects relating to the Steel Trade. The basis upon which the Aston Report has arrived at its assessment of \$15,572.00 was set out as follows:

Ref	Description	Unit	Qty	Rate	Value	Remark
Defect 12	The vertical steel framing on South rear wall found to be installed unevenly and not vertically aligned. Does not appear to be erected in accordance with Shop Drawings, which detail uniform vertical installation. Notes on Erection Plans state all members to be erected as per direction indicated. Replace.					Replace Members
	Fabricate and replace members	1	0.385	\$12,500.00	\$4,612.50	
Defect 13, 15, 18, 19, 21	Visual inspection has identified rust, marks, scuffs and stripping of coating in various locations. Steel to be inspected, cleaned recoated as necessary					Allow 3 days
	Leading Hand	Hr	24	\$95.00	\$2,280.00	
	Labour (X2)	Hr	48	\$85.00	\$4,080.00	
	Working at Height Plant and Equipment	Day	3	\$750.00	\$2,250.00	
	Materials, prime etc	Item	1	\$2,000.00	\$2,000.00	
Defect 28	Fire Hose Reel at Grid 1E, Copper Pipe Rough in has been roughly cut through the edge of the internal steel member			\$21,979.00	\$17,583.20	Replace Members
	Fabricate and replace member approx.. 4m long (approx. 22kg)(Allow Additional 30% on Pierce Engineering Steel rate for retrofit piecemeal works.)	1	0.028	\$12,500.00	\$350	
Total					\$58,680.55	

223. It can be seen from the above that the Steel Trade defects relate to the following specific Defects included in the Aston Report:

Defect 12, 13, 15, 16, 17, 18, 19, 20, 21 and 28.

The Aston Report states that its assessment of the rectification works relating to Defect 15, 18, 19 and 21 have been included in the assessment in Defect 13 and that no valuation had been provided for Defect 16, 17 and 20.

224. In his Statutory Declaration, Mr Perkins states that:

(a) In relation to Defect 12:

“The photos of the alleged defect are of wall girt “bridging”, which are adjustable and clip into the wall. These can be adjusted on site and would have been done had the Contract not been terminated... In my opinion, any rectification only requires approximately one person and a maximum of four hours to properly align girt bridging.”²⁵⁷

(b) In relation to Defect 13, 15, 18, 19 and 21:

“The photos ... contain touch up works that would have been attended to as part of (the Claimant’s) final inspection and touch up works at the Project, had (the Respondent) not purported to terminate the Contract.

...

Predominantly, all that is required is cleaning with soap and rag, or touch up with some primer paint, to be performed by one man on an elevated platform over three to four hours. Recounting the steel and estimating three days of labour for Defects 13, 15, 18, 19 and 21 is excessive.”²⁵⁸

(c) In relation to Defect 28:

“The alleged defective copper pipe was not installed at the time that I finished at the Project before going on leave and I cannot make any comment on it.”²⁵⁹

225. The Tsipis Report agrees that Defect 12, 13, 15, 18, 19 and 21 are defects, but disagrees that Defect 28 is a defect. Figure 50 of the Tsipis Report summarises the conclusions and assessments made by Mr Tsipis and this is reproduced below:

²⁵⁷ Paragraph 141 and 143 of the SDLP.

²⁵⁸ Paragraph 145 and 148 of the SDLP.

²⁵⁹ Paragraph 150 of the SDLP.

Defect	Is it a Defect?	Reasons	Value
12	Yes	It is likely that the non-vertical bridging has not installed correctly, so that the bridging ends have not been located centrally in the girt holes. Alternatively, it may be that the girts have not been installed correctly so that the bridging holes are misaligned with adjacent girts causing the installed bridging to not be vertical. Only a detailed site inspection would determine the correct cause of the bridging non-verticality.	\$680.00
13	Yes	Based upon the provided photographs, some structural steel members have marks, scuffs, and stripping of coating due to the use of lifting slings and this damage to the steel coating is a defect requiring rectification.	\$8,330.00
15	Yes	A replica of Defect 13 as it relies upon the same photographs.	Included in 13
18	Yes	Based upon the provided photographs, the rust on steelwork is a defect requiring rectification.	Included in 13
19	Yes	Based upon the provided photographs, the presence of mud, dirt and similar on steelwork is a defect requiring rectification.	Included in 13
21	Yes	Based upon the provided photographs, the staircase to the outgoing loading bay exhibits defects requiring rectification.	Included in 13
28	Yes	The cut of the wall grit to suit the copper pipe for the Hose Reel at Grid 1E is insignificant and would not affect the structural integrity of the girt as the removed cross-section area is minimal and would be accommodated in the safety factor applied for the structural load analysis to size the girt.	\$0.00

Mr Tsipis had arrived at this assessment of Defect 12 on the basis of 8 hours labour at the rate of \$85.00 per hour. Defect 13 had been assessed on the basis of 48 hours labour at the rate of \$85.00 per hour, plus equipment of 3 days at \$750.00 per day and materials where an allowance of \$2,000.00 has been set aside.

226. In the Supplementary Aston Report, the author's response to Mr Tsipis' comments are as follows:

- (a) In relation to Defect 12, he maintains his assessment relating to the estimated rectification costs:

"... Having inspected the site, an elevated work platform would be needed to disconnect and realign each horizontal girt. At least 2 operatives would be needed to safely disconnect and lift each girt.

Most likely, a rigging crew of around 4 operatives including leading hand would be needed over the course of several days (4 riggers, 8 hours per day, 2 days, \$75/hr = \$4,800, excluding scissor lift, tools and materials. This aligns with the statutory declaration of Mr Jamie Lee (SDJL)";

- (b) In relation to Defect 13, 15, 18, 19 and 21, he maintains his assessment relating to the estimated rectification costs and notes that whilst the Tsipis Report has agreed for an estimate of three days work it had allowed for a smaller, two-person crew:

"I disagree based on my experience and the site visit. It is telling that (the Claimant) have already carried out re-priming and touch up of the steel works once before, yet defects still remain"; and

- (c) In relation to Defect 28, the position summarised in the Tsipis Report is unacceptable:

“My concerns are not just regarding structural integrity but also lack of protection of dissimilar metals (copper pipe resting against steel member) which can have corrosive effects as well as the cut into the steel member damaging the steel surface treatment (which can lead to rust).

The design drawings do not show the copper pipe installed through the member, and the only reason this would occur is through workmanship.

My opinion is based on my experience in progressively inspecting works for valuation and identifying issues which are defective. My opinion for this item is unchanged.”²⁶⁰

227. I agree with the basis upon which the author of the Aston Report had arrived at his assessment relating to Defect 12, 13, 15, 18, 19 and 21. There is no dispute by the Claimant regarding the defective workmanship relating to these Defects (see paragraph 225 above) and I consider that the assessment set out in the Aston Report (and re-affirmed in the Supplementary Aston Report) is more reasonable than that provided in the Tsipis Report. I also agree with the viewpoint set out in the Supplementary Aston Report regarding the workmanship relating to Defect 28, as well as its assessment.
228. Thus, for the reasons set out in the above paragraph, I decide that the value to be given to the Steel Trade Defects is \$15,572.00.

Concrete Trade Defects

229. As can be seen from the table at paragraph 202 above, in its Payment Schedule, the Respondent, by reference to the Aston Report, claims a set-off for an amount of \$9,835.00 representing the estimated costs of rectifying a number of defects relating to the Concrete Trade works. The basis upon which the Aston Report arrived at its assessment for the costs of rectifying the claimed defects was set out as follows:

Ref	Description	Unit	Qty	Rate	Value	Remark
Defect 01	Undulations, pillowing and non-compliance with tolerance requirements visually identified. Conduct Complete Detailed Survey of Slab.					Since form 16 provided, assume slab not to be condemned
	Slab Survey Report	1	Item	\$5,000.00	\$5,000.00	

²⁶⁰ All the above quotation are located in the column “Aston Response to E3 comments at pages 52 to 54 and 67.

Defect 02	Retrofit dishing/falling to amenities showers. Not made good properly. Rough concrete cuts carried out, and not made good. Grinding or re-levelling. Concrete cutting and replacing section of slab.					Allow for cutting set and replacing castings
	Concrete cut sections around water.	4	No	\$375.00	\$1,500.00	
	Drill and install chemset starter bars	32	No	\$17.00	\$544.00	
	Replace Reinforcement	4	Item	\$95.00	\$380.00	
	Replace Concrete, laid to compliant falls.	0.6	m3	\$250.00	\$150.00	
	Allow Minimum Order Fee	3.4	m3	\$40.00	\$136.00	
	Allow engineer signoff	2	m3	\$250.00	\$500.00	
Defect #3	Grouting encasing around steel columns baseplates. Poor workmanship, lack of jointing. Surface cracking to each location identified. Poor finish to adjacent concrete. Retrofit jointing or sealing compounds.					Require Engineer Inspection
	Allow engineer inspection	0.5	hr	\$250.00	\$125.00	
Defect #4	Chips/damage to concrete in in various locations identified. Grouting/patching to ensure uniform finish.					Require Engineer Inspection
	Allow engineer inspection.	0.5	hr	\$250.00	\$125.00	
Defect #5	Inconsistent falls and cross falls to waste drains Laundry, PPE Store, ANTE Clean/Dirty, Lab. (Facilities rooms along grid 5).					Require Engineer Inspection
	Allow engineer inspection	0.5	hr	\$250.00	\$125.00	
Defect 22	Widespread surface cracking of concrete to outgoing goods hardstand and driveway. Application of liquid filler and/or sealing compound. Subject to Engineer Inspection, my require replacement of sections of slab.					Require Engineer Inspection
	Allow engineer inspection.	0.5	hr	\$250.00	\$125.00	
				Total	\$9,835.00	

It can be seen from the above table that the Concrete Trade Defects relate to Defects 1, 2, 3, 4, 6 and 22.

230. In the SDLP, Mr Perkins expresses the following views regarding the above Defects:

- (a) Defect 1 – The photograph relied on by Aston does not evidence non-compliance or undulations and any remaining debris or bumps on the surface can be addressed by the grinding process in the Epoxy package. Accordingly, the detailed survey proposed by Aston is unnecessary;
- (b) Defect 2 – The photographs relied on by Aston relate to the amenities area that was not able to be completed when the Claimant's Contract was terminated on 6 April 2021;
- (c) Defect 3 – The photographs relied on by Aston do not disclose poor workmanship and the lack of jointing was due to the Claimant not having been provided with the structural steel design prior to the laying of the concrete slab. In any event, the grout mix for the structural steel received engineering approval;
- (d) Defect 4 – Various of the photographs relied on by Aston do not evidence defective workmanship but rather dirt on the slab. The other photographs

disclose the need for rendering to be applied, which would have occurred had the Contract not been terminated;

- (e) Defect 6 – The falls and cross-falls in the concrete slabs shown in the various photographs were constructed as per the design provided by Designtek; and
- (f) Defect 22 – The photographs relied on by Aston do not show any structural defects, but only minor hairline surface cracks, which are not uncommon when concrete is laid on hot days. These minor cosmetic defects would have been filled in by one of the five coats that followed the Epoxy package.

231. The Tsipis Report agrees that Defect 4 is a defect, but Mr Tsipis does not agree that the other claimed Defects relating to the Concrete Trade demonstrate poor workmanship. Figure 49 of the Tsipis Report summarises the conclusions and assessments made by Mr Tsipis and this is reproduced below:

Defect	Is it a Defect?	Reasons	Value
01	No	Aston has not substantiated Defect 01. In fact, the available surveying and photographic evidence indicates that the concrete slab is substantially compliant.	\$0.00
02	No	The project records show that Defect 02 has been resolved.	\$0.00
03	No	Incomplete work rather than a defect.	\$0.00
04	No	The Aston photographs show defective work that requires rectification.	\$1,000.00
06	No	Aston has not substantiated Defect 06. The available surveying and photographic evidence indicates that the concrete slab is substantially compliant, including the required falls.	\$0.00
22	No	Aston has not substantiated the allegation that the surface cracking is a defect. In fact, the available photographic evidence indicates that the alleged surface cracking is not a defect, as defined in Table 3.10 of the QBCC Guide.	\$0.00

Mr Tsipis had arrived at his assessment relating to Defect 4 at the amount of \$1,000.00, based on an allowance of one day work for a labourer, plus materials.

232. In the Supplementary Aston Report, the author has responded to the comments made by Messrs Perkins and Tsipis, as follows:

- (a) In relation to Defect 1, Aston agrees that its recommendation for a detailed survey to be carried out to confirm slab conformity “*does not constitute defect rectification scope, therefore I revised by estimate for this item to \$nil*”;

- (b) In relation to Defect 2:

“Epoxy floor finish is not specified to the entire concrete slab areas, nor a substantial floor grind/patch. Importantly, there is no epoxy flooring specified to the amenities area (the location of this defect). The work in the epoxy trade package will not make good this concrete work. With such deep cuts around the wastes the waterproofing layer may not reach a homogeneous layer.”

Accordingly, the position, as outlined in the earlier Report (including the estimated costs of rectifying this defect), value to rectify this issue, remains unchanged;

- (c) In relation to Defect 3, the author agrees that obtaining an engineer opinion does not constitute a defect and has therefore revised the estimate for this item to \$nil;
- (d) In relation to Defect 4, the author notes Mr Tsipis' agreement that this is a defect and accepts Mr Tsipis' estimate of \$1,000.00 for the carrying out of the rectification work;
- (e) In relation to Defect 6, the author agrees that obtaining an engineer opinion does not constitute a defect and has therefore revised the estimate for this item to \$nil;
- (f) In relation to Defect 22, the author states that upon receiving additional information regarding the QBCC guidelines, the cracking falls within an acceptable range and therefore does not constitute a defect.

233. Based on the information set out above and in particular the revised opinion set out in the Supplementary Aston Report, I consider that the value to be given to the estimated cost for rectifying the defects relating to the Concrete Trade is \$4,210.00. I have arrived at this view by accepting the position outlined in the Supplementary Aston Report relating to Defect 2 as outlined at paragraph 232(b) above and, in relation to Defect 4, as outlined at paragraph 232(d) above, noting also the concessions made in regard to Defect 1, 3, 6 and 22 by the author of the Supplementary Aston Report.

Blockwork Trade Defects

234. As can be seen from the table at paragraph 202 above, in its Payment Schedule, the Respondent, by reference to the Aston Report, claims a set-off for an amount of \$7,490.00 representing the estimated cost for rectifying a number of defects relating to the Blockwork Trade works. The basis upon which the Aston Report arrived at its assessment for the costs of rectifying the claimed defects was set out as follows:

Ref	Description	Unit	Qty	Rate	Factor	Value	Remark
Defect 08, 09, 10, 11	Work required to retro-fit ties and joints, patch basecourse blockwork.						Since a Form 16 has been provided, assume wall does not need to be condemned (despite poor workmanship to base course)
	Leading Hand	hr	16	\$95.00	1	\$1,500.00	Allow 2 days
	Labourer (X2)	hr	32	\$85.00	1	\$2,720.00	Allow 2 days
	Materials	Item	1	\$2,000.00	1	\$2,000.00	Cement, expansion foam (or similar) retrofit ties. Replacement blockwork as needed.

	RPEQ Engineer inspection of blockwork considering poor workmanship to blockwork.	hr	5	\$250.00	1	\$1,250.00	Including submission of report.
Total						\$7,490.00	

It can be seen from the above table that the Blockwork Trade Defects relate to Defects 8, 9, 10 and 11.

235. In the SDLP, Mr Perkins expresses the following views regarding the above Defects:

- (a) Defect 8 – Whereas the photographs relating to this claimed Defect depict the base course of the blockwork having “cut-outs”, this was to allow an engineer to pull them out and inspect that the base course had been installed correctly. The “cut-outs” in the blockwork would be reinstated after the engineer inspection and the photographs evidence that the basework to the Blockworks Package had been constructed properly. Further, whereas the blockwork “*cosmetically*” do not look finished, they are yet to be rendered, meaning that it would be covered over and not seen:

“Therefore, the pictures are not the finished product but are a completed structural wall before the works the subject of the rendering and building packages are completed, with (the Claimant) departing the Project prior to this and being unable to oversee the completion. Any cosmetic deficiency does not matter as this is meant to be concealed by the finished product.”²⁶¹

- (b) Defect 9 – Whereas the photographs relating to this claimed Defect show gaps between blockwork walls, including at intersection points, Mr Perkins states:

“All of the photos contained above depict a 10 millimetre clear control joint. The observation from Aston that no horizontal ties are evident is because they are concealed and not visible.

There is meant to be a gap in the wall as this is a control joint, being an engineered solution so that if movement of the structure occurs, then that movement will be isolated to the joint and not the blockwork walls, which would result in cracks and failure.

The wall is yet to have Sicaflex sealant applied; however, the wall has been built to specification. The filling in of the wall was contained in the subsequent building works package that was never awarded.

²⁶¹ Paragraph 275 of the SDLP.

*Aston has failed to provide any proper evidence that clear control joints have not been installed.*²⁶²

- (c) Defect 10 – The photographs provided by Aston do not show defective work:

“The blockwork has been completed to a point where the render works will then take over the complete the wall before the timber frame and plaster sheet erection to create the internal wall.

*The preparation of the wall for rendering is part of the rendering specification and therefore was not required to be completed in the Concreting Package.*²⁶³;

- (d) Defect 11 – The photographs provided by Aston in relation to this claimed Defect show that the jointing and sealing of the blockwork have not been completed which would have been part of the subsequent rendering package. This was however not able to be completed because of the termination of the Contract.

236. The Tsipis Report expressed the view that, other than Defect 11, none of the other claimed items constitute defects. Figure 51 of the Tsipis Report summarises the conclusions and assessment made by Mr Tsipis, and this is reproduced below:

Defect	Is it a Defect?	Reasons	Value
08	No	Form 16 Certification evidences that the blockwork confirms with the Contract drawings and specifications	\$0.00
09	No	Form 16 Certification evidence that the blockwork confirms with the Contract drawings and specifications	\$0.00
10	No	The cleaning down of the blockwork with acid wash and the preparation to receive wall finishes and linings will form part of the trade package. Accordingly, Defect 10 relates to follow-on work and is not a defect.	\$0.00
11	Yes	Based upon the provided photographs, the joint sealing in the blockwork walls has not been completed as required by the Contract drawings and specification.	\$3,120.00

Mr Tsipis arrived at his assessment relating to Defect 11 on the basis of an allowance for a leading hand 8 hours x \$95.00 plus labourer of 16 hours at \$85.00 per hour, plus an allowance of \$1,000.00 for materials.

237. In the Supplementary Aston Report, the author maintains the position previously adopted. However, the author of the Report notes that:

- (a) In respect of its assessment of \$7,490.00, that that amount had included the rectification works to address Defects 8, 9 and 11;
- (b) In respect of Defect 10, the earlier Report had not proposed any amount relating to the cleaning down of the blockwork and whilst noting the

²⁶² Paragraph 277 to 280 of the SDLP.

²⁶³ Paragraph 282 – 283 of the SDLP.

response given by Messrs Perkins and Tsipis, no correction is required; and

- (c) In regard to Defect 11, the Tsipis Report had agreed this item constituted a defect but, whereas the Tsipis Report had assessed the required rectification work based on a 3-person crew over one day, the author maintains its position that the rectification work will require two days work by the 3-person crew.

238. I agree with the viewpoints expressed by Messrs Perkins and Tsipis that Defect 8 is not a defect as the blockwork and properly constructed, and any cosmetic deficiency would be concealed by the wall linings, and that Defect 9 is also not a defect as the blockwork had been constructed in accordance with the Contract. In regard to Defect 11, I agree with Mr Tsipis' conclusion that the joint sealing in the blockwork walls were not completed as required by the Contract drawings and specifications and I consider that Mr Tsipis' allowance relating to the costs for rectifying this defect, viz: \$3,120.00 is reasonable. I am not satisfied that this rectification for a period greater than one day. Accordingly, I have assessed the total value to be given to the Blockwork Trade Defects at \$3,120.00.

Summary of assessment of Defects

239. For the reasons set out above, I have decided that the amount that the Respondent is entitled to set-off for its claimed Defects is \$26,597.77. This amount has been arrived at as follows:

Civil Trade Defects	\$3,695.77
Metal Roofing Trade Defects	\$nil
Steel Trade Defects	\$15,572.00
Concrete Trade Defects	\$4,210.00
Blockwork Trade Defects	\$3,120.00
Total	<u>\$26,597.77</u>

Summary of Respondent's Set-Off

240. In regard to the various components that comprise the set-off and damages claimed by the Respondent, I have concluded that the amount that the Respondent is entitled to set-off from the amount payable to the Claimant is \$81,840.44. This amount represents the combined amounts relating to the doubling up of insurance (\$55,242.67) and the estimated costs of rectifying defects (\$26,597.77).

ADJUDICATED AMOUNT

241. It follows, from the reasons set out above, that the adjudicated amount is \$688,858.49 (ex GST), or \$757,744.34 (incl GST) and this amount has been arrived at as follows:

Management Fee	\$203,707.73
Trade Packages	\$502,227.50
Trade Packages Variations	\$63,763.70
EOT / Delay Cost	\$1,000.00
Sub-total	\$770,698.93
Less Set-Offs	\$81,840.44
Sub-total	\$688,858.49
Plus GST	\$68,885.85
Adjudicated Amount (incl GST)	\$757,744.34

FRIVOLOUS OR VEXATIOUS

242. Section 84(2)(a)(ii) of the Act requires that I decide whether the AA is frivolous or vexatious.

243. The Respondent has made no specific submissions relating to this issue, other than to state under the heading of “*Adjudicator’s Fees*” that I should give consideration to the “*volume of irrelevant material*” that the Claimant had “*mulcted*” with²⁶⁴. Not only do I disagree with the Respondent’s characterisation of the material that the Claimant had included in its AA²⁶⁵, but when I apply the true test for determining whether the AA is “*frivolous*” or “*vexatious*”, viz: whether the AA disclosed a reasonable basis for prosecution, it is clear, given the decisions I have made above, that the Claimant was justified in availing itself of the benefits extended to it under the Act.

244. I accordingly decide that the AA is not frivolous or vexatious.

DUE DATE FOR PAYMENT

245. Section 73(1) of the Act provides:

“(1) A progress payment under a construction contract becomes payable –

²⁶⁴ Paragraph 40.3 of the AR.

²⁶⁵ See also paragraph 255(c) below.

- (a) *if the contract provides for the matter-on the day on which the payment becomes payable under the contract; or*
- (b) *if the contract does not provide for the matter-on the day that is 10 business days after the day a payment claim for the progress payment is made under part 3.”*

246. Whereas the Claimant has made no submissions relating to this matter, the Respondent submits that the only relevant provision within the Contract that relates to when a payment is required to be made is Annexure Part C which provides for the “*management fee*” to be paid “*within 7 days after receipt of a progress claim following completion of the relevant stage*”. However (so the Respondent contends), as only a small part of the Payment Claim relates to the Management Fee, if any amount is found to be payable (which I have held to be the case) then, by reason of s 73(1)(b), the due date for payment is 10 business days from the Payment Claim.
247. I consider that as Annexure Part C of the Contract is confined to only one part of the construction work carried out (i.e. the Management Fee) and as the Contract does not state when payment relating to the Trade Packages and Trade Packages Variation is to be made, it follows that the provision of s 73(1)(b) of the Act applies, i.e. 10 business days after when the Payment Claim had been made. Thus, given that the Payment Claim was made on 24 May 2021, it follows that the due date for payment is 7 June 2021.

INTEREST

248. Section 73(2) and (3) of the Act provides:

- “(2) *Interest for a construction contract is payable on the unpaid amount of a progress payment that has become payable at the greater of the following rates -*
- (a) *the rate stated in the contract;*
- (b) *the rate prescribed under the Civil Proceedings Act 2011, section 59(3) for a money order debt.*
- (3) *However, for a construction contract to which the Queensland Building and Construction Commission Act 1991, section 67P applies because it is a building contract, interest is payable at the penalty rate under that section.”*

249. The Claimant refers to Item 23 of Part A of the Contract which states, in relation to the interest rate on overdue payments, “*if nothing is stated, 18% per annum*”, but, as the Contract does not otherwise stipulate an interest rate, the applicable interest rate, pursuant to s 73(2)(a) of the Act, is 18% per annum.

250. The Respondent submits that:

“As (the Claimant’s) claim has no basis under the Contract (except for management fee), the rate of interest in the Contract is not relevant to such a claim.

Accordingly, if any amount is payable to (the Claimant), (the Respondent) submits that interest is payable at the rate provided by section 67P of the QBCC Act, by operation of sections 73(2) and (3) of the BIF Act.”²⁶⁶

251. I disagree with the Respondent’s submissions. I have found that the nature of the Contract that the parties entered into was for Construction and Construction Management and not merely of a construction management nature. Accordingly, as the Contract does in fact provide for the rate of interest that is payable on the unpaid amount of a progress payment, viz: 18% per annum, it follows that by reason of s73(2)(a) of the Act that that is the applicable rate.

ADJUDICATOR’S FEES

252. Section 95(4) of the Act provides that the parties are jointly and severally liable to pay the adjudicator’s fees and expenses and s95(5) provides that the parties are each liable to contribute to the adjudicator’s fees and expenses in equal proportion, unless the adjudicator decides otherwise.

253. Each party has made submissions that I should exercise my discretion and require the other party to pay the whole of the adjudicator’s fees, or as an alternative submission by the Respondent, at the very least on the basis that the Claimant should *“at the very least ... bear ... 50% of the Adjudicator’s costs”²⁶⁷*. The Respondent has also submitted that the Claimant’s material in its AA contained volumes of irrelevant material:

“However if it is found that (the Claimant) is entitled to a progress payment, (the Respondent) submits the Adjudicator should give consideration to the volume of irrelevant material (the Claimant) has mulcted the Adjudicator with (running some 14 arch lever folders).

For instance, (the Claimant) has provided extensive material in respect of its claims for time related costs, which were accepted in the Payment Schedule (and have previously been paid).”²⁶⁸

254. In deciding the apportionment of fees, I must take into account s96(2) of the Act, which provides:

“In making the decision, the adjudicator –

(a) must consider the conduct of the claimant and respondent; and

²⁶⁶ Paragraph 39.1 and 39.2 of the AR.

²⁶⁷ Paragraph 40.5 of the AR.

²⁶⁸ Paragraph 40.3 and 40.4 of the AR.

- (b) *may consider any of the following matters –*
 - (i) *the relative success of the claimant or respondent in the adjudication;*
 - (ii) *whether the claimant or respondent commenced or participated in the adjudication for an improper purpose;*
 - (iii) *whether the claimant or respondent commenced or participated in the adjudication without reasonable prospects of success;*
 - (iv) *the reasons given by the respondent for not making the progress payment the subject of the adjudication application;*
 - (v) *whether an adjudication application is withdrawn;*
 - (vi) *the services provided by the adjudication in adjudicating the adjudication application, including the amount of time taken to consider discrete aspects of the amount claimed;*
 - (vii) *another matter to the adjudicator considers relevant in making the decision.”*

255. Noting the provisions set out in s 96(2) of the Act, I make the following comments:

- (a) The Claimant has clearly been the successful party. But for my finding in relation to the QBCC licensing issue, the Claimant would have been awarded a higher portion of the amount it had pressed for in its Payment Claim;
- (b) On the other hand, other than the decision I made in relation to the QBCC licensing issue, many of the arguments that the Respondent had advanced were not accepted, including the position it had adopted relating to jurisdiction and the validity of the Payment Claim. I was required to spend significant time considering many of the Respondent’s unsuccessful arguments;
- (c) Contrary to the Respondent’s submissions, the material that the Claimant included in its AA was not irrelevant. The Claimant included extensive material in its AA so as to address the many reasons that the Respondent had given in its Payment Schedule for withholding payment, and this included addressing the viewpoints set out in the Aston Report. If the Claimant had not addressed those matters by way of the evidence that was set out in the Statutory Declarations of Messrs Milfull and Perkins, as well as the expert opinion set out in the Tsipis Report, then the Claimant would not have succeeded in substantiating its position and the matters/opinions set out in the Payment Schedule would have been unchallenged. Accordingly, the Respondent’s submission that the material included in the AA as being irrelevant is very much misplaced; and
- (d) The extent of my time (and therefore my fees) reflect not only the many contentions that the parties have raised, but also the complexity associated with such contention. Each party is of course entitled to present its case as best it thinks fit, but the greater the number of contentions a party raises (as well as the complexities that may relate to such contentions), then the greater the time I am required to spend in addressing each of the parties’

arguments. Clearly however, if a party advances arguments which prove to be unsuccessful then, by reason of s 96(2)(i) and (vi) of the Act, these are matters that I must take into account in the apportionment of my fees.

256. In the circumstances and noting the comments I have set out in the above paragraph, I consider that the Respondent should pay 85% of the Adjudicator's fees and the Claimant the remaining 15%.

Joram (John) Murray
J118216
25 October 2021